

**COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION No. 17-CI-01348**

COMMONWEALTH OF KENTUCKY

INTERVENING PLAINTIFF

v.

KKR & CO. LLP, et al.

DEFENDANTS

ORDER

This matter is before the Court upon (1) a Motion to Intervene submitted by Tia Taylor, Ashley Hall-Nagy and Bobby Estes (the “Tier 3 Group”) filed February 1, 2021; and (2) the Tier 3 Group’s Motion for Leave to File a Third Amended Complaint, filed December 31, 2020.¹ Upon review of the parties’ briefs and papers, and otherwise being sufficiently advised, the Court hereby **DENIES** both Motions for reasons stated more fully below.

BACKGROUND

This action² was initiated in December 2017 by eight individuals (the “Original Plaintiffs”) who were enrolled in retirement plans managed by the Kentucky Retirement Systems (“KRS”), an agency of the Commonwealth of Kentucky. KRS has since changed its name to the Kentucky Public Pension Authority (“KPPA”), and will be referred to subsequently as either KRS or KPPA. Because the Original Plaintiffs enrolled in state retirement plans prior to 2014, each of them had “defined-benefit” Tier 1 or Tier 2 retirement plans; upon becoming eligible for retirement benefits,

¹ The Original Mayberry Plaintiffs also filed a Motion to Amend after the ruling of the Kentucky Supreme Court remanded this action with instructions to dismiss the original claims. The Court denied that Motion to Amend, and dismissed all claims brought by the Original Plaintiffs in an Order entered December 28, 2020.

² Because the Original Plaintiffs have been dismissed from this action, the caption of this case has been amended to reflect that the Commonwealth of Kentucky is now the sole Plaintiff and real party in interest in this suit.

each retiree would receive payments in fixed amounts. These benefits are guaranteed by statute to Tier 1 and Tier 2 enrollees for the rest of their lives.

By contrast, the Tier 3 Group are three individuals who are beneficiaries of KRS's Tier 3 pension plan. The Tier 3 Group refers to their plan as a "Hybrid Cash Balance Plan." While their plan is not purely a defined contribution plan or a defined benefit plan, the Tier 3 plan incorporates features of both. Like a defined *contribution* plan, the value of benefits under the Tier 3 plan is determined based on each member's individual account. Like a defined *benefit* plan, the Tier 3 plan assets are held in a single investment pool, and it uses a specific formula to determine an individual member's benefits. Included in these benefits is "upside sharing," which means that if KPPA assets perform strongly (specifically, meaning the pool yields interest greater than four percent across the average of the preceding five years) then a member's account will be credited with 75 percent of that upside exceeding four percent. However, base monthly pension benefits that Tier 3 members accrue (which is at least a four percent base return) cannot be diminished or lost.

The Original Plaintiffs brought suit against KRS trustees and officers, investment advisors, hedge-fund managers, and others, alleging that mismanagement of KRS retirement assets had resulted in a 25-billion-dollar deficit in the retirement asset pool. At the outset of this action, KRS declined to join the lawsuit as either a plaintiff or a defendant, but explicitly approved of the Original Plaintiffs pursuing their claims on behalf of KRS on a derivative basis. The Kentucky Attorney General also declined to participate at that time.

On November 30, 2018, this Court denied Defendants' initial Motions to Dismiss. The Court found that the Original Plaintiffs had standing to pursue their claims. It found that because the Original Plaintiffs had alleged a sufficient injury to KRS and the Commonwealth, that such

allegation could support their derivative claims. The Order found that Plaintiffs could sue derivatively both as KRS beneficiaries and as Kentucky taxpayers. With the exception of the Government Finance Officers Association, the Court denied each Defendant's Motion to Dismiss. This initial denial resulted in interlocutory appeals filed by the KRS officer and trustee Defendants. Therein, these Defendants argued that the Original Plaintiffs lacked standing based on the nature of their alleged injury. Other Defendants sought a writ of prohibition from the Kentucky Court of Appeals declaring that this Court did not have subject-matter jurisdiction over the Original Plaintiffs' claims.

