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

JEFFREY C. MAYBERRY, *et al.* **PLAINTIFFS**

v. **ORDER**

KKR & CO. LLP, *et al.* **DEFENDANTS**

This matter is before the Court on remand from the Supreme Court of Kentucky, following its ruling that the Plaintiffs lack constitutional standing to pursue their claims for breach of fiduciary duty and mismanagement of the funds held by Kentucky Retirement Systems for public employee pensions. *Overstreet v. Mayberry,* 603 S.W.3d 244 (Ky. 2020). The Supreme Court of Kentucky remanded the case "with direction to dismiss the complaint." *Id.* at 265. Following this ruling from the Kentucky Supreme Court, the Plaintiffs[1] filed a Motion for Leave to File Second Amended Complaint and Attorney General Daniel Cameron filed a Motion to Intervene on Behalf of the Commonwealth of Kentucky. Upon consideration of all arguments, briefs, papers, and otherwise being sufficiently advised, the Court hereby **DISMISSES** the Complaint filed by the Plaintiffs, **DENIES** Plaintiffs' Motion to file a Second Amended Complaint, and **GRANTS** the Office of the Attorney General's Motion to Intervene, for reasons explained more fully below.

BACKGROUND

This action was filed with this Court on December 27, 2017 by eight individuals (the "Original Plaintiffs"), each being members of the Kentucky Retirement Systems ("KRS"). The

[1] Jeffery C. Mayberry, Hon. Brandy O. Brown, Martha M. Miller, Steve Roberts, Teresa M. Stewart, Ashley Hall-Naqy, Tia Taylor, and Bobby Estes.

Original Plaintiffs are composed of two groups: the "Mayberry Plaintiffs" (Jeffery C. Mayberry, Hon. Brandy O. Brown, Martha Michelle Miller, Steve Roberts, and Teresa Stewart) and the "Wyman Plaintiffs" (Ben Wyman, Jason Lainhart, and Don Coomer). The Original Plaintiffs each began participation in KRS prior to 2014, and thus had defined-benefit retirement plans, meaning that the payments that they will receive each month upon retirement will be fixed amounts. And, the Commonwealth of Kentucky has guaranteed by statute that those members of KRS enrolled prior to 2014 who receive these defined-benefit retirement payments would receive them for their entire lives.

The Original Plaintiffs brought suit against several defendants, including KRS trustees, KRS officers, various investment advisors, and hedge-fund managers, among others, based on a 25-billion-dollar funding deficiency in the KRS asset pool. Original Plaintiffs asserted that Defendants mismanaged KRS retirement assets in several ways, including concealing the declining state of KRS assets. And, the Original Plaintiffs argue that Defendants recklessly sought to rectify the state of KRS retirement assets by investing 1.5 billion dollars in high risk investment vehicles. This further worsened the state of the KRS portfolio: the new investments lost another 100 million dollars by 2018 and accumulated massive fees. KRS itself did not join this action as either a plaintiff or defendant but stated that it supported the Original Plaintiffs' action as being on behalf of KRS on a "derivative basis." The Kentucky Attorney General was notified of the filing of the Original Plaintiffs' complaint, but initially declined to participate in this suit.

Defendants filed a Motion to Dismiss this case in February of 2018. Defendants argued that the Original Plaintiffs lacked standing to bring their claims, in part arguing that the Original Plaintiffs suffered no injury—as defined-benefit retirees, they are guaranteed payment of fixed

amounts even if KRS were to fail. Further, some Defendants argued that they are immune from the Original Plaintiffs' claims.

On November 30, 2018, this Court entered an Opinion and Order denying Defendants' Motion to Dismiss. Therein, this Court held that the Original Plaintiffs alleged a sufficiently concrete injury to have standing to bring their suit because the true plaintiffs—the Commonwealth and KRS—suffered injury due to Defendants' alleged conduct. The Court also found that the Original Plaintiffs could bring suit derivatively as members and beneficiaries of KRS and as Kentucky taxpayers, and the Attorney General's initial failure to join this action did not prevent them from doing so. Further, the Court held that the factual record was insufficient to determine whether applicable statutes of limitation had been tolled, that sovereign immunity defenses raised by Defendants did not apply, and that the Court had both subject matter jurisdiction over the dispute and personal jurisdiction over the Defendants. Finally, the Court found that the Original Plaintiffs had stated sufficient claims to overcome Defendants' motion to dismiss except as to the Government Finance Officers Association ("GFOA"), whose motion to dismiss was granted due to a failure to sufficiently allege a breach of any duty owed by GFOA to any of the Original Plaintiffs.

The KRS trustee and officer Defendants filed two interlocutory appeals from this Court's 2018 Order, arguing both that the Original Plaintiffs lacked constitutional standing and that they were entitled to sovereign immunity as KRS trustees and officers. In a separate action filed in January of 2019, another group of Defendants sought a writ of prohibition from the Kentucky Court of Appeals; these Defendants requested a determination that this Court lacked subject-matter jurisdