COMMONWEALTH OF KENTUCKY
COUNTY OF FRANKLIN CIRCUIT COURT
CASE NO. 17-CI-1348
DIVISION ONE

JEFFREY C. MAYBERRY, *et al.* PLAINTIFFS

v.

PLAINTIFFS' RESPONSE TO DEFENDANTS' OBJECTION TO FURTHER PROCEEDINGS IN THIS ACTION AND MOTION TO ENFORCE MANDATE AND VACATE CONSOLIDATION ORDER

KKR & CO., L.P., *et al.* DEFENDANTS

ELECTRONICALLY FILED

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Plaintiffs Jeffrey C. Mayberry, Hon. Brandy O. Brown, Martha M. Miller, Steve Roberts, Teresa M. Stewart, Ashley Hall-Nagy, Tia Taylor and Bobby Estes (the "Mayberry Plaintiffs")[1] respectfully respond to Defendants' Objection to Further Proceedings in This Action and Motion to Enforce Mandate and Vacate Consolidation Order, as follows:

I. INTRODUCTION AND OVERVIEW

The Prisma Defendants object to "any further proceedings in this matter," asserting that the Court has no jurisdiction – that it cannot even consider its own jurisdiction or entertain the Attorney General's motion for intervention or the Mayberry Plaintiffs' motion for leave to file a Second Amended Complaint. The Prisma Objection fails for several reasons, two of which are highlighted in this response:

[1] Mayberry, Brown, Miller, Roberts and Stewart (the "*Mayberry* Five") are plaintiffs who brought this action in December 2017 and named plaintiffs in the January 17, 2018 first amended verified complaint ("FAC"), and the proposed amended complaint submitted a year ago, now replaced by the Mayberry Plaintiffs' July 29, 2020 proposed second amended verified complaint ("SAC").

- Dismissal for failure to adequately plead constitutional standing does *not* divest the Court of jurisdiction to consider and rule upon a proffered curative amendment, nor does it prohibit (or excuse) the Court from performing a futility analysis with respect to the proffered amendment; and

- The Supreme Court's mandate does *not* preclude consideration of the Mayberry Plaintiffs' motion for leave to file a Second Amended Complaint. This Court is instructed to "dismiss the complaint," but the mandate is silent on whether the Court may entertain a motion to amend to cure the pleading defect. That the mandate was issued in the context of "*interlocutory appeals* from the … circuit court's order denying Defendants' *motion to dismiss* on [constitutional] standing and immunity grounds" supports the view that the Mayberry Plaintiffs be afforded the opportunity to seek leave to amend.

II. ARGUMENT

A. Dismissal for Inadequate Pleading of Constitutional Standing Does Not Preclude Leave to Amend

Prisma argues that "[o]nce Plaintiffs were adjudicated to lack constitutional standing, this Court's jurisdiction was lost and Plaintiffs lost any ability to seek leave to replead." Objection at 7, n.4. But the authorities they cite do not support that broad (and erroneous) assertion. The general rules concerning leave to amend apply in cases involving failure to plead constitutional standing in the same way they apply to dismissals on other CR 12.02 grounds, and the circumstances here present a paradigmatic case for entertaining a motion for leave to amend.

The FAC was filed before the first of the *Sexton/Thole/Mayberry* trio of decisions – which changed the framing of the standing analysis – was rendered.[2] The motions to dismiss were briefed and argued before *Sexton* was handed down. The Court permitted supplemental briefing to respond to *Sexton*, but even then Plaintiffs viewed the "injury in

[2] *Cabinet for Health & Family Servs. v. Sexton*, 566 S.W.3d 185 (Ky. 2018); *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615 (2020); *Overstreet v. Mayberry*, Nos. 2019-SC-000041-TG, *et al.*, slip op., at 36, 2020 Ky. LEXIS 225 (Ky. July 9, 2020). The *Sexton/Thole/Mayberry* decisions, taken together, didn't just "move the goalposts"; they changed the size, shape and location of the goal.

fact" issue as an inquiry into whether *KRS* – which the Mayberry Plaintiffs viewed as the "real plaintiff" – had suffered an "injury in fact," *not* whether the derivative plaintiffs personally could meet the "injury in fact" hurdle. As a result, Plaintiffs pleaded, briefed and argued the motions to dismiss with that frame of reference. Ultimately, the Supreme Court ruled that this framing was incorrect and that "injury in fact" to the derivative plaintiffs was also required. But the Mayberry Plaintiffs' original framing of the issue, focusing on KRS rather than the derivative plaintiffs, was reasonable under the then-extent case law. Indeed, this Court adopted that same frame in its analysis of the standing issue, as did the bipartisan leadership of both houses of the legislature and a group of leading corporate law professors in their respective amicus briefs filed in the Supreme Court (attached as Exhibits B and C to the Mayberry Plaintiffs' August 13, 2020 Reply in Further Support of Their Motion for Appointment of Lead Plaintiff, Lead Counsel and Liaison Counsel).

The general rule is that leave of court to amend a complaint or other pleading is "freely given when justice so requires." CR 15.01. This rule applies even when a motion to dismiss the prior complaint has been granted on subject matter jurisdiction grounds.

> It is an abuse of discretion for the court to dismiss a suit on the basis of the original complaint without first considering and ruling on a pending motion to amend.... Thus, ***leave to amend the complaint should be freely given when necessary to cure defective allegations concerning subject-matter jurisdiction, and where an amended complaint contains the required jurisdictional allegations, the complaint should not be dismissed***.