In the interim, the Supreme Court of Kentucky issued a ruling that modified the Commonwealth's doctrine of standing; on September 27, 2018, the Kentucky Supreme Court rendered its decision in *Commonwealth Cabinet for Health and Family Services, Department of Medicaid Services v. Sexton*, 566 S.W.3d 185 (Ky. 2018). Therein, the Kentucky Supreme Court adopted the United States Supreme Court's analysis for constitutional standing as explained in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). In short, a plaintiff must have suffered an injury in fact that can be causally connected to the alleged conduct, and stated that all Kentucky courts have a responsibility to ascertain standing to determine whether a cause is justiciable. *Sexton*, 566 S.W.3d at 188.

The Supreme Court of the United States reached its decision in *Thole v. U.S. Bank N.A.*, 140. S.Ct. 1615 (2020) on June 1, 2020. The United States Supreme Court held in *Thole* that the plaintiffs lacked standing to bring their action for mismanagement of their pension plans issued under the Employee Retirement Income Security Act ("ERISA"). *Thole*, 140 S.Ct. at 1618. It found that standing requires "an injury in fact that is concrete, particularized, and actual or imminent." *Id.* at 1619. Because the plaintiffs in *Thole* were members of defined-benefit plans

rather than defined-contribution plans, the plaintiffs lacked a sufficient injury because they were “legally and contractually entitled to receive those same monthly payments for the rest of their lives.” *Id.* at 1619-20. Whether or not the plaintiffs prevailed on the merits of their claims, “they would still receive the same monthly benefits that they are already slated to receive.” *Id.* at 1618.

On July 9, 2020, the Supreme Court of Kentucky ruled on both interlocutory appeals and the writ of prohibition in *Overstreet v. Mayberry*, 603 S.W.3d 244 (Ky. 2020). The Kentucky Supreme Court noted that the Original Plaintiffs were beneficiaries of a statutorily-guaranteed inviolable contract with the Commonwealth to receive their retirement benefits. *Overstreet*, 603 S.W.3d at 253-54. For that reason, the Supreme Court of Kentucky determined that the Original Plaintiffs lacked standing, drawing from the rationale employed by the United States Supreme Court in *Thole*. *Id.* By lacking a sufficient personal injury, the Original Plaintiffs lacked the ability to bring derivative suit on KRS’s behalf. *Id.* at 257. The Kentucky Supreme Court also determined that the Original Plaintiffs lacked taxpayer standing. *Id.* at 264-65. It also discussed at length the role of the Kentucky Attorney General in cases like these; it noted that the Attorney General is obligated to bring suit in a derivative capacity on behalf of the agencies of the Commonwealth, and has broad discretion to evaluate cases to decided whether or not he wants to pursue them. *Id.* at 265-66. The Supreme Court of Kentucky “dismiss[ed] this case” and “remand[ed] this case to the circuit court with direction to dismiss the complaint.” *Id.* at 249-51; *Id.* at 266.

Before the *Overstreet* decision became final on July 30, 2020, several parties attempted to revive this case. The Attorney General filed a Motion to Intervene on July 20, 2020, arguing that he held a statutory right to intervene. Further, the Original Plaintiffs filed a Motion for Leave to File Second Amended Complaint on July 29, 2020, wherein they sought to amend their complaint to add allegations which they believed would be sufficient to rectify their lack of standing. These

new allegations included, for example, the elimination of their Cost of Living Allowance benefits by the legislature, which the Original Plaintiffs alleged would not have happened but for the financial state of KRS. The proposed Amended Complaint would have also added the Tier 3 Group as plaintiffs to this action, alleging that their retirement benefits would be directly affected by any diminished performance of the KRS portfolio.

On December 28, 2020, this Court granted the Attorney General's Motion to Intervene, Denied the Original Plaintiffs' Motion to File a Second Amended Complaint, and dismissed the Original Plaintiffs from this action. *See Order, Mayberry et al. v. KKR & Co. LLP, et al.*, Franklin Cir. Case No. 17-CI-1348, at 17-18 (Dec. 28, 2020). The Court found that the Original Plaintiffs lacked standing and that their proposed amendments were insufficient to cure that deficiency. *Id.* However, the Court determined that the Attorney General was "empowered by statute, the Civil Rules" and the *Overstreet* decision to intervene and pursue its claims on behalf of the Commonwealth. *Id.* at 17. In addition, the Court denied without prejudice the Original Plaintiffs' Motion as to the proposed addition of the Tier 3 Group. *Id.*

