COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I

CIVIL ACTION NO. 17-CI-1348
Electronically Filed

COMMONWEALTH OF KENTUCKY — PLAINTIFF

v.

KKR & CO., L.P., ET AL. — DEFENDANTS

THE RVK PARTIES' RESPONSE TO THE TIER 3 MOTION TO INTERVENE

TABLE OF CONTENTS

INTRODUCTION

After this matter was litigated at every level of Kentucky's courts over the past three years, this Court determined in December that the Attorney General was empowered to intervene in this case and represent the interests of KRS, its members, and the Commonwealth. The Tier 3 movants followed that decision by attempting to intervene with what they claim to be a materially identical complaint asserting the same claims for alleged breaches of duties to KRS. The Court should reject these efforts.

As a threshold matter, the Tier 3 movants lack constitutional standing. They are *not* members of a defined contribution plan. Like the Tier 1 and 2 members whose claims were dismissed in *Overstreet*, their benefits are determined by a statutory formula, and they have no property interest in the general pool of KRS assets. Under that statutory formula, an injection of cash into KRS from a derivative-style litigation judgment will not affect the amount of Tier 3 members' "upside sharing" or any other benefits. Just as in *Overstreet*, the Tier 3 movants' claims should be rejected for lack of standing because whether they win, lose, or draw in their purported derivative claims on behalf of KRS, their benefits will remain the same.

The Tier 3 members also cannot intervene as of right because their interests are adequately protected. Just in December, this Court ordered that the Attorney General—the Commonwealth's Chief Law Officer—should "take over this case" because he has "a public interest in ensuring that KRS assets" are "managed in a prudent fashion." The movants allege that their claims and factual allegations "mirror" those in the Attorney General's operative complaint. The Attorney General is empowered by statute to represent the interests of Kentucky citizens like the Tier 3 plaintiffs in issues relating to the Commonwealth's agencies. The movants' complaints about the Attorney General's litigation strategies or Kentucky's government accountability statutes cannot support a claim to intervene.

The claims are also fatally flawed. The Tier 3 members' interests fundamentally conflict with those of KRS. The formula defining Tier 3 benefits gives members a *promise* of certain interest credits each year, and the *possibility* to earn more based on KRS's overall investment returns. Their interest in seeking large returns to increase the possibility that they will earn more conflicts with KRS's obligation to employ an investment strategy to pay the promises made to members of all tiers. In addition, though styled as a *derivative* complaint, the movants acknowledge that they neither made a demand on the KRS Board to take action nor pleaded facts to establish that such a demand would be futile. Instead, they seek a personal recovery for themselves, which is not permitted in a derivative suit. And the claims are long-barred by the statute of limitations since they seek to assert claims that arose in very public settings and relate to very public decisions years before they even became members of the plans.

Finally, the Tier 3 members' belated intervention motion is years too late. Constitutional standing has been an issue that prior Plaintiffs' counsel (and current Tier 3 counsel), KRS, and the defendants have all recognized in this case for more than three years now. The Court should not permit Tier 3 members to prolong this litigation when they acted as spectators while this issue moved deliberately through the Kentucky courts, only to seek intervention after the Attorney General is permitted to intervene and assert identical claims.

The RVK Parties stand ready to defend the Attorney General's meritless claims against them. The Court should deny the Tier 3 members' effort to intervene, and permit this litigation to move forward in due course.

BACKGROUND

I. The Court found that the Attorney General is empowered to "take over" this case.

On December 28, this Court held that "the Attorney General must be allowed to take over this case and pursue these claims on the merits" through intervention. (12/28/2020 Order, at 17.)

Over defendants' objections,[1] the Court reasoned that "the Attorney General is empowered by statute, the Civil Rules, and the decision of the Kentucky Supreme Court in this case" to revive the *Mayberry* action after the Supreme Court ordered that it be dismissed. (*Id.*) In the same order, the Court also rejected the efforts of some of the *Mayberry* plaintiffs and of the Tier 3 movants here to amend the *Mayberry* complaint.

After this order and a second failed effort to amend the 2017 *Mayberry* complaint to which they were never parties, the Tier 3 movants filed this motion to intervene and a "backstop" separate action with identical parties, factual allegations, and claims. *See Tia Taylor v. KKR & Co., L.P.*, Case No. 21-CI-20 (Franklin Cir. Ct.).

II. The Tier 3 movants' complaint "mirrors" the OAG's operative complaint.

The operative complaint of the OAG asserts materially the same claims and facts as the proposed intervening complaint of the Tier 3 movants. As the Tier 3 movants put it, their complaint "mirrors" the OAG's complaint, and the factual and legal allegations overlap entirely. Both complaints repeat false allegations made by the now-dismissed original plaintiffs that are largely contradicted by the public record.

The Tier 3 movants allege that the RVK Parties issued a "Bombshell report" in April 2010[2] warning KRS, the General Assembly, and the general public that KRS "face[d] an appreciable risk of running out of assets in the next few years," and that there was "no prudent investment strategy that would allow KRS to invest its way to significantly improved status."

[1] The RVK Parties maintain that the Court lacks jurisdiction to grant this motion to intervene for the same reasons that it lacked jurisdiction to grant the OAG's motion to intervene. Recognizing that the Court disagreed with this position in its December 28 order, the RVK Parties note the issue to preserve it for appeal.

[2] The proposed intervening complaint omits that RVK prepared a similarly dire public report in 2015 that again concluded: (1) "[T]he [KERS-NH] Plan faces substantial financial challenges over the next 20 years," with "persistent funding shortfalls, elevated contribution levels, unsustainable payout ratios, and, in the worst-case scenario, the potential for complete depletion of the asset base"; and (2) "[i]nvesting out of the current situation is not possible." That report was also presented to the General Assembly in open session.

(Tier 3 Compl. ¶ 40). The public record is clear that RVK's 2010 report and findings were discussed at length in at least four public meetings and hearings at the time.[3] On the heels of RVK's report and testimony, a *July 2010* news article quoted then-President of the Kentucky Senate David Williams describing the financial condition of the KRS pension funds as a "Death Spiral."[4] In a spirit of stubborn fact-denial, the Tier 3 movants nevertheless allege that the RVK Parties participated in a wide-ranging secret conspiracy to "let the deception continue" about the true state of affairs at KRS because their "business model depended on keeping clients."[5] (*Id.* ¶¶ 198, 201). They also falsely claim that the RVK Parties joined KRS staff in counseling the KRS Board to *increase* risk in 2011 by investing a portion of the portfolio in hedge funds of funds. (*Id.* ¶ 24.) This allegation likewise is contradicted by the public record.[6] And they claim that the RVK Parties engaged in "obfuscation" or "deliberate deception" in a 2010 annual report letter, despite the letter's warning that the "KRS Non-Hazardous Pension Plan . . . face[s] the possibility of converting to a pay-as-you-go model," (*id.* ¶ 321), or somehow dissembled in

[3] 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. 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; Program Review & Investigation Cmte., Min. (July 8, 2010) https://apps.legislature.ky.gov/minutes/prog_rev/100708OK.HTM.

[4] *Owensboro Messenger-Inquirer*, Editorial, (July 15, 2010).

[5] This scienter allegation illustrates the complaint's utter lack of substance. Clients are a condition precedent to all professions. It is not a business "model," nor if it were would it be a sinister one.

[6] 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. (RVK Ans. ¶ 219; ¶ 103 (noting that absolute return investments were the tenth riskiest of fourteen asset classes considered by KRS).)

letters from 2011–2015 that disclosed the investments in hedge funds of funds and disclosed that "going forward the portfolio is more diversified than ever," (*id.* ¶ 324).

Based on demonstrably false allegations, the Tier 3 movants assert claims against the RVK Parties for: (1) breaches of statutory, trust, fiduciary, and other duties to KRS; (2) participating in a joint enterprise and/or a civil conspiracy; (3) aiding and abetting breaches of statutory, fiduciary, or other duties owed to KRS; and (4) punitive damages.

The OAG's complaint asserts the same evidently false facts relating to the RVK Parties. (OAG Compl. ¶ 128 (RVK "let the deception continue" before and after its 2010 report; ¶ 12 (KRS, with the aid of its advisors, chose to "take longshot imprudent risks with KRS Funds to try to catch up for the Funds' prior losses and deceptions"); ¶ 125 (alleged "false or misleading letters and reports" because "RVK's business model depended on keeping clients"); ¶¶ 231–35 (2017 news articles claiming "near collapse" of KRS Plans).)