61A AM. JUR. 2D PLEADING § 710 (emphases added).

> If the [jurisdictional] allegations are not sufficient ... the district judge has at least two possible courses of action. When the pleader's affidavits or other evidence show either that the court actually has subject matter jurisdiction over the case or that the nonmoving party might be able to amend to allege jurisdiction, the district court may deny the motion and

> direct the pleader to amend the pleading or it may dismiss with leave to amend within a prescribed period of time. ***Only when the affidavits show that the pleader cannot truthfully amend to allege subject matter jurisdiction should the court dismiss without leave to replead***.

CHARLES ALLAN WRIGHT, *ET AL.*, 5B FED. PRAC. & PROC. CIV. § 1350 (3d ed. 2015) (emphases added).[3]

This rule applies equally in cases involving constitutional standing. *See, e.g., In re Adobe Sys. Privacy Litig.,* 66 F. Supp. 3d 1197, 1218 (N.D. Cal. 2014) ("[T]he Court GRANTS [dismissal of Plaintiffs' claim] for lack of Article III standing. Because Plaintiffs may be able to cure this deficiency in an amended complaint, this dismissal is without prejudice."); *S. Ill. Laborers' & Emp'rs. Health & Welfare Fund v. Pfizer Inc.*, No. 08 Civ. 5175 (KMW), 2009 U.S. Dist. LEXIS 91414, at *26 (S.D.N.Y. Sept. 30, 2009) (granting leave to amend *sua sponte* after finding that plaintiff failed to allege Article III standing). In *Scahill v. District of Columbia*, 909 F.3d 1177, 1183 (D.C. Cir. 2018), the D.C. Circuit reversed the trial court's denial of leave to amend to cure defects in pleading Article III standing, holding that "a plaintiff may cure a standing defect under Article III through an amended pleading alleging facts that arose after filing the original complaint."

The rationale for granting leave to amend is especially strong where, as here, the legal standard changes or evolves during the pendency of the case. In *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 71 (2d Cir. 2012), the District Court *sua*

[3] This matter should be viewed, for purposes of leave to amend, in the same light as if the Circuit Court had dismissed on the same grounds. "Amended pleadings may be filed where the ends of justice require it. [Citations omitted.] The right to amend after reversal because of defective pleadings is the same as before trial." *London & Provincial Marine & Fire Ins. Co. of London, England v. Mullins*, 105 S.W.2d 1057, 1060 (Ky. Ct. App. 1937).

sponte dismissed the complaint for lack of subject matter jurisdiction, on the basis of new U.S. Supreme Court authority handed down after argument of defendants' motions to dismiss. On appeal, the Second Circuit held the plaintiffs should have been given leave to amend in view of the newly announced test:

> It appears as though the complaint was drafted to satisfy the [prior] test, which was in operation when the complaint was filed.... Given that the [plaintiffs] understandably drafted their complaint in accordance with pre-*Morrison* doctrine, they cannot be faulted for their failure to allege facts suggesting that irrevocable liability was incurred within the United States.

Id.

There are no doubt cases in which all relevant jurisdictional facts are in the record and leave to amend would be futile because those facts plainly reveal the absence of constitutional standing or some other aspect of subject matter jurisdiction. This is not such a case; the Mayberry Plaintiffs should be permitted to attempt to amend with allegations that would satisfy the new *Sexton/Thole/Mayberry* test.

B. The Mandate Does Not Preclude Leave to Amend

Prisma asserts that the Supreme Court's mandate to "dismiss the complaint" requires this Court to enter a final judgment dismissing the case – and prohibits it from doing anything more. But the mandate does not say that – the mandate is silent on whether the Court is permitted, for example, to entertain a motion for leave to amend – and there is no default rule to that effect. Under the circumstances, the mandate should *not* be understood to preclude the Mayberry Plaintiffs' motion for leave to amend, or the Attorney General's motion to intervene.

First, the instructions contained in the Supreme Court opinion neither say or imply that the Court must decline amendment or intervention.

Second, the procedural posture of the case in the Supreme Court circumscribed the

range of the Court's decision. The case was there on an *interlocutory appeal* (on immunity grounds) of this Court's denial of Defendants' *Motions to* Dismiss – in other words, on a very narrow and constrained jurisdictional basis, and still in a preliminary phase of the case as a whole. Nothing in the opinion requires this Court to short circuit the ordinary procedural rules by shutting off the Mayberry Plaintiffs' right to attempt to replead. The fact that the Motions to Dismiss were, in effect, decided by the Supreme Court rather than the Circuit Court does not change the essential rights of Plaintiffs after such a decision. The Mayberry Plaintiffs are in basically the same procedural posture as if this Court had made this same decision, on the same grounds, on the first round of motions in the case.

Third, the Supreme Court did not undertake any kind of futility analysis, so that necessary step is left to this Court.

III. CONCLUSION

The arguments made in this memorandum are not exclusive; there are other good arguments for holding that this Court maintains and may exercise jurisdiction. Similarly, there are other arguments to be made in support of the Mayberry Plaintiffs' motion for leave to file their SAC. The point of these arguments is that the Court has jurisdiction to entertain the motion for leave, and ancillary to that has jurisdiction to entertain the Attorney General's motion for intervention.

Dated: August 20, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

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