Following the Court's December 28, 2020 Order, the Tier 3 Group filed a Motion for Leave to File a Third Amended Complaint on December 31, 2020, despite not yet being parties to this suit. The Attorney General had yet to file his Intervening Complaint. Accordingly, the Court entered an Order on January 12, 2021 wherein the Attorney General was given until February 1, 2021 to file its Amended Intervening Complaint. The Court noted that it would be impossible to evaluate the Tier 3 Group's proposed claims without reviewing the arguments offered by the Attorney General, and so the Court gave the Tier 3 Group until Thursday, February 11, 2021 to file a Motion to Intervene. In the January 12, 2021 Order, the Court also held the Tier 3 Group's Motion for Leave to File Third Amended Complaint in abeyance.

Prior to the deadline for the Attorney General to file his Intervening Complaint, the Attorney General filed a Motion for Extension of Time, wherein he informed the Court that KRS had entered into a contract with an outside law firm to investigate the nature and scope of the allegations in this case. The Attorney General argued that the information discovered during that investigation would be relevant in crafting his upcoming Amended Complaint, and therefore requested that he be granted additional time so that KRS's investigation could be finished prior to filing the Amended Complaint. The Court granted that request and, following additional extension, the Attorney General submitted his Amended Complaint on May 25, 2021.

In his Intervening Amended Complaint, the Attorney General notes his intent to fully occupy the field in this case on behalf of the Commonwealth. "It is the intent of the Commonwealth to assume complete control of this action and to prosecute it to recover all damages caused by Defendants and incurred by the Commonwealth or KRS, including any and all damages for any claims that might otherwise be brought derivatively by Commonwealth taxpayers, citizens, pension fund beneficiaries (regardless of whether such beneficiaries are classified as Tier 1, Tier 2, or Tier 3), on account of Defendants' actions as alleged herein." Commonwealth of Kentucky's First Amended Complaint, *Commonwealth v. KKR et al.*, Franklin Circuit Court No. 17-CI-1348 (filed May 24, 2021). "The Commonwealth's prosecution of the claims set forth herein are intended to fully 'occupy the field,' thus rendering the pursuit of any other action filed by any other person in any purported derivative or representative capacity on its behalf, on behalf of KRS, on behalf of the taxpayers or citizens of the Commonwealth, or on behalf of the beneficiaries of any Kentucky public employees' pension plan for the benefit of plan beneficiaries or the Commonwealth unnecessary and unauthorized." *Id.*

Briefing on the Tier 3 Group's Motion to Intervene has been completed, and now the Motion is properly before this Court for its review. In its Motion, the Tier 3 Group first argues that they have pled a sufficient injury to confer standing to sue on behalf of KRS in a derivative capacity. They note that the Tier 3 Group were excluded from the Kentucky Supreme Court's decision in *Overstreet*, as the Supreme Court's decision discussed whether members of a defined benefit plan had suffered a sufficient injury to confer standing. The Tier 3 Group argues that they are not members of a defined benefit plan, but rather that they are members of a "hybrid cash balance defined-contribution plan." Ultimately, they argue that they have suffered individual injury due to poor investment returns and wasteful practices that have deprived them of their upside credits and that have potentially compromised their potential retirement benefits. They argue that this injury permits them to sue to remedy alleged conduct which extends beyond their individual injuries.

Second, the Tier 3 Group argues that they have a statutory right to intervene under CR 24.01(1), and that if they do not then they should be permitted to intervene under CR 24.01(2). They argue that KRS 61.645(15) grants them a statutory right to intervene; though that statute does not specifically confer this right, the Tier 3 Group argues that the general language of that statute is sufficient to confer it implicitly. Alternatively, the Tier 3 Group argues that they should be allowed to permissively intervene in this action because the Tier 3 Group's claims are substantially similar to those of the Attorney General. They argue that because the Original Plaintiffs have lost standing that they should be permitted to pick up where the Original Plaintiffs left off and pursue claims on behalf of the KPPA in a derivative capacity.