Just like the Tier 3 complaint, the OAG's operative complaint asserts claims against the RVK Parties for (1) breaches of statutory, trust, fiduciary, and other duties to KRS; (2) participating in a joint enterprise and/or a civil conspiracy; (3) aiding and abetting breaches of statutory, fiduciary, and other duties to KRS; and (4) punitive damages.

Though the Tier 3 movants contend that the OAG pursues claims for breaches of duties to the Commonwealth, (Mot. to Intervene at 40–51), the OAG's complaint plainly and repeatedly purports to assert causes of action for alleged breaches of duties "to KRS." (OAG Compl. ¶ 251 (defendants breached various duties "to KRS and its Funds and to the Commonwealth and its taxpayers"); ¶¶ 256–57 (alleging a wide-ranging "years-long conspiracy," the effects of which could have been avoided had any defendants "complied with their duties to KRS or the Commonwealth"); ¶¶ 271–72 (trustees' and other defendants' conduct "breached those fiduciary

duties to KRS"); ¶ 275 (defendants "knowingly provided substantial assistance to Trustees and Officer Defendants in the breaches of their fiduciary duties to KRS"); ¶ 280 (seeking punitive damages because of alleged "disregard for the rights of KRS, its Pension Funds, the Commonwealth, and Kentucky's taxpayers"); Prayer for Relief ¶ 1 (seeking declaration that defendants "breached their respective duties to KRS and to the Commonwealth of Kentucky and its taxpayers"); ¶ 6 (requesting the Court use its "equity power to fashion such relief as is justified and necessary to benefit KRS and/or restore KRS that to which it is entitled").

III. The Tier 3 movants contend that, unlike the OAG, their derivative claims can avoid what they consider nettlesome government transparency and accountability laws.

Though both the Tier 3 movants and the OAG assert claims based on the same facts and for the same alleged breaches of duties to KRS, the Tier 3 movants urge the Court to permit them to avoid government transparency and accountability laws that they believe would require damages to be paid to branches of government other than KRS. (Mot. to Intervene, at 35–39.) The Tier 3 movants assert that any "net recovery"[7] on their claims would be "an asset of KRS." (Mot. to Intervene at 36–37.) In contrast, they assert, any recovery that OAG could obtain would need to be deposited into the general fund surplus account under KRS 48.005(4), which is available to "elected officials" who are "hostile to public employee unions/pension funds, favor other priorities, like tax cuts, and at a minimum face other fiscal pressures demanding state funding." (*Id.* at 36.)

IV. The KRS Tier 3 plans to which the proposed intervenors belong are not traditional defined contribution plans.

The proposed intervenors are individual members of KRS's Tier 3 plan. *This is not a defined contribution plan*. It is a hybrid plan with "characteristics of both a defined benefit plan

[7] This is presumably "net" because the Tier 3 movants seek private attorney's fees and expenses before KRS is paid any of the claimed government funds through a private engagement agreement to which KRS is not a party.

and a defined contribution plan." (Tier 3 Compl. ¶ 83 (displaying "KRS's publications").) The plan "resembles a defined contribution plan because it determines the value of benefits for each participant based on individual accounts. However, the assets of the plan remain in a single investment pool like a traditional defined benefit plan. [The Plan] resembles a defined benefit plan since it uses a specific formula to determine benefits." (*Id.*) The employer and employee contributions for Tier 3 members are held and invested alongside and in the same manner as the rest of the system (i.e., KERS, CERS, and SPRS). (*Id.* ¶ 89.) Tier 3 members have no control over how the pooled funds are invested.

This specific formula is set by statute. Generally, "[m]embers and employers contribute a specific amount into the member's account. The account earns a guaranteed amount of interest [4%] at the end of each fiscal year. If the member has participated in the plan during the fiscal year, there may be additional interest credit added"—known as "upside sharing"—"to the member's account depending on KRS's investment performance" for the entire pool of assets used to pay all benefits for KRS members in all tiers, measured as a percentage of gain or loss. "When a member is eligible to retire, the benefit is calculated based on the member's accumulated account balance." (*Id.* ¶ 83.)

Tier 3 KRS members are not promised to receive interest exceeding 4% annually. Instead, there is a possibility that they may earn "upside sharing" credits if: (1) the system's geometric average net investment returns for the last five years exceeds 4%; and (2) the member was active and contributing to the plan in the fiscal year. "If a system's geometric average net return for the previous five years exceeds 4%, then the member's account will be credited with 75% of the amount of return over 4%." (*Id.*) Stated formulaically, a Tier 3 member's benefits grow each year by calculating: set member contribution + set employer contribution + 4% of the

prior year's balance + any upside sharing (geometric average of the plan's net investment return for the previous 5 years – 4% x 75%).

The monthly pension benefits that Tier 3 members have accrued cannot be reduced or lost. (*Id.* ¶ 84, p. 48.) The accrual of *future* benefits (including future interest and employer contribution rates), cost of living adjustments (which Tier 3 members do not claim to have ever received), and health insurance benefits can be suspended or reduced if in the judgment of the General Assembly "the welfare of the Commonwealth so demands." (*Id*. ¶ 44, pp. 45–48.)

The interests of KRS and the individual Tier 3 members are not fully aligned with respect to managing investment risks of the commingled KRS assets. Because of the statutory formula, Tier 3 members' interests lie in maximizing the possibility that they earn upside in each five-year period. KRS, in contrast, must manage its risk of loss against the possibility for upside because it *must pay the guaranteed benefits* for members in each tier—defined benefits and 4% for Tier 3 members—regardless of investment performance. In addition, as with the heavy stock market losses from 2008–2009, it can take KRS much longer than five years to make up for catastrophic losses. The Tier 3 members, in contrast, need not be overly concerned with downside risk because *at worst*, they are guaranteed 4% each year, and a catastrophic loss to a plan in one year will have no bearing on their upside sharing opportunities just six years later. So while Tier 3 members might like KRS to place 100% of its funds in the stock market or cryptocurrency, KRS must carefully manage risk so that it can pay guaranteed benefits to all participants regardless of tier or benefit formula.

The Tier 3 movants do not allege that they have failed to receive any benefits that they were promised under the statutory formula, that the General Assembly has changed their future pension benefits, or that the General Assembly has changed their future insurance benefits.

Their principal claims of injury appear to be that KRS should have taken on more risk in order to generate higher investment returns and thus a higher possible upside sharing for them (with the benefit of hindsight), and that there is a chance that the General Assembly will change their future benefits at some point.

V. The Tier 3 movants purport to disclaim any individual recovery and proceed derivatively, but they seek individual recoveries for themselves and others.

The Tier 3 movants claim that they do not seek any "individual recovery of damages" or "any relief for the named Plaintiffs individually or collectively as a class." (Tier 3 Compl. ¶¶ 2, 331(c).) Yet they seek a judgment paying funds to their own accounts and the accounts of other Tier 3 members. (*Id.* at Prayer for Relief ¶ 4 (seeking a judgment "[d]irecting or requiring, under the Court's equitable powers, that appropriate credits be made to account for and make up for the diminished upside sharing suffered by Plan participants receiving Tier 3 benefits and for lost earnings thereon—or adjusting benefits to be paid to Tier 3 participants who have already retired or otherwise left service—as this Court shall direct").) The Tier 3 movants contend that "retroactive credits to their individual accounts" based on a "recovery for KRS as a whole" are necessary "as a practical matter" to make them "whole." (Mot. to Intervene, at 11 n. 12.)

ARGUMENT

I. The Court lacks subject matter jurisdiction because Tier 3 members lack constitutional standing.

As a threshold matter, this Court lacks jurisdiction over the proposed complaint because the Tier 3 members lack constitutional standing. To establish constitutional standing, "a plaintiff must demonstrate (1) an injury in fact that is concrete, particularized, and actual or imminent, (2) that the injury was caused by the defendant, and (3) that the injury is redressable by a ruling favorable to the plaintiff." *Overstreet v. Mayberry*, 603 S.W.3d 244, 249 (Ky. 2020). "For an injury to be 'particularized,' it must affect the plaintiff in a personal and individual way. . . . For

an injury to be concrete, it must 'actually exist.' And while an injury may be threatened or imminent, the concept of imminence 'cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for constitutional standing purposes—that the injury is *certainly impending*.'" *Id.* at 253. "Allegations of *possible* future injury are not sufficient." *Id.* (all emphases in original). The party seeking relief bears the burden of establishing each of these elements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).[8]

"Standing is not dispensed in gross." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (quoting *Davis v. FEC*, 554 U.S. 724, 734 (2008) and *Lewis v. Casey*, 518 U.S. 343 (1996)). "To the contrary, a plaintiff must demonstrate standing *for each claim he seeks to press* and for *each form of relief that is sought*." *Id.* (emphasis added); *DaimlerChrysler Corp v. Cuno*, 547 U.S. 332 (2006). Because the Tier 3 movants contend that they seek relief different from that sought by the OAG, they must have standing to support each of their claims and each form of relief sought. *Town of Chester*, 137 S. Ct. at 1651.

