COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I

CIVIL ACTION NO. 17-CI-1348
Electronically Filed

JEFFREY C. MAYBERRY, ET AL. PLAINTIFFS

v.

KKR & CO., L.P., ET AL. DEFENDANTS

OBJECTION OF RVK PARTIES TO ATTORNEY GENERAL'S MOTION TO INTERVENE

R.V. Kuhns & Associates, Inc. ("RVK"), James Voytko, and Rebecca Gratsinger (collectively, the "RVK Parties") object under CR 24.02(1) to the motion of the Attorney General to intervene in this action because this Court lacks subject matter jurisdiction to consider or grant the motion, the motion is untimely, and public policy does not support intervention. The RVK Parties notice the hearing of their objections for Monday, August 17, 2020, at the conclusion of this Court's 9:00 a.m. motion docket. The Court should deny the motion to intervene for the reasons set forth below, as well as the arguments made in support of the objections of the Blackstone Defendants, which are adopted and incorporated here.

INTRODUCTION

This Court lacks subject matter jurisdiction to consider or grant this motion for two independent reasons. First, the Court *never* had subject matter jurisdiction over this action because the suit was not justiciable from the outset under Ky. Const. § 112. Second, this Court has no subject matter jurisdiction to give life to an inert suit when the Supreme Court has mandated that *this* suit be dismissed. Simply put, there is no living, breathing lawsuit in which the Attorney General can *join*.

Even if this Court had jurisdiction—which it does not—the Attorney General's post-mandate motion arrives 937 days after this non-justiciable lawsuit was filed and is untimely in the extreme. The Attorney General recognizes the untimeliness of this motion by filing a separate identical lawsuit "just in case" the motion is denied. Likewise, the proposed Intervening Complaint attached to this motion confirms that there has been no legitimate reason for the Attorney General's delay. It merely warms up the stale allegations Plaintiffs made public in December 2017 and pretends he has newly *discovered* them.

The interests of justice also would not be advanced by permitting the Attorney General to intervene in a non-justiciable suit where he has simply parroted stale, debunked claims. The self-proclaimed "core" of these claims—that dozens of parties conspired with a public agency beginning in 2010 to hide a secret financial crisis facing KRS, while at the same time attempting to "gamble" their way out of the crisis with "high-risk" investments—is grounded in two demonstrable falsehoods. First, in 2010, RVK—an independent investment consultant for KRS that neither managed nor sold investments—publicly and repeatedly advised the KRS Board of Trustees, KRS staff, the General Assembly, public interest groups, and the general public that the KRS pension funds faced severe financial challenges over the coming years, that KRS had no way to invest its way out of its financial hole, that the KRS pension funds had an appreciable risk of running out of assets, and that the future cost to the state would be unimaginably high. Second, after the KRS pension funds lost billions of dollars in stock market-tracking investments during market downturns in 2001–2002 and 2008–2009, the KRS board decided to *decrease risk* in its portfolio by decreasing the amount of funds that were allocated to the roller-coaster of the stock market and increasing allocations of *less risky* and *less volatile* investments, including absolute return investments which hedged (reduced) risk by purposely *not* tracking the stock

market. In doing so, these less-risky investments produced several hundred million dollars in profits for KRS, net of fees.

None of the policies supporting intervention are present here. There is no suit in which to intervene. The filing is too late. The Attorney General is not promoting efficiency or judicial economy because his claims are not being *joined* to the claims of others. The Attorney General's graceless adoption of stale, debunked claims should be tested in his own, already-filed lawsuit—not in the non-justiciable shell of a suit that the Supreme Court has mandated be dismissed.

COUNTERSTATEMENT OF MATERIAL FACTS

The Attorney General seeks merely to republish the December 2017 claims of eight private plaintiffs against 30 defendants, including (selected) KRS trustees and officers, (Intervening Complaint ¶¶ 52–64), "hedge fund sellers" and their principals, (*id.* ¶¶ 65–123), an "actuarial advisor," (*id.* ¶¶ 130–136), and RVK and two of its principals, Jim Voytko and Rebecca Gratsinger, (*id.* ¶¶ 124–129).

I. RVK provided investment consulting services to KRS and prepared the public analysis that the Attorney General claims "sounded the alarm" at KRS.

The Attorney General's proposed Intervening Complaint identifies RVK as an investment consulting firm that services institutional investors, including pension plans like KRS. (*Id.* ¶ 124.) RVK had no agenda or incentive apart from that of KRS because RVK is not a market participant—it neither sells investments nor manages them. KRS engaged RVK as an investment advisor after KRS had lost over $6.7 billion in the stock markets during two market downturns between 2001 and 2009. (*Id.* ¶¶ 7, 124.) Jim Voytko and Rebecca Gratsinger both work at RVK. (*Id.* ¶¶ 125–126.)