Finally, the Tier 3 Group argues that the Attorney General is unable to adequately represent their interests or the interests of other KPPA members. They argue that the Attorney General is

not in a position to pursue a plan-wide recovery on behalf of KPPA; because the KPPA and the Commonwealth are sufficiently separate entities, the Tier 3 Group believes that any recovery by the Attorney General would be allocated to Kentucky's general fund rather than into KPPA funds. They also argue that, because KRS and the Commonwealth are distinct legal entities, that the Attorney General does not have the sole power to pursue recovery on behalf of KPPA. The Tier 3 Group, by being beneficiaries of KPPA retirement plans and by pursuing a derivative lawsuit on KPPA's behalf, argues that they would be better situated to maximize recovery for KPPA beneficiaries. They also argue that they will not be required to defend themselves from certain arguments that the Attorney General may be subject to; because the Attorney General represents the Commonwealth, the Tier 3 Group argues that he will be required to defend the past conduct of KRS and therefore will be confronted with a defense of *in pari delicto*. Relatedly, they argue that it is not certain that the claims that the Tier 3 Group wishes to present—which include breach of fiduciary duty, breach of trust, aiding and abetting, common enterprise, and conspiracy—will be available to the Attorney General since KRS is a separate legal entity than the Commonwealth; because the Attorney General represents the Commonwealth rather than KRS, the Tier 3 Group believes it is unclear that these claims will be available to the Commonwealth since the Defendants were in a position of trust and confidence with KRS rather than the Commonwealth. And, the Tier 3 Group also argues that they will avoid imputation of knowledge of any wrongdoing by virtue of their derivative claim.

The Attorney General and the Commonwealth oppose intervention of the Tier 3 Group and has not authorized them to pursue their claims. Fundamentally, he argues that he fully occupies the field by taking over this suit. He argues that he has broad power to bring suits which he believes is necessary to protect the public interest. Conversely, he argues that the Tier 3 Group seeks to

assert claims that the Supreme Court already dismissed in *Overstreet*, and argues that the minor differences between the Tier 3 Group's claims and the Original Plaintiffs' claims are not enough to confer standing. Relatedly, he argues that there has been no legislative enactment that empowers the Tier 3 Group to pursue their proposed derivative claims, noting that no statute confers to retirement plan beneficiaries the ability to sue third parties on behalf of KRS. He argues that Tier 3's argument that KRS 61.645(15) authorizes such derivative suits is incorrect, and that, at best, this statute only authorizes suits against KRS trustees for actions taken as trustees. Even if the Tier 3 Group is able to pursue its claims, the Attorney General argues that this does not necessarily mean that they have derivative, trust beneficiary, or taxpayer standing.

He further argues that, contrary to the assertion of the Tier 3 Group, that he has the authority to act on behalf of KRS despite having not been directly retained by the KRS Board; he argues that specific retention of counsel by a state agency "does not preclude a need for the Attorney General to protect the interest of all the people when ... unlawful conduct is claimed ... toward" the agency. *See Commonwealth ex rel. Beshear v. Commonwealth, Office of the Governor ex rel. Bevin*, 498 S.W.3d 355, 364 (Ky. 2016). More specifically, he argues that the language of KRS 61.645(11) ("[t]he Attorney General may act as legal advisor and attorney for the board...") grants him the discretion to protect the public interest in this case. He also argues that KRS does not need additional, separate representation and that KRS is not so distinct from the Commonwealth broadly that the Attorney General will be unable to provide sufficient representation.

KRS also opposes the Tier 3 Group's proposed intervention. It argues that their Motion should be denied because they made no demand on the KRS Board to pursue a derivative lawsuit. Even if such demand was not required, KRS argues that the Tier 3 Group has not shown that such

demand would have been futile, which KRS argues is a prerequisite to pursuing a derivative claim without having first made a demand on the Board.

All Defendants oppose the Tier 3 Group's proposed intervention. The RVK Parties argue that the Tier 3 Group lacks standing based on the nature of their Tier 3 benefits: they note that enrollees in a Tier 3 plan receive money pursuant to a statutorily-defined formula and that their benefits would not be impacted following recovery in this civil suit. They also argue that the AG adequately protects the Tier 3 Group's interests. They argue that the proposed intervention is years too late and thus barred by the relevant statute of limitations. And, they argue that the Tier 3 Group may not pursue a derivative suit because it has not made a demand on the KRS Board.