Like the *Mayberry* plaintiffs before them, the Tier 3 movants cannot meet this requirement for each of their claims. As in *Mayberry*, they purport to disclaim any "individual recovery of damages" or "any relief for the named Plaintiffs individually or collectively as a class." (Tier 3 Compl. ¶ 2, 331(c).) Also like the *Mayberry* Tier 1 and 2 plaintiffs, the Commonwealth did not promise them a stake in the value of the KRS funds. Rather, by statute,

[8] Dozens of courts have rejected the Tier 3 movants' repeated assertion that standing is a mere "legal technicality." *See, e.g., Moonin v. Nevada*, 2014 U.S. Dist. LEXIS 6314, at *13 (Jan. 15, 2014) (plaintiffs' claim that they should avoid dismissal on the "mere technicality" of constitutional standing was "woefully misguided"); *Campaign v. Miss. Dep't of Human Servs.*, 175 F. Supp. 3d 691, 698 (S.D. Miss. 2016) ("While Plaintiffs attempt to marginalize this argument as a mere technicality, standing is a threshold matter to the justiciability of claims in federal court under Article III of the Constitution."); *Smith v. United States*, 58 Fed. Cl. 374, 376 (2003) ("Far more than a 'mere technicality,' the doctrine of standing goes to the heart of the constitutional separation of powers because it defines the contours of the judicial power."); *Greater St. Louis Health Sys. Agency v. Teasdale*, 506 F. Supp. 23 (E.D. Mo. Mar. 11, 1980) ("The standing requirement is not an empty technicality.").

Tier 3 members are entitled to pension benefits defined by a set formula guaranteeing 4% interest every year and a promise that their account value can never be reduced. And indeed, the movants do not contend that they have lost anything. To the contrary, they have enjoyed positive interest credits—including a base rate and upside sharing—for each year in which they participated in the plans.[9] (*Id.* ¶ 95.) Not one of the Tier 3 movants contends that she has been paid a dime less than what was promised under the formula. The movants' contention that KRS should have taken on more risk (with hindsight) in order to increase the potential that they would receive more upside sharing credits cannot support a claim because, even if that were a cognizable claim or injury, it could not be redressed by a judgment to KRS.

A. The Tier 3 movants are not members of a defined contribution plan.

The Tier 3 movants' standing arguments hinge entirely on a false analogy to ERISA defined contribution plans. The KRS Tier 3 plan is not that. Members have "individual accounts," and a component of their accounts has the *possibility* to increase based in part on the overall investment performance of the KRS plans, but the analogy ends there. (Tier 3 Compl. ¶ 83.) Unlike in a traditional defined contribution plan, "the assets of the plan"—including member contributions, employer contributions, and past investment returns—"remain in a single investment pool like a traditional defined benefit plan." (*Id.*) The KRS Board, in making investment decisions, must therefore do so with its obligations to both the traditional defined benefit participants and Tier 3 participants in mind. This investment pool is not merely the sum of the value in Tier 3 members' accounts. (*Id.* (employer and employee contributions for Tier 3 members are held and invested with the rest of the system).)

[9] First-year Tier 3 members do not receive interest credits because the prior year's accrued balance from which interest would be calculated is $0.

Critically, unlike in a defined contribution plan, Tier 3 members cannot lose their contributions or accrued benefits—including their own contributions, interest on their own contributions, and (if vested) employer contributions and interest on those contributions. The formula contains no downside. Regardless of whether the value of KRS's assets rise or fall, the legislature has decided that Tier 3 members' "accrued benefits" *must grow* each year. And if the law changes, any accrued benefits still cannot be lost. *See* KRS 61.692(a) ("[T]he amount of benefits the member has accrued at the time" of any change in law "shall not be affected" by that change.). When a member retires, her benefits are calculated based on this formula over her years of service—not the value of the KRS plans at the time of her retirement.

That a portion of the formula—the "upside sharing interest"—is variable does not alter the nature of what Tier 3 members are entitled to receive at retirement: promised benefits defined by a statutory formula, with the possibility of an upside. Unlike in a defined contribution plan, Tier 3 members' benefits are only loosely tied to investment returns in the sense that they can increase based on the *percentage* return—not the *value* or *amount* of the investment return—of the entire Plan for a five-year period. Whether the KRS Plans earn 10% interest on $1 million (to make $100,000 in returns) or $1 billion (to make $1,000,000 in returns), the value of Tier 3 members' benefits will be the same—they will receive an upside sharing benefit based on the 10% return. If the plan loses 30% in a year or 0%, they suffer no loss; their benefits are still defined by the statutory formula and guaranteed to increase absent a change in law.

Thus, members' accrued benefits do not rise and fall with the value of the plans. They do not change based on influxes of cash to the plan (like, say, from a litigation judgment or a larger-than-expected contribution from the Commonwealth), or if the legislature chooses again to use the KRS funds as a "'piggybank' to fund other political priorities," (Mot. to Intervene at 46), or

by expenditures (such as payments to consultants). Like the Tier 1 and 2 members whose contributions are also placed in this pool, Tier 3 members have no property interest in the general pool because *their benefits are not at all tied to its value*.

Thus, Tier 3 members' benefits are not tied to the plans' value in any sense. The investment returns are no more than a statutory metric (%) to determine the amount of interest earned for a given year. (Tier 3 Compl. ¶ 83.) The possible upside sharing interest benefit does not convert the plans to ERISA defined contribution plans.

B. The alleged depletion of "upside sharing" benefits is insufficient to satisfy the injury or redressability requirements.

The Tier 3 contention that they can establish constitutional standing on their hedge fund of fund investment-related claims fails on both the redressability and injury elements. To establish constitutional standing, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The Tier 3 movants cannot satisfy this element because their retirement benefits will not change based on the outcome of this putative derivative lawsuit.

As they must to maintain this action derivatively, the movants purport to disclaim any "individual recovery of damages" and "any relief for the named Plaintiffs individually or collectively as a class." (Tier 3 Compl. ¶¶ 2, 331(c).) As described above, the Tier 3 members' benefits, including the possible upside sharing, are defined by a statutory formula that *does not change* based on non-investment related inflows of cash. Regardless of whether or how much KRS collects from any defendant in this case, the Tier 3 members will receive the same annual credits to their accounts: "a minimum 4% annual return, plus an annual 'upside' of 75% of KRS's investment returns over 4% computed on a 5 year basis." (Mot. to Intervene at 13.) That should be the end of the matter—because the Tier 3 movants' requested relief (a monetary

judgment deposited into KRS) would not redress their purported injuries, they lack standing under *Lujan*, *Sexton*, and *Overstreet*.

Perhaps recognizing this fatal flaw, the Tier 3 movants make a request that Kentucky's pension law and the law of derivative standing do not allow: they request a judgment "[d]irecting or requiring, under the Court's equitable powers, that appropriate credits be made to account for and make up for the diminished upside sharing suffered by Plan participants receiving Tier 3 benefits and for lost earnings thereon – or adjusting benefits to be paid to Tier 3 participants who have already retired or otherwise left service – as this Court shall direct." (Tier 3 Compl., Prayer for Relief ¶ 4.) In other words, the Tier 3 movants seek a judgment *compelling KRS to pay them* and other similarly situated individuals.

The Court cannot grant this relief in a lawsuit purportedly brought *on behalf of* KRS. The Kentucky legislature defined the method by which Tier 3 participants accumulate benefits, and it is not by sharing in (or taking from) the general, commingled pools of KRS assets. (*Id.* ¶ 83 (displaying "KRS's publications" and statutory formula).) It did not provide a mechanism for members in a certain tier to reach into those KRS funds for additional benefits for themselves. There is no authority for this Court to perform a legislative act by re-writing the statutory formula; nor may the Court reallocate damages received by KRS, and compel KRS to pay those sums to Tier 3 members.

The request only highlights the standing problem that the Tier 3 movants cannot overcome. These are not ERISA defined contribution plans that are the sum of individual accounts where a plan fiduciary allocates any recoveries for its component plans. Indeed, KRS does not "allocate" its gains and losses to any of its members—it utilizes the KRS assets as a tool to pay pension and health insurance obligations to members in Tiers 1, 2, and 3. If the Tier 3

movants could obtain a recovery on behalf of KRS, this request would require the Court to *take that money from KRS and give it to them*, individually. There is no authority to support the movants' claim for an individual recovery in a derivative action on behalf of KRS.

C. The risk of a future legislative action to reduce future insurance or pension benefits is too speculative to confer standing.

The claimed risk that the Commonwealth will, in the future, prospectively reduce their pension or insurance benefits is too speculative to establish a "certainly impending," non-speculative injury. *Overstreet*, 603 S.W.3d at 255. The movants do not and cannot identify any pending effective date on legislation that might reduce their future pension or insurance benefits. Without that, this allegation is but pure speculation and not a "certainly impending" injury.

The Tier 3 members' contentions that the Plans could become insolvent and that the Commonwealth would decline to pay the benefits they had been promised are also entirely speculative and do not survive *Overstreet.* This claim requires the Court to accept both that (1) depletion of the KRS plans' assets are "certainly impending," and (2) the Commonwealth would otherwise decline to pay the accrued benefits of its Tier 3 members. *Id.* at 256 ("[A]n injury in fact will not result unless it can be shown, at least, that plan termination is imminent, *and the employer* will not be able to cover the shortfall in the event of plan default."). As in *Overstreet*, there simply is no credible allegation of impending plan termination or that the Commonwealth would either be unwilling or unable cover a shortfall. *Id.* at 255.

D. The Tier 3 members cannot establish standing based on a claimed risk of loss of their own contributions.

The Tier 3 movants' recycled assertion that they can establish an injury-in-fact because they bring their claims to "help protect . . . the safety of their past, continuing, and future personal contributions into the endangered funds" is baseless. (Mot. to Intervene, at 14 (citing Compl. ¶¶ 15, 18).) As an initial matter, the Supreme Court already held that KRS members'

individual contributions do not create a property interest sufficient to create standing because—though their contributions are ultimately commingled with employer contributions and invested—nothing "giv[es] them an interest in the general pool of KRS assets," and "KRS beneficiaries' rights are, in essence, 'only the receipt of promised funds.'"[10] *Overstreet*, 603 S.W.3d at 262 (quoting *Jones v. Bd. of Trustees of Ky. Ret. Sys.*, 910 S.W.2d 710, 713 (1995)).

The assertions that Tier 3 personal contributions are at risk or "have been lost" are also wrong. The KRS publication and statute cited by the Tier 3 movants to describe the inviolable contract exceptions state that the General Assembly may only make *prospective* changes to benefits: "For members who begin participating in [KERS] on or after January 1, 2014, the General Assembly reserves the right to amend, suspend, or reduce the benefits and rights provided under KRS 61.510 to 61.705 if, in its judgment, the welfare of the Commonwealth so demands, *except that the amount of benefits the member has accrued at the time of amendment, suspension, or reduction shall not be affected.*" (Tier 3 Compl. ¶ 84 (slide citing KRS 61.692(2)(a) (emphasis added).) In other words, the amount of benefits to which Tier 3 members will be entitled *will never be less* than what they put in. Unlike in a defined contribution plan, they have *zero* risk of losing their contributions. In the event that the General Assembly prospectively reduces benefits, the "accrued benefits would remain protected." (*Id.* ¶ 83, slides at p. 42 & 43.) Even if the value of the KRS funds were to fall below the amount of Tier 3 members' cumulative contributions, the General Assembly has decided that they will continue to receive benefits that reflect those contributions. Tier 3 members will have lost nothing.

[10] The Tier 3 movants cite to a portion of this Court's November 30, 2018 order for the proposition that "this Court (and the Supreme Court) recognized that KRS beneficiaries and therefore Tier 3 Plaintiffs have a property interest in the contributions that they have made to KRS over the years." (Mot. to Intervene, at 28–29 & n.16.) They neglect to mention that the Supreme Court explicitly disagreed with that portion of the Court's opinion finding that their interest in contributions was sufficient to establish standing.

II. Tier 3 members cannot intervene as a matter of right.

Even if Tier 3 members could establish the requisite constitutional standing, they cannot meet the requirements to intervene as a matter of right under CR 24.01. That rule provides for intervention when, on timely application, a movant establishes that a statute provides an "unconditional right to intervene," or "when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless that interest is adequately represented by existing parties." The Court should deny intervention as of right because the Tier 3 movants have no statutory right to intervene, and the Attorney General adequately represents their interest.[11]

A. Tier 3 members do not have a statutory right to intervene.

Movants' assertion that they have a *statutory right to intervene* under CR 24.01(1)(a) simply because they claim to have a *statutory cause of action* under KRS 61.645(15) is inconsistent with the language of the rule. CR 24.01(1)(a) provides for intervention "when a statute confers an unconditional right to intervene." It does not provide for intervention every time an applicant claims a cause of action arising under a statute. The statute on which the movants rely to establish a claimed unconditional right to intervene, KRS 61.645(15), does not even mention intervention,[12] and it therefore does not satisfy CR 24.01(1)(a).

The Tier 3 movants' reading of CR 24.01(1)(a) would render meaningless every Kentucky statute that actually provides for an unconditional right to intervene. *See e.g.*, KRS

[11] The Tier 3 movants also do not have a "property interest" in the KRS funds. The Supreme Court rejected that argument for Tier 1 and 2 members, *Overstreet*, 603 S.W.3d at 261–63, and the same logic applies to the movants.

[12] As the RVK Parties and others argued in the *Mayberry* motions to dismiss, KRS 61.645 does not provide members with a statutory right of action against third parties that have done business with KRS. The Kentucky Supreme Court declined to express an opinion on the issue. *Overstreet*, 603 S.W.3d at 260 n.71.

350.250 ("In such an action under this section [relating to surface mining], the cabinet, if not a party, may intervene as of right."); KRS 15.240 ("Notwithstanding any other provision of law to the contrary the Attorney General shall have the authority to initiate actions or intervene in actions brought pursuant to the provisions of KRS Chapters 146, 151, 217B, 224 and 350."). The Court should deny the intervention motion under CR 24.01(1)(a).

B. The Attorney General adequately represents the interests of the Tier 3 members.

This Court has *already determined* that that Attorney General "adequately represent[s]" the interests sought to be protected by the Tier 3 members and the original Mayberry plaintiffs before them—"ensuring that KRS assets . . . are managed in a prudent fashion." (*See* 12/28/20 Order, at 12–13.) As a result, because their interests are already "adequately represented by existing parties," the Tier 3 movants cannot satisfy CR 24.01(1)(b)'s requirements.

1. Because the OAG's claims "mirror" the Tier 3 claims, the OAG's representation is presumed adequate.

Because the Tier 3 movants and the OAG claim to "have the same ultimate objective"—recovering damages sustained by KRS due to alleged breaches of fiduciary duties and mismanagement of KRS funds, (*compare* AG Compl. ¶¶ 249–78, with Tier 3 Compl. ¶¶ 350–80)—there is a "presumption of adequate representation." *Penman v. Correct Care Sols.*, 2020 U.S. Dist. LEXIS 200185, at *17 (W.D. Ky. Oct. 27, 2020); *see also Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987) (noting a "presumption of adequacy of representation" when "the proposed intervenor and a party to the suit . . . have the same ultimate objective.").

As the Tier 3 movants themselves have explained, the OAG's claims are a mirror image of those they attempt to assert. The OAG's claims "arise out of the same set of facts and involve overlapping legal theories as the claims asserted by the Mayberry Plaintiffs." (7/31/20 Pls.' Resp. to OAG Mot. to Intervene, at 3.) And the Tier 3 movants state that their claims are "100%

overlapping" with the original Plaintiffs' claims. (Mot. to Intervene, at 30.) The OAG's claims are likewise "100% overlapping" with the Tier 3 movants' claims, and the OAG's representation is presumed to be inadequate.

2. The Attorney General's representation is presumed adequate due to his broad authority to investigate and assert claims on behalf of the Commonwealth and its agencies.

Beyond the presumption of adequacy that comes from the overlapping claims, the OAG's representation is additionally presumed adequate because the Attorney General is the Commonwealth's chief law officer. "It is the Attorney General's responsibility"—not that of private citizens—"to file suit to vindicate public rights, as attorney for the people of the State of Kentucky." (12/28/20 Order, at 12 (quoting *Commonwealth ex rel. Conway v. Thompson*, 300 S.W.3d 152, 173 (Ky. 2009).) "It is unquestioned that '[a]t common law, [the Attorney General] had the power to institute, conduct[,] and maintain suits and proceedings for the enforcement of the laws of the state, the preservation of order, and the protection of public rights." *Overstreet*, 603 S.W.3d at 265 (quoting *Conway*, 300 S.W.3d at 173). This includes the power and authority to seek a recovery that would ultimately inure to KRS, as the Attorney General has specifically stated he is pursuing. (*See* AG Compl. at ¶¶ 134–35 (asking the Court to use its "equity power to fashion such relief as is justified and *necessary to benefit KRS and/or restore to KRS that to which it is entitled*") (emphasis added).)