The Attorney General proposes to allege that "RVK prepared the analysis . . . in 2010 which revealed the closing vise that KRS faced between the demographics of its members and

beneficiaries and its actuarial situation." (*Id.* ¶ 127; "RVK Report.") Plaintiffs described the RVK Report as a "bombshell" which "clearly stated the KRS-NH Fund was likely in a death-spiral." (Pls.' Comp. Mem. in Opp. to Mot. to Dismiss at 22, Ex. 2.) Despite recognizing that the RVK Report "revealed" the significant underfunding issues facing KRS, the Attorney General seeks to allege that RVK nevertheless was allegedly incentivized to "let the deception continue because it served their selfish economic purposes to do so." (Interv. Compl. ¶ 128.) This was purportedly because "RVK's business model depended on" "keeping clients," "representing a large number of public pension funds," and earning fees from clients. (*Id.*) Public records—which are subject to judicial notice—directly refute Plaintiffs' claims against the RVK Parties.

II. The "core" allegation that the Attorney General seeks to make—that the RVK Parties conspired with at least 29 others to conceal the truth about the financial crisis facing KRS in 2010—is false.

RVK prepared asset liability studies in 2010 for a *public entity* presented at *public KRS meetings* that described KRS's "true financial condition" after KRS lost $6.7 billion in the stock market declines preceding 2009[1]—and endured years of well-documented, deliberate underfunding from the executive and legislative branches. (Interv. Compl. ¶¶ 5, 180–181; Pls.' Comp. Mem. at 21–24; Pls.' Resp. at 7.) Among other things, these studies publicly concluded:

- "[T]he KERS Non-Hazardous Pension Plan (KERS-NHPP) at best faces severe financial challenges over the next 5 to 20 years and at worst faces an appreciable risk of running out of assets needed to pay benefits. By severe challenges, we mean, for example, low funding ratios (a large gap between plan benefit obligations and plan assets) for the next 20 years and likely beyond, coupled with unusually high and continually rising contribution requirements. By worst case, we mean complete exhaustion of the fund's assets in perhaps seven to ten years leaving only currently scheduled annual contributions and whatever other funds the Commonwealth might choose to provide available to pay benefits."

[1] The Intervening Complaint does not and cannot tie any of these catastrophic losses to RVK, as it asserts that RVK was hired "after the 2008–2009 losses." (Interv. Compl. ¶ 226.)

- “Given the current circumstances, . . . there is no reasonable investment strategy available to the KERS Board that would allow the plan to ‘invest its way to significantly improved financial status.’”

- “[N]o reasonable investment strategy . . . would allow the plan to invest its way to significantly improved financial status.”

- “Under all scenarios—even the most conservative asset protective approach—the KERS-NHPP faces a critical period from 2018 to 2020 when the confluence of a series of scheduled annual contributions that are below actuarially required levels coupled with rising benefit payments push total plan assets to very low levels in this 20 year forecast—or even deplete them entirely.”

- “Adopting an aggressive investment approach”—having nothing to do with absolute return strategies but rather increasing allocations of *equities* from 18% to 57% of the portfolio—“would ‘substantially increase[] the chances of the catastrophic event of depleting all assets in near future.’”

RVK, *KERS Asset Liability Studies, Non-Hazardous Pension Plan* (April 2010). RVK presented these studies in multiple public meetings.[2]

The RVK Parties also presented these studies in open session to the Kentucky legislature. *See* Interim Cmte. on State Gov’t, Min. of 1st Mtg. of 2010 Interim (July 21, 2010), https://apps.legislature.ky.gov/minutes/st_gov/100721OK.HTM (noting RVK testimony on the 2010 Asset Liability Study, including RVK’s conclusion that “it is unlikely that KRS will be able to earn its way out of the funding dilemma”); Program Review & Investigation Cmte., Min. (July 8, 2010) https://apps.legislature.ky.gov/minutes/prog_rev/100708OK.HTM (noting RVK testimony on 2010 Asset Liability Study, including RVK’s conclusion that KRS has “a large current funding problem” that “is likely to grow considerably over the next 5 to 15 years”); Overview & Summary Presentation to the Kentucky Interim Joint Committee on State

[2] RVK’s April 2010 *KERS Asset Liability Studies* were provided, discussed, and made part of the record at a public meeting of the KRS investment committee on May 4, 2010, and the KRS Trustees on May 20, 2010. These public board meetings were attended by non-trustee members of the KRS pension plans and by representatives of the Kentucky Public Retirees (“a non-profit organization of retired Kentucky government employees whose mission is to actively support the protection of our retirement benefits”), the Louisville Firefighters, the Fraternal Order of Police, the LRC, and the Kentucky Personnel Cabinet.