The PAAMCO/Prisma Defendants argue that the Tier 3 Group has no statutory right to intervene. They also note that KRS 61.645(11) provides the Attorney General the authority to act as legal advisor and attorney for KRS and therefore that the interests of KRS and the Attorney General are completely aligned. They also argue that the Kentucky Model Procurement Code ("KMPC") would require that any recovery obtained by the Tier 3 Group be deposited in the same general fund that the Tier 3 Group believes any recovery obtained by the Attorney General would be deposited. They also argue that permissive intervention should be denied since the Tier 3 Group's accusations of corruption and incompetence at the hands of the Attorney General and KRS would create further delay.

In addition to the arguments advanced by other defendants, the Blackstone Defendants argue that the Tier 3 Group manufactures a conflict between the Attorney General and KRS where none exists; they note that nothing would prevent KRS from obtaining any recovery that was first deposited in the state general fund. Defendants William Cook, Ice Miller LLP, and the CavMac Defendants join in the above Defendants' opposition to the Tier 3 Group's proposed intervention.

ANALYSIS

I. The Tier 3 Group's Motion to Intervene Must be Denied

In light of the Attorney General's Intervening Complaint, it is apparent to the Court that the Attorney General is actively pursuing broad, plan-wide relief on behalf of not only KRS or the Commonwealth, but also KRS beneficiaries across all tiers of KRS pension plans. Thus, the Court finds that the Attorney General will adequately represent the interests of the Tier 3 individuals, and that their involvement in the case is not necessary. The Court additionally finds that the Tier 3 Group has no statutory right to pursue a derivative action on behalf of KRS, and thus is not entitled to intervention on that basis. For these reasons, the Court denies the Tier 3 Group's Motion under CR 24.01 and 24.02; the Court will not reach issues such as whether the Tier 3 Group has standing to pursue their claims broadly.

Intervention is governed by Civil Rule 24, which allows intervention under two mechanisms. Under certain circumstances, a court must permit a party to intervene as a matter of right: "[u]pon timely application anyone *shall* be permitted to intervene in an action: (a) when a statute confers an *unconditional* right to intervene." CR 24.01(1) (emphasis added). In other circumstances, a court has discretion to permit intervention: [u]pon timely application anyone *may* be permitted to intervene in an action: (a) when a statute confers a *conditional* right to intervene or (b) when an applicant's claim or defense and the main action have a question of law or fact in common." CR 24.02 (emphasis added). CR 24.02 "provides trial courts with discretion to allow intervention in cases if the interest of the movant so warrants, even if the asserted interest fails to satisfy the dictates of CR 24.01." *A.H. v. W.R.L.*, 482 S.W.3d 372, 375 (Ky. 2016). For a right to intervene to be conferred by statute, the statute must *explicitly* confer that right. *See Com., Cabinet for Health and Family Services v. L.J.P.*, 316 S.W.3d 871, 876 (Ky. 2010) (noting that a statute

did not confer an unconditional right to intervene because “nowhere in the termination statutes is intervention mentioned.”).

First, the Court finds that the Tier 3 Group lacks an unconditional right to intervene under CR 24.01. In contrast to the broad legal authority of the Attorney General to pursue claims such as those presently before the Court, the statutory right of the Tier 3 Group to pursue their proposed derivative claims is unclear. Though the Tier 3 Group argues that KRS 61.645(15)(e) provides them with the ability to pursue a derivative lawsuit against KRS, the Court does not view read this statute so broadly. The statute reads as follows:

(e) Any action taken as a trustee, or any failure to take any action as a trustee, shall not be the basis for monetary damages or injunctive relief unless:

1. The trustee has breached or failed to perform the duties of the trustee's office in compliance with this section; and
2. In the case of an action for monetary damages, the breach or failure to perform constitutes willful misconduct or wanton or reckless disregard for human rights, safety, or property.

KRS 61.645(15)(e). Given the statute its broadest reading, this statute confers a right for KRS beneficiaries to sue trustees for breaches of their duties as trustees. While the Tier 3 Group may have the ability to pursue relief against trustees, this statute does not provide them the ability to pursue recovery against third parties—such as those who are defendants to this action—in a derivative capacity. The Court finds that this statute does not authorize derivative suits as broad as those pursued by the Tier 3 Group—much less does it authorize intervention in suits like this. This Court’s original ruling that the Plaintiffs should be allowed to pursue derivative claims was premised on the finding that both the Attorney General and the KRS had refused to pursue those claims, so that the claims of the fund beneficiaries would be lost if they could not sue derivatively. That situation no longer applies since the Attorney General has stepped forward to litigate those claims.