Courts widely recognize that when, as here, a government seeks to represent the same interests as private parties, the government's representation is presumed adequate for purposes of intervention. *See, e.g.*, *Stuart v. Huff*, 706 F.3d 345, 351 (4th Cir. 2013) (noting that "every circuit to rule on the matter" has agreed with the principle that "a more exacting showing of inadequacy should be required where the proposed intervenor shares the same objective as a government party"); *Helgeland v. Wis. Municipalities*, 745 N.W.2d 1, 23 (Wis. 2008) (quoting

Edwards v. City of Houston, 78 F.3d 983, 1005 (5th Cir. 1996) ("[W]hen the putative representative is a governmental body or officer charged by law with representing the interests of the absentee, a presumption of adequate representation arises whether the would-be intervenor is a citizen or subdivision of the governmental entity.")); *Prete v. Bradbury*, 438 F.3d 949, 956 (9th Cir. 2006) ("[T]here is also an assumption of adequacy when the government is acting on behalf of a constituency that 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."); *Wade v. Goldschmidt*, 673 F.2d 182, 186 n.7 (7th Cir. 1982) ("[A]pplicants have not overcome the presumption of adequacy of representation that arises when the proposed intervenor and a party to the suit (especially if it is the state) have the same ultimate objective.").

Such a rule makes good sense, as "it is among the most elementary functions of a government to serve in a representative capacity on behalf of its people." *Stuart*, 706 F.3d at 351. Further, "to permit private persons and entities to intervene in the government's defense of a statute upon only a nominal showing would greatly complicate the government's job." *Id.* In other words, "the business of the government could hardly be conducted if, in matters of litigation, individual citizens could usually or always intervene and assert individual points of view." 6 Moore's Federal Practice § 24.03[4][a][iv][A] (3d ed. 2011).

In short, the Tier 3 members already have an adequate representation in this lawsuit—the Attorney General of the Commonwealth of Kentucky. It is inherently within his job duties to vindicate the types of interests the Tier 3 members purport to assert, and his complaint demonstrates that he does in fact intend to do so. The Tier 3 members should not be permitted to interfere in the OAG's assertion of claims on behalf of the public interest.

3. Litigation strategy differences do not undermine the OAG's representation of citizens of the Commonwealth.

The Tier 3 movants' attempt to disparage the OAG by suggesting that the OAG lacks the "expertise" or motivation of their own counsel cannot suffice to overcome the OAG's presumption of adequacy. It is well established that "[a] mere disagreement over litigation strategy. . . does not, in and of itself, establish inadequacy of representation." *Ark Encounter, LLC v. Stewart*, 311 F.R.D. 414, 425 (E.D. Ky. 2015) (quoting *Bradley*, 828 F.2d at 1192 (6th Cir. 1987) (denying motion to intervene filed by four taxpayers when the Commonwealth already represented their interests)). Likewise, the Kentucky Supreme Court in *Overstreet* made clear that the Attorney General is "entrusted with *broad discretion* in the performance of his duties, which includes *evaluating the evidence and other facts to determine whether a particular claim should be brought*." 603 S.W.3d at 265 (emphasis added). Therefore, to the extent that the Tier 3 movants disagree with particular litigation decisions by the OAG, that disagreement cannot form the basis for a finding of inadequate representation under CR 24.01.

4. The Tier 3 members are subject to the same merits defenses as the Attorney General.

The Tier 3 movants are incorrect that the Attorney General's identical "direct" claims will face defenses that the Tier 3 movants can sidestep because their claims are couched as "derivative." (Tier 3 Mem., at 40.) The Tier 3 movants must still prove causation for their claims, and they must still deal with the significant and obvious problem that the Commonwealth's repeated "refus[al] to adequately fund KRS, using it as a 'piggybank' to fund other political priorities," (*Id.* at 45), caused the current state of affairs at KRS. They are no different from the OAG in this regard.

Nor can the Tier 3 movants avoid that the knowledge and acts of KRS officers and directors since 2010 undercut their claims. An organization is not a sentient being. It is

"imputed" to know what its agents know. *Devasier v. James*, 278 S.W.3d 625, 631 (Ky. 2009). The Tier 3 movants' argument that, unlike the Attorney General, they are entitled to erase the knowledge and acts of KRS under what they claim Kentucky calls the "non-imputation doctrine," (Tier 3 Mem., at 49 (citing *Wilson v. Paine*, 288 S.W.3d 284 (Ky. 2009)), falls flat. There is no such doctrine in Kentucky. Instead, *Wilson* applied the narrow "adverse interest" exception to the imputation doctrine in the context of whether the statute of limitations should be tolled against corporate directors. And this exception applies only if an agent *intentionally* committed a *fraud* for their *own personal financial benefit. Wilson*, 288 S.W. 3d at 290.

That exception does not apply here. The Tier 3 movants' complaint names zero KRS trustees or officers as defendants, asserting instead that third parties aided and abetted the nonparty trustee and officers' breaches. None of the fiduciary duty allegations suggest the non-party trustees and officers *intentionally* committed a *fraud* for their *own personal financial benefit*. The Tier 3 claim that hedge funds of funds were unsuitable investments does not allege that the trustees and officers intentionally invested in order to harm KRS, nor does it allege that the trustees and officers pocketed any pecuniary benefit. None of the trustees or officers are alleged to have received any benefits or kick-backs from the investment, nor is it alleged that they had any personal stake in the investment. The adverse interest exception therefore does not apply. *See Kirschner v. KPMG LLP*,| 938 N.E.2d 941, 961 (N.Y. App. 2010) (exception does not apply unless there is "outright theft or looting or embezzlement").

The patently false Tier 3 claim that the trustees and officers hid the true financial condition of KRS (despite the indisputable public disclosure of the 2010 RVK report and public testimony before the General Assembly) so that they could try to earn enough money to fill the "hole" created by their earlier investment decisions (investing heavily in domestic and

international stocks before RVK's tenure) fails for the same reasons. The Tier 3 movants do not allege that the trustees and officers wanted the investments they chose to fail, nor do they allege that they received a pecuniary benefit in exchange for making these investments.

5. The Tier 3 efforts to sidestep Kentucky government accountability laws on procurement and the handling of government funds are insufficient to support intervention.

The Tier 3 members' critiques of public accountability laws put in place by the Kentucky General Assembly are also sufficient to support intervention. Nor can the Tier 3 movants' misguided attacks on the OAG's ability to secure a recovery for KRS (should any recovery be awarded) support their intervention motion.

As an initial matter, the Tier 3 movants' argument that they alone can secure recovery for KRS is wrong: the OAG here requests the Court to use its "equity power to fashion such relief as is justified and necessary to benefit KRS and/or restore to KRS that to which it is entitled." (*See* AG Compl. at ¶¶ 134–35.) Moreover, even if that were not the case, Kentucky's stated policy preferences—enshrined in statute—for how monies recovered by the OAG are handled cannot render the OAG's representation "inadequate."

The subsection of the statute on which the Tier 3 movants rely for this proposition does not apply. KRS 48.005(3) applies only when an action "result[s] in the recovery of funds or assets *to be held in trust by the Attorney General* [or other enumerated parties] . . . *for charitable, eleemosynary, benevolent, educational, or similar public purposes* . . . ." KRS 48.005(3) (emphasis added). The OAG does not seek a recovery that would be put in a trust for "charitable, eleemosynary, benevolent, educational, or similar public purposes," so this subsection does not apply here.

Even if the Tier 3 movants' properly read KRS 48.005, the statute would only further support their exclusion from this case. KRS 48.005 is a public accountability statute designed to

ensure that "the actions of individuals or agencies who are charged with the administration of funds or other assets are conducted in full view, and are open to public scrutiny" and that "settlements are handled in a manner that assures maximum accountability to the citizens of the Commonwealth and their duly elected legislative representatives." KRS 48.005(1)(c)–(d). Even if the General Assembly had decided that all recoveries from lawsuits involving the OAG should be deposited in the general fund, that would be the General Assembly's prerogative. The General Assembly, and not private litigants, gets to determine the allocation of public funds.

The OAG's obligations to comply with the Model Procurement Code—and the movants' belief that they can avoid it—also do not support intervention. As the Supreme Court in *Overstreet* stressed, "importantly, when the Attorney General turns to outside counsel to assert claims belonging to the Commonwealth, their relationship is governed by strict statutory procurement and oversight requirements." 603 S.W.3d at 265–66. The Tier 3 movants' suggestion that it would somehow be in KRS's best interest for private counsel to take the governmental reins without any oversight whatsoever and seek a yet-undisclosed contingency fee flies in the face of the letter and spirit of Kentucky's government accountability laws.

In the end, under the Tier 3 movants' arguments, the OAG would *never* be able to adequately represent the interests of a specific agency or another arm of the Commonwealth. That is not the law in Kentucky. The OAG's public accountability statutory obligations are not nettlesome obstacles to be avoided and do not render its representation of a state agency "inadequate" under CR 24.01.

III. Permissive intervention is inappropriate where the complaint is fatally flawed.

The Court should also deny permissive intervention. CR 24.02 permits intervention on timely application "(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. . . .

In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." CR 24.02. Movants' argument that KRS 61.645(15) creates a "conditional right to intervene" is wrong for the same reasons explained above that it does not create a right to intervene at all.[13] That the claims are "100% overlapping" is not a reason to permit a party to enter the case and assert identical claims. (*See* above, Part II.B.2; Mot. to Intervene, at 30.) And finally, as explained below, the Court should not exercise its discretion to permit intervention when the claims are facially invalid.

A. The Tier 3 members failed to make a demand on the Board or demonstrate that such a demand should be excused.

Even if the General Assembly amended KRS Chapter 61 to permit KRS members to derivatively sue third parties on KRS's behalf, the movants still could not bring their claims because all statutorily-permitted derivative suits require a refused pre-suit demand or particularized pleading of futility. *See, e.g.*, KRS 271B.7-400(2) (shareholder derivative complaint must "allege with particularity the demand made, if any, to obtain action by the board of directors and either that the demand was refused or ignored or why he did not make the demand"). The Tier 3 Complaint does not comply with this requirement, and indeed acknowledges that "Plaintiffs have not made a demand on the current KRS Trustees to bring suit asserting the claims set forth herein." (Tier 3 Compl. ¶ 104.)

Nor does the complaint plead futility with particularity. To plead futility, a complaint must allege "particularized factual allegations" raising a "reasonable doubt" whether "as of the time the complaint is filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand." *Rales v. Blasband*, 634 A.2d

[13] Plus, the alleged "condition"—constitutional standing—is required in every case.

927, 934 (Del. 1993)[14]; *see Bacigalupo v. Kohlhepp*, 240 S.W.3d 155, 157 (Ky. App. 2007) (Kentucky courts "ha[ve] previously adopted Delaware case law when examining corporate statutes such as KRS 271B.400").

The Tier 3 complaint alleges no "particularized factual allegations" that, if true, would establish that as of the time that their complaint may be filed (no earlier than March 2021), KRS could not make an independent business judgment as to whether or not to prosecute or dismiss the claims in the Tier 3 complaint. Aside from conclusory allegations of breach of duty involving only a tiny minority of three non-party trustees[15] of the fifteen members on the KRS board, the Tier 3 complaint alleges nothing to indicate that a majority of the board—or for that matter, any smaller committee of independent directors authorized by the board—could not properly exercise independent and disinterested judgment in responding to the Tier 3 demand.

1. The Tier 3 allegations concerning the Board's inability or unwillingness to sue third parties are insufficient.

The Tier 3 movants allege that—*as of 3 years ago*—the KRS board was unable or unwilling to bring suit for breach of fiduciary duties because they would not sue themselves or were otherwise unable to do so. (Tier 3 Compl., ¶¶ 103–06.) The Tier 3 movants fail to make any allegation that "as of the time [the intervening Tier 3] complaint is filed" the KRS Board lacks the capacity or will to investigate or, if prudent, prosecute their new Tier 3 claims. The

[14] The *Rales* test applies when "a stockholder brings a derivative suit alleging that a third party breached a contract with the corporation." 634 A.2d at 934, n.9. As Plaintiffs' suit alleges that a third party breached its duties to KRS, the *Rales* test—rather than the test in *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984)—should apply.

[15] The putative complaint alleges that David Harris, David Rich and J. T. Fulkerson breached their duties in 2016 by allowing William Cook to become a member of the Investment Committee, permitting Prisma to provide onsite assistance to KRS and agreeing to invest an additional $300 million in the Daniel Boone Fund. (Tier 3 Compl. ¶ 105.) The Tier 3 Complaint also claims that Fulkerson breached his duties in 2016 by approving $285 million in additional hedge fund investments recommended by Prisma. (*Id.* ¶¶ 114, 132.) No other breaches of duty are alleged against any current KRS trustee.

only allegation they make is that litigation concerning the composition of the board is pending (*id*. ¶ 106), which, of course, does not disable the board from taking any action.

These allegations fail to excuse demand as a matter of law. *See Aronson v. Lewis*, 473 A.2d 805, 818 (Del. 1984) ("[T]he incantation that demand is excused because the directors otherwise would have to sue themselves . . . has been made to and dismissed by other courts."); *see also In re Keithley Instruments, Inc.*, 599 F. Supp. 2d 875, 893 n.13 (N.D. Ohio 2008) ("[A] failure of the board to sue will always be present in the demand futility context, and it cannot, by itself, indicate interestedness."). Likewise, the movants' claim that KRS has "neglected to bring these facially meritorious claims" also does not suffice to show futility. (Tier 3 Compl. ¶ 104.) *See Richardson v. Graves*, 1983 Del. Ch. LEXIS 466, at *9 (Ch. June 17, 1983) ("The mere fact that [the board] ha[s] not elected to sue before the derivative action was filed should not of itself indicate 'interestedness.' As a matter of fact, it is the Board's inaction in most every case which is the *raison d'etre* for [derivative lawsuits]."). "[I]naction by the Board will not excuse the failure to make a demand because it would deprive the Board of the opportunity to be 'prodded' into action, which is a fundamental goal of the demand requirement." *In re Ferro Corp. Derivative Litig*., 2006 U.S. Dist. LEXIS 11608, at *18 (N.D. Ohio Mar. 21, 2006).

2. The Court must take judicial notice of the independence and ability of KRS to consider and take action regarding the Tier 3 claims.

KRS is a party to this action and has notified this Court that it is capable of independently investigating and prosecuting claims if it deems such claims are valid. (*See* Joint Notice (April 17, 2018).[16]) While KRS advised the Court that it *preferred* to permit certain others to prosecute

[16] "Kentucky Retirement Systems ('KRS') has established an independent special litigation committee of the Board of Trustees to investigate and consider the claims asserted in Named Plaintiffs' Amended Complaint, and determine what role KRS should take in this litigation, including whether KRS should directly assert the claims advanced in the Amended Complaint." (Joint Notice, at 1.)

claims *in 2018*, it purported to reserve the right to consider asserting claims in the event it was determined that the individual Mayberry plaintiffs lacked standing.[17] (*Id*. at 2.) This action by KRS was undertaken by a subset of the Board of Trustees described by KRS and *Mayberry* counsel as an "independent" litigation committee. (*Id*.) KRS has now advised the Court that after *Overstreet*, it commissioned outside counsel to investigate potential legal claims for a fee up to $1.2 million, with a report and recommendations due in late March 2021. (2/11/2021 Hrg., Mot. for Ext.) By its own words and actions, the KRS board has demonstrated that it is independent, capable, and willing to consider and investigate these claims, which refutes the argument that demand upon KRS should be excused on grounds of futility.

B. The Tier 3 complaint demands relief that is not derivative in nature.

The Tier 3 complaint declines to assert any claim for individual relief and asserts that the relief they seek is solely derivative on behalf of KRS:

> c. This action is not a class action. ***It does seek any relief for the named Plaintiffs individually*** or collectively as a class. The action is an entirely derivative one for KRS and/or its Funds.
>
> d. The injuries pleaded by Plaintiffs are not damages for which recovery is sought for them or could be sought for them in this action brought derivatively for KRS. The injuries are pleaded to establish standing only.

(Tier 3 Compl. ¶ 331.) Despite these allegations, the Tier 3 complaint asks this Court to enter a judgment which would compel relief to certain individual members instead of KRS. These claims do not seek to recover a judgment *for the benefit* of KRS.

Derivative claims are asserted solely on behalf of the entity and the recovery must go to the entity rather than particular shareholders or members. *Security Trust Co. v. Dabney*, 372

[17] "KRS has considered the possibility that Named Plaintiffs' action could be dismissed on standing grounds. Although KRS disagrees with that possibility, KRS reserves all rights which might then be available to it, including to step into the shoes of the Named Plaintiffs and directly pursue such claims should the Named Plaintiffs' claims be dismissed on standing grounds and should KRS then determine that it is in its best interests to do so."