Government (July 19, 2010), at 17 (pension funding ratios would tumble from 45% to 16% by 2017—even if "all actuarial and return assumptions are met over that time period"). In one public presentation to the General Assembly, RVK testified:

- "[W]e are certain that [paying pension benefits is] likely to be far more expensive than you probably ever imagined."
- "The financial outlook . . . is summed up most simply by saying you have a large current pension funding problem. You have a pension funding problem that's likely to grow considerably larger over the next five to fifteen years, even in a normal investment environment."
- "The most likely case is that you have severe challenges ahead that you face very sharply rising contribution rates, that you face a very reasonable likelihood of shrinking assets, rather than growing assets . . . ."
- "It is, in our judgment, extremely unlikely that no matter how much risk they took on within any realm of prudence that they could earn their way out of this dilemma." (Tr. at 25)

Public Testimony of RVK to the Kentucky Interim Joint Cmte. on State Gov't (July 21, 2010).

RVK's plain-spoken public disclosures were consistent with its complete independence in advising KRS. The Attorney General moves this Court to intervene in order to re-issue false allegations about "conspiracies" and "secrets" which are debunked by the public record.

III. Plaintiffs' other core allegation—that KRS turned to "aggressive, high-risk investment vehicles" in 2011 by investing in hedge funds of funds—is false.

The Attorney General likewise seeks to resuscitate Plaintiffs' false allegation that KRS's 2011 decision to invest 10% of the pension plans' investment funds into hedge funds of funds (which are "absolute return strategies") was a "gamble" with "extremely high risk." (Interv. Compl. ¶¶ 19, 260.) In truth, KRS's investments in hedge funds of funds provided diversification and risk reduction (hedging) to a portfolio that had just lost billions of dollars in the stock market and that could not afford to be overly exposed to the stock market for another market downturn. (RVK Ans. to Am. Compl. ¶ 219.)

The 2011 asset reallocation, including the decision to invest approximately 10% of the pension funds' assets in hedge funds of funds, actually *decreased* risk in the portfolio in large part by decreasing the allocation to riskier stocks (with risk/volatility ranging between 17.5% to 28%) in favor of increasing allocations to less risky and less volatile investments, including core real estate (10.5%), real return (9.5%) and absolute return (or hedge fund of fund) (8.5%) investments which did not track the stock market. (*Id.*; *see also* RVK Ans. ¶ 103 (noting that absolute return investments were the *tenth* riskiest of fourteen asset classes considered by KRS).)

ARGUMENT

The RVK Parties fully adopt and incorporate the facts and arguments presented by the Blackstone Defendants in support of their objections. This Court lacks subject matter jurisdiction for two different reasons, the motion is untimely, and public policy does not support intervention.

First, the Court has no subject matter jurisdiction because the Supreme Court has held that this is not a "justiciable cause[]" under Section 112(5) of the Kentucky Constitution. "If a case is not *justiciable*, specifically because the plaintiff does not have the requisite standing to sue, then the circuit court *cannot hear the case*." *Cabinet for Health & Family Servs. v. Sexton*, 566 S.W.3d 185, 196 (Ky. 2018) (emphasis in original). As the underlying suit is non-justiciable, there is nothing in which the Attorney General can join or intervene.

Second, the Court cannot revive a lawsuit that the Supreme Court ordered to be dismissed. On July 9, the Supreme Court directed the Circuit Court to dismiss this case. That mandate becomes final on July 30, 2020. In the interim 20 days, including when the Attorney General filed his motion, the action was stayed. After the decision became final on July 30, the Court lacks jurisdiction to take any action other than to dismiss the lawsuit.

Even if this Court had subject matter jurisdiction, this motion is untimely in the extreme. Post-judgment intervention is generally disfavored for many reasons. *Farmland Dairies v. Commissioner of New York State Dep't of Agriculture & Markets*, 847 F.2d 1038, 1044 (2d Cir. 1988). The Attorney General chose to sit on the sidelines of this highly public lawsuit for nearly three years. Despite all of this time in which the Attorney General theoretically could have undertaken his own investigation, he instead has chosen merely to repeat a series of stale claims that are contradicted by the public record. There is no reason why the Attorney General should not be required now to stand and support the allegations made in his separate new lawsuit rather than hiding under the cloak of this non-justiciable case.

Public policy also does not support intervention at this juncture. Numerous courts have found the prejudice to potential intervenors to be slight and intervention to be inappropriate where they have filed or could file a separate lawsuit. *E.g.*, *John R. Sand & Gravel Co. v. U.S.*, 59 Fed. Cl. 645, 651 (Ct. Cl. 2004). The Attorney General has, of course, already filed his own lawsuit making identical claims. That new case should be the avenue for the Attorney General to test his stale and baseless claims. The Court should reject this belated effort at intervention.

CONCLUSION

The Court should deny the Attorney General's motion to intervene for lack of subject matter jurisdiction and for failure to satisfy the requirements of CR 24.[3]

[3] The RVK Parties submit this objection without waiving their argument that the Court lacks jurisdiction to act on the motion to intervene or to take any action beyond dismissing the case pursuant to the Supreme Court's directive.

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CERTIFICATE OF SERVICE

I certify that on July 30, 2020, I served the foregoing document by email to the service list below.

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