The inability of KRS beneficiaries to sue third parties on a derivative basis becomes more apparent when comparing KRS 61.645(15)(e) to other statutes which confer the ability to pursue derivative suits. For instance, KRS 271B.7-400, titled “Procedure in derivative proceedings; shareholders of a public benefit corporation,” specifically mentions derivative lawsuits and the circumstances under which such suits may be brought. Similarly, KRS 272A.13.010 authorizes derivative suits by members of limited cooperative associations (“[a] member may maintain a derivative action to enforce a right of a limited cooperative association if...”), KRS 362.2-932 allows partners in limited partnerships to bring derivative lawsuits (“[a] partner may bring a derivative action to enforce a right of a limited partnership if...”), and KRS 275.337 authorizes derivative suits by members of limited liability companies (“[a] member may maintain a derivative action to redress an injury sustained by or enforce a duty owed to a limited liability company if...”). By comparison, KRS 61.645(15)(e) makes no mention of derivative lawsuits, and the Court is unaware of any instance where a Kentucky statute has been read so broadly as to impliedly authorize derivative suits when derivative suits are not specifically mentioned. In light of these other statutes, the Court declines to infer that KRS 61.645(15)(e) authorizes the Tier 3 Group to pursue plan-wide relief on behalf of KRS in a derivative capacity, and does not find any other statutory basis under which the Tier 3 Group could conceivably be granted a right to intervene in this suit.

Because the requirements of CR 24.01 have not been met, the Court must now determine whether permissive intervention under CR 24.02 is proper in the instant case. The Court finds that it is not. For the same reasons outlined above, the Court does not believe that KRS 61.645(15)(e) provides a conditional right to intervene in this suit either. Again, this statute makes no mention of legal action against anyone other than KRS trustees, and cannot be read to provide a conditional

right to pursue relief on behalf of KRS broadly. The Court therefore declines to read KRS 61.645(15)(e) to provide a conditional statutory right to intervene.

And, because the Court believes that the Attorney General's presence in this action will sufficiently ensure that the interests of the Tier 3 Group—and all KRS beneficiaries—will be adequately represented, the Court declines to exercise its discretion to allow the Tier 3 Group to permissively intervene. The Attorney General has broad statutory and common law authority to pursue the claims in their Intervening Complaint. “The Attorney General is the chief law officer of the Commonwealth of Kentucky and all of its departments, commissions, agencies, and political subdivisions...and shall exercise all common law duties and authority pertaining to the office of the Attorney General under common law, except when modified by statutory enactment.” KRS 15.020. Further, the Attorney General “shall appear for the Commonwealth in all cases in the Supreme Court or Court of Appeals wherein the Commonwealth is interested...” *Id.* At common law, the Attorney General is broadly empowered to intervene in lawsuits which involve the public interest. *Hancock v. Terry Elkhorn Mining Co., Inc.*, 503 S.W.2d 710, 715 (Ky. 1973). “[I]n exercise of his common-law powers, an attorney general may not only control and manage all litigation in behalf of the state, but he may also intervene in all suits or proceedings which are of concern to the general public.” *Id.*, quoting 7 Am.Jur.2d.

This Court has already acknowledged that the Attorney General has “a strong interest in the subject matter of this case in his capacity as the attorney for the Commonwealth.” Order, Dec. 28, 2020 at 13. Now, in light of the Attorney General's Intervening Complaint, the Court is of the opinion that the Attorney General intends to exercise his broad statutory and common law authority to the benefit of not only KRS or simply the Commonwealth broadly, but for the benefit of all Tier 1, Tier 2, and Tier 3 beneficiaries. The Attorney General makes this intention explicitly

clear. In paragraph three of his Intervening Complaint, the Attorney General states his intention to “prosecute [the case] to recover all damages caused by Defendants and incurred by the Commonwealth or KRS, including any and all damages for any claims that might otherwise be brought derivatively by ... pension fund beneficiaries (regardless of whether such beneficiaries are classified as Tier 1, Tier 2, or Tier 3).” The Court believes the Attorney General is well within his authority to pursue such claims, and accordingly the presence of the Tier 3 Group as plaintiffs would be redundant.