S.W.2d 401, 403 (Ky. 1963) (recovery "belongs to the corporation"); *Liberty Nat'l Bank & Trust Co. v. Foster*, 737 S.W.2d 704, 708 ("the cause of action is one belonging to the corporation"). A lawsuit is not *derivative* where particular individual members of the entity would receive the benefit of the recovery rather than the entity at large. *2815 Grand Realty Corp. v. Goose Creek Energy, Inc*., 656 F. Supp. 2d 707, 716 (E.D. Ky. 2009).

That is the case here. The Tier 3 movants demand a judgment for "monetary relief"

> "[d]irecting or requiring . . . that appropriate ***credits be made*** to account for and make up for the diminished upside sharing suffered by Plan participants receiving ***Tier 3 benefits*** and for lost earnings thereon – or adjusting benefits to be paid to ***Tier 3 participants*** who have already retired or otherwise left service . . . ."

(Tier 3 Compl., Prayer for Relief, ¶ 4) (emphasis supplied). In other words, even if the Tier 3 movants had valid claims (which they do not) and managed to prevail, either KRS would be ordered to pay individuals with Tier 3 accounts (not Tier 1 or Tier 2 members) an additional amount representing the additional upside interest (%) that they claim would have been credited to their accounts had KRS decided to make different investment risk/reward decisions that—using 20/20 hindsight—would have provided higher returns, or the defendants would be compelled to pay the amount directly to the Tier 3 members. The judgment would in effect be *against* KRS, taking money *from* KRS (that it would otherwise apply to benefit all Plans) and forcing KRS to credit the recovery to the individual Tier 3 accounts. Because the recovery would not *belong* to KRS, the Tier 3 claims are facially invalid and intervention is futile.

C. The Tier 3 claims seek to assert in a derivative action claims relating to transactions that occurred prior to their employment.

The derivative claims also fail because the Tier 3 movants do not claim to have been KRS members at the time of the complained-of transactions and conduct. *See* KRS 271B.7-400(1) ("A person shall not commence a proceeding in the right of a domestic or foreign corporation unless he was a shareholder of the corporation when the transaction complained of

occurred or unless he became a shareholder through transfer by operation of law from one who was a shareholder at that time."); *In re Bank of N.Y. Derivative Litig.*, 320 F.3d 291, 298–99 (2d Cir. 2003) ("[I]n order to assert standing under the contemporaneous ownership rule, a plaintiff must have owned stock in the corporation throughout the course of the activities that constitute the primary basis of the complaint."). The named movants allege that they became KRS members in 2015, 2016, and 2019, (Tier 3 Compl. ¶¶ 77–79), several years after the primary actions on which the claims against the RVK Parties are alleged to have occurred. The Court should not permit Tier 3 movants to assert claims based on public events that occurred before they became KRS members.

D. The Tier 3 claims are time-barred.

Intervention does not cure the untimely nature of these claims. *Floyd v. Gray*, 647 S.W.2d 936, 938 (Ky. 1983) (claims of intervening movant were time-barred based on the date of filing intervention motion); *Nat'l Trust v. FHA*, 2010 U.S. Dist. LEXIS 83080, at *2–3 (W.D. Ky. Aug. 13, 2010) (denying intervention because movants' claims would not relate back and would be time-barred); *Bray v. Husted*, 2013 U.S. Dist. LEXIS 206799 (E.D. Ky. Mar. 11, 2013) (same); *Cervetto v. Powell*, 2016 U.S. Dist. LEXIS 75051, at *3–4 (W.D. Ky. June 9, 2016).

All claims against the RVK Parties are subject to a one-year limitations period. KRS 413.245; *see Seiller Waterman, LLC v. RLB Props.*, 610 S.W.3d 188, 205 (Ky. 2020) ("By its plain, unambiguous language, KRS 413.245 applies to civil actions arising out of any act or omission in rendering or failing to render professional services."); KRS 413.140(1)(c) (civil conspiracy statute is one year). The Tier 3 complaint does not and cannot allege that the RVK Parties had any relationship with KRS within a year of the proposed intervening complaint.

Even if the five-year statute applied to the fiduciary duty or aiding and abetting claims under KRS 413.120(6), the claims are time-barred. Most of the Tier 3 claims against the RVK

Parties concern KRS's public decision to invest in hedge funds of funds "in 2010–2011." (Tier 3 Compl. ¶ 24.) Other Tier 3 claims concern public statements that the RVK Parties allegedly made before and after their "Bombshell report" between 2010–2015. (*Id.* ¶¶ 321–25.) All of these claims accrued more than five years before their complaint, and therefore are time-barred.

The Court's reasoning for denying the RVK Parties' motion to dismiss the *Mayberry* complaint on statute of limitations grounds—that Plaintiffs alleged that some defendants' "compensation has not yet been fully disclosed"—is not an allegation that the Tier 3 Plaintiffs have made about the RVK Parties. (11/30/2018 Order on Motions to Dismiss.)

E. The Tier 3 movants' personal interests are in conflict with prudent management of KRS.

It is the Tier 3 movants, and not the OAG, who are "hopelessly conflicted" with KRS. Due to the incentives inherent in the Tier 3 statutory formula, Tier 3 members who are protected from losses by guaranteed floors in their benefits formula have an interest in KRS "going for broke" and investing in the riskiest opportunities possible, so as to maximize the possibility that they will benefit from upside sharing while the rest of their benefits remain statutorily guaranteed. But KRS has starkly different interests—namely, the prudent management of the plan and its assets to ensure its ability to pay benefits in the long-term to all participants regardless of which tier and associated benefit formula applies to them. While the Attorney General can adequately balance all of KRS's competing interests, the Tier 3 members with their singular focus on maximizing upside sharing for one group of KRS members cannot.

As explained above, Tier 3 members' benefits are not tied to the value of KRS's assets, and they can never lose their contributions or accrued benefits—meaning that if KRS loses big on its investments, Tier 3 members lose nothing. On the other hand, due to the upside sharing, if KRS wins big on its investments, Tier 3 members gain in the form of upside sharing. Thus, the

incentive for Tier 3 members is clear: KRS should bet it all on the investments with the highest risk/reward ratio, as there is much to gain and nothing to lose for Tier 3 members. And, in fact, that is exactly what the Tier 3 members are alleging—that KRS should be taking on *more risk* to maximize upside sharing. (*See* Tier 3 Compl. ¶ 14.)

KRS, however, has more at stake than just maximizing upside sharing. It must maintain the health and stability of the entire plan in order to ensure that there are sufficient funds to pay all of the members' benefits, at all Tiers. This, of course, requires careful balancing of the competing goals of stability versus growth opportunity over decades. At times, investment in more conservative approaches is required to ensure the longevity and survival of the plan overall.

Unlike the Tier 3 members, the OAG can take into account all of the interests within KRS. The OAG can balance KRS's need to maintain the health of the overall plan with the goal of also increasing upside sharing for Tier 3 members when possible. The OAG therefore is much better situated to represent KRS's interests as a whole, and there is no need to interject the skewed perspective of private Tier 3 members.

IV. The motion to intervene is untimely.

Finally, this motion is untimely. Any party seeking to intervene must do so with a "timely" motion. CR 24.01 and 24.02. A party seeking to intervene after the case has been finally adjudicated—as here after *Overstreet*—has a "special burden" to justify the lack of timeliness. *Monticello Elec. Plant Bd. v. Bd. of Educ.*, 310 S.W.2d 272, 274 (Ky. 1958). That "special burden" is not met when, as here, the moving party was aware of the litigation but sought to intervene only after it concluded. *Arnold v. Commonwealth ex rel Attorney General*, 62 S.W.3d 366, 369 (Ky. 2001); *Pearman v. Schlaak*, 575 S.W.2d 462, 464–65 (Ky. 1978); *Murphy v. Lexington-Fayette Cty. Airport Bd.*, 472 S.W.2d 688, 690 (Ky. 1971); *Kelly v. Marino*, 358 S.W.2d 519, 521 (Ky. 1962); *Hazel Enters., LLC v. Cmty. Fin. Servs. Bank*, 382

S.W.3d 65, 68 (Ky. App. 2012). CR 24 does not allow a nonparty to "simply lie back and await the result of the action." *Murphy*, 472 S.W.2d at 690.

The Tier 3 motion does not even attempt to address this requirement, and the movants cannot satisfy it. It was no secret or surprise that the original plaintiffs risked being dismissed on standing grounds. Indeed, the Tier 3 members' counsel has boasted that they suspected *before the case was filed in 2017* that the original complaint would be attacked as "specious" due to lack of standing. (*See* 9/9/19 Mayberry Five's Motion for Appointment of Lead Plaintiff, Lead Counsel and Liaison Counsel, at 26.) Likewise, in the Joint Notice, KRS recognized the possibility that the original plaintiffs lacked standing. And the defendants of course all raised the issue in motions to dismiss in early 2018. In short, everyone knew standing would be an issue.