While the Tier 3 Group believes that the Attorney General will be unable to adequately represent the interests of KRS because the Commonwealth and KRS are somehow separate legal entities, the Court disagrees with this characterization. Rather, KRS is plainly an agency and component part of the Commonwealth. As the Supreme Court of Kentucky has explained:

Kentucky Retirement Systems is a statutorily created agency of state government, KRS 61.645(1), administered by a board of trustees that manages and administers the retirement funds of the County Employees Retirement System, the Kentucky Employees Retirement System and the State Police Retirement System. Due to its management and disbursement of state, county and police employee retirement benefits, Retirement Systems itself is clearly an integral part of state government.

Commonwealth v. Kentucky Retirement Systems, 396 S.W.3d 833, 837 (Ky. 2013). “[T]he Kentucky Retirement System is an ‘arm, branch, or alter ego’ of the state.” *Id.* Thus, the Court agrees that, due to the fact that KRS is a component of the Commonwealth rather than somehow being a separate entity, that KRS does not need any representation other than the Attorney General for their interests to be adequately represented.

While the Tier 3 Group believes that their presence in this case will be essential to ensure that sufficient recovery be allocated to KRS beneficiaries and to the KRS funds (in the event recovery is obtained), the Court disagrees that their presence is necessary in this regard either. In fact, the Court finds the reverse: that any recovery secured by the Tier 3 Group would still be

subject to the same statutory oversight as any recovery secured by the Attorney General. The purpose of KRS 48.005 is stated plainly in the statute itself; “public accountability for funds or other assets recovered in a legal action by or on behalf of the general public, the Commonwealth, or its duly elected statewide constitutional officers is appropriate and required, whether the character of the assets or funds recovered is public or private.” KRS 48.005(1)(a). Upon a plain reading of KRS 48.005, the obligation to deposit recovery in the State Treasury is triggered upon entry into a case by the Attorney General, and this obligation then extends to any plaintiff in the case who seeks recovery on behalf of the Commonwealth or one of its agencies:

Whenever the Attorney General or other duly elected statewide constitutional officer is a party to or has entered his appearance in, a legal action on behalf of the Commonwealth of Kentucky, including ex rel. or other type actions, and a disposition of that action has resulted in the recovery of funds or assets to be held in trust by the Attorney General or other duly elected statewide constitutional officer or by a person, organization, or entity created by the Attorney General, or the Commonwealth, through court action or otherwise, to administer the trust funds or assets, for charitable, eleemosynary, benevolent, educational, or similar public purposes, those funds shall be deposited in the State Treasury and the funds or assets administered and disbursed by the Office of the Controller.

KRS 48.005(3). Now that the Attorney General has entered his appearance in this case, any recovery sought on behalf of KRS—as the Tier 3 Group seeks—must still be deposited in the State Treasury, with the funds administered by the Office of the Controller.

Further, the Court finds that it has the ability under KRS 48.005 to specifically apportion any monetary recovery to KRS prior to money being deposited into the general fund, and therefore it is speculative to assert that KRS beneficiaries will experience diminished recovery if the Attorney General pursues this case without the Tier 3 Group. Under KRS 48.005(4), the Attorney General is able to recover his costs of litigation first. Second, “any required consumer restitution or payments shall be made.” Lastly, “[a]ll remaining funds shall be deposited in the general fund surplus account.” The Court has the ability to order that recovery be specifically tailored as justice

requires, and such payment would be made prior to remaining funds being deposited in the general fund. The Court therefore finds that the presence of the Tier 3 Group in this action is not necessary to ensure that KRS and its beneficiaries receive recovery in this suit.

CR 24.01 provides that intervention may be denied if the Court determines that the interest asserted by the parties seeking intervention “is adequately represented by existing parties.” CR 24.01(1). As noted, the Court finds that the Attorney General will adequately represent the interests of the Tier 3 Movants. While the Tier 3 Group may have differences with the Attorney General over strategy and tactics, those potential litigation disputes do not form a basis for finding the Attorney General’s representation of the interests of the Tier 3 Movants is inadequate. To the contrary, the Attorney General has every incentive to maximize any recovery against the Defendants, and to include any damages that have accrued to the public retirement system, and all its participants, in Kentucky. As the court found in *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003), there is “an assumption of adequacy when the government is acting on behalf of a constituency it represents. ... In the absence of a ‘very compelling showing to the contrary,’ it will be presumed that a state adequately represents its citizens when the applicant shares the same interest. ... Where parties share the same ultimate objective, differences in litigation strategy do not normally justify intervention.” (internal citations omitted).