If Tier 3 movants truly believed that they were differently situated from Tier 1 and 2 members, they could have sought to join before *any* court ruled on standing and the case made its way into the appellate courts. Their professed surprise at the purported "change in the law" is no defense. The defendants raised standing as an issue even before *Sexton*, and *Sexton* was decided before this Court ruled on the motions to dismiss. Had they sought to join earlier, this Court, the appellate courts, and all of the other parties could have saved significant time and resources by addressing their standing infirmities at the same time. But they waited to see what might happen. And as a result, the parties to this case must litigate threshold issues again.

The Tier 3 delays continued even after *Overstreet*. Although the RVK Parties continue to disagree that the OAG timely intervened, at least its motion was filed within days of the *Overstreet* decision. In contrast, the Tier 3 members continued to waste the time and resources of the parties and this Court by filing a meritless "motion to amend" an already-dismissed complaint. And, after this Court denied their "motion to amend" and indicated that CR 24 is the

proper procedural route for non-parties seeking to be added to a litigation, they filed *another* "motion to amend," which required the attention and resources once again of the parties and Court. The Tier 3 members thus waited *over six months* after *Overstreet* was issued to finally file a CR 24 motion to intervene.

Under CR 24's timeliness inquiry, the question of prejudice focuses on the prejudice caused by the proposed intervenor's delay rather than by the intervention itself. *See Kirsch v. Dean*, 733 F. App'x 268, 278 (6th Cir. 2018) (citing *United States v. City of Detroit*, 712 F.3d 925, 933 (6th Cir. 2013)); *Mason v. Rockcastle Cnty. Fiscal Court*, 2015 Ky. App. Unpub. LEXIS 328, at *5 (Ky. App. May 15, 2015). Thousands of pages of briefing, numerous hearings, and countless attorneys' hours might have been avoided if the Tier 3 members had intervened earlier in the case, or been joined from the outset. Their calculated decision to "wait and see" how the courts would rule with respect to the original plaintiffs should not be rewarded.

CONCLUSION

The Court should deny the Tier 3 individuals' motion to intervene.

/s/ Jeffrey S. Moad
Philip W. Collier
Thad M. Barnes
Jeffrey S. Moad
STITES & HARBISON, PLLC
400 West Market Street, Suite 1800
Louisville, KY 40202-3352
Telephone: (502) 681-0415
Email: pcollier@stites.com
tbarnes@stites.com
jmoad@stites.com

Counsel for the RVK Parties

CERTIFICATE OF SERVICE

On March 2, 2021, I served the foregoing document by email to the service list below.

/s/ Jeffrey S. Moad
Counsel for the RVK Parties

Victor B. Maddox	victor.maddox@ky.gov
J. Christian Lewis	christian.lewis@ky.gov
Justin D. Clark	justind.clark@ky.gov
Steve Humphress	steve.humphress@ky.gov
Aaron J. Silletto	aaron.silletto@ky.gov

Counsel for the Commonwealth of Kentucky

Michelle Ciccarelli Lerach	mlerach@bottinilaw.com
James D. Baskin	jbaskin@bottinilaw.com
Francis A. Bottini, Jr.	fbottini@bottinilaw.com
Albert Y. Chang	achang@bottinilaw.com
	sammirati@bottinilaw.com
	sramsey@bottinilaw.com
Jeffrey M. Walson	jeff@walsonlcm.com

Counsel for Ashley Hall-Nagy, Tia Taylor, and Bobby Estes

Abigail Noebels	anoebels@susmangodfrey.com
Barry Barnett	bbarnett@susmangodfrey.com
Steven Shepard	sshepard@susmangodfrey.com
Ryan Weiss	rweiss@susmangodfrey.com

Counsel for KKR & Co., L.P., Henry Kravis, and George Roberts

Peter E. Kazanoff	pkazanoff@stblaw.com
Paul C. Curnin	pcurnin@stblaw.com
David Elbaum	david.elbaum@stblaw.com
Michael J. Garvey	mgarvey@stblaw.com
Sara A. Ricciardi	sricciardi@stblaw.com
Michael Carnevale	michael.carnevale@stblaw.com

Counsel for Prisma Capital Partners, L.P., Girish Reddy, Pacific Alternative Asset Management Company, LLC, and Jane Buchan

Barbara B. Edelman	barbara.edelman@dinsmore.com
Grahmn N. Morgan	grahmn.morgan@dinsmore.com
John M. Spires	john.spires@dinsmore.com

Counsel for KKR & Co., L.P., Henry Kravis, George Roberts, Prisma Capital Partners, L.P., Girish Reddy, Pacific Alternative Asset Management Company, LLC, and Jane Buchan

Donald J. Kelly	dkelly@wyattfirm.com
Virginia H. Snell	vsnell@wyattfirm.com

Jordan M. White jwhite@wyattfirm.com
Brad S. Karp bkarp@paulweiss.com
Lorin L. Reisner lreisner@paulweiss.com
Andrew J. Ehrlich aehrlich@paulweiss.com
Brette Tannenbaum btannenbaum@paulweiss.com
Counsel for Blackstone Group, L.P., Blackstone Alternative Asset Management, L.P., Steven A. Schwarzman and J. Tomilson Hill

Margaret A. Keeley mkeeley@wc.com
Ana C. Reyes areyes@wc.com
Alexander Zolan azolan@wc.com
Susan Pope spope@fbtlaw.com
Cory Skolnick cskolnick@fbtlaw.com
Counsel for Ice Miller, LLP

Charles E. English, Jr. benglish@elpolaw.com
E. Kenly Ames kames@elpolaw.com
Steven G. Hall shall@bakerdonelson.com
Robert G. Brazier rbrazier@bakerdonelson.com
Counsel for Cavanaugh Macdonald Consulting, LLC, Thomas Cavanaugh, Todd Green and Alisa Bennett

John W. Phillips jphillips@ppoalaw.com
Susan D. Phillips sphillips@ppoalaw.com
Sean Ragland sragland@ppoalaw.com
Counsel for Jennifer Elliott

Mark Guilfoyle mguilfoyle@dbllaw.com
Patrick Hughes phughes@dbllaw.com
Kent Wicker kwicker@dbllaw.com
Andrew D. Pellino apellino@dbllaw.com
Counsel for Defendant Thomas Elliott

Michael L. Hawkins mhawkins@mlhlawky.com
Counsel for Brent Aldridge

Albert F. Grasch, Jr. mel.camenisch@rgcmlaw.com
J. Mel Camenisch, Jr. al.grasch@rgcmlaw.com
J. Wesley Harned wes.harned@rgcmlaw.com
Counsel for T.J. Carlson

Laurence J. Zielke lzielke@zielkefirm.com
John H. Dwyer, Jr. jdwyer@zielkefirm.com
Karen C. Jaracz kjaracz@zielkefirm.com
Counsel for Defendant Timothy Longmeyer

David J. Guarnieri dguarnieri@mmlk.com
Jason R. Hollon jhollon@mmlk.com
Kenton E. Knickmeyer kknickmeyer@thompsoncoburn.com
Mike Bartolacci mbartolacci@thompsoncoburn.com
Shaun Broeker sbroeker@thompsoncoburn.com
Counsel for Defendant David Peden

Keven P. Fox kfox@lgpllc.com
Stewart C. Burch sburch@lgpllc.com
Counsel for Defendant William A. Thielen

Glenn A. Cohen gcohen@derbycitylaw.com
Lynn M. Watson watson@derbycitylaw.com
warden@derbycitylaw.com
whitehouse@derbycitylaw.com
Lori Mattingly mattingly@derbycitylaw.com
Counsel for Defendant William Cook

Richard M. Guarnieri rguar@truelawky.com
Philip C. Lawson plawson@truelawky.com
Counsel for Defendants Bobbie Henson and Randy Overstreet

Brent L. Caldwell bcaldwell@caldwelllawyers.com
Noel Caldwell noelcaldwell@gmail.com
Counsel for Defendant Vince Lang

Perry M. Bentley perry.bentley@skofirm.com
Connor B. Egan connor.egan@skofirm.com
Christopher E. Schaefer christopher.schaefer@skofirm.com
Chadler M. Hardin chad.hardin@skofirm.com
Paul C. Harnice paul.harnice@skofirm.com
Sarah Jackson Bishop sarah.bishop@skofirm.com
Counsel for Nominal Defendant Kentucky Retirement Systems

Dustin E. Meek dmeek@tachaulaw.com
Counsel for Government Finance Officers Association