Likewise, CR 24.02 provides that “[i]n exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.” This case is already four years old, and has not progressed beyond the very early stages of pleading and limited discovery. It has already been the subject of extensive appellate litigation that has gone to the Kentucky Supreme Court. It has been characterized by extensive and unproductive disputes between counsel that have delayed and obstructed the adjudication of the

claims on the merits. The Court finds that the intervention of the Tier 3 Group would undoubtedly add to the delay, and would likely result in “prejudice to the rights of the original parties” to a fair and efficient adjudication of the claims and defenses that are before the Court. At a minimum, it is apparent that the participation of the Tier 3 Group as Intervening Plaintiffs would result in an entire new round of litigation over their standing, because of the issue of whether their “hybrid plan” is more like a defined benefit plan than a defined contribution plan for purposes of standing. The standing issue has already delayed the litigation for two years and has been to the Kentucky Supreme Court once. The additional costs and delay to all the parties inherent in allowing the Tier 3 Group to intervene cannot be justified when the Attorney General has a statutory and common law mandate to fully protect the interests of those Movants within the context of the Commonwealth’s claims that have been asserted in the First Amended Complaint.

Because the Court finds that the Tier 3 Group is not entitled to intervene in this case under either CR 24.01 or CR 24.02, the Court declines to address whether the Tier 3 Group has standing to pursue their claims or whether their attempted intervention is timely. There is no statutory right, absolute or conditional, for the Tier 3 Group to intervene regarding the claims before the Court.

II. The Tier 3 Group’s Motion for Leave to File a Third Amended Complaint is Denied

Because the Court has already determined that the Tier 3 Group lacks a basis for intervention in this action and therefore are not a party to it, the Tier 3 Group will not be allowed to file an additional amended complaint. Because the Tier 3 Group are not plaintiffs in this case, the Court **DENIES** this Motion.

CONCLUSION

First, the Court finds that the presence of the Tier 3 Group would result in “undue delay and prejudice” to the rights of existing parties, and that the rights of the Tier 3 Group are adequately represented by the Attorney General. The Court finds that no statute provides the Tier 3 Group a right to intervene in this case, either absolutely or conditionally, and thus the Tier 3 Group is not entitled to intervention of right under CR 24.01 or CR 24.02. Further and as the Court previously found, it is the Attorney General who is empowered to take over this case, and he has represented in his Intervening Complaint that he intends to seek broad recovery for the benefit of, among others, all KRS beneficiaries. And, there is no basis to argue that any money ultimately recovered in this suit cannot be specifically allocated to KRS beneficiaries through the Court’s power to craft particularized remedies, and to order restitution in the event funds have been wrongfully diverted or charged by the Defendants. For these additional reasons, the Court also denies the Tier 3 Group permissive intervention under CR 24.02.

For the reasons stated above, IT IS ORDERED:

1. The motion of the Tier 3 Group to Intervene under Cr 24.01 and CR 24.02 is **DENIED**;
2. Because the Tier 3 Group is not a party to this case, the Court **DENIES** their Motion to File a Third Amended Complaint;
3. The Court declines to reach issues of standing or the timeliness of the Tier 3 Group’s claims;
4. The Court reiterates that henceforth, the caption of the case will be amended to reflect the parties to this action going forward, and pleadings should be denominated *Commonwealth of Kentucky, Intervening Plaintiff v. KKR & Co., LLP, et al., Defendants*;

5. The Court further re-iterates the Court's dismissal of the Government Finance Officers Association as a party has been finally adjudicated and all appeals on that issue have been exhausted. The Attorney General's initial pleading mistakenly reasserted the claim against Government Finance Officers Association, but that claim has been omitted from the First Amended Complaint. Therefore, the record should be clear that all claims against Government Finance Officers Association were dismissed with prejudice and it is no longer a party to this litigation.

SO ORDERED, this 14th day of June, 2021.



PHILLIP J. SHEPHERD
electronically signed
6/14/2021 11:06:17 AM ET

PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division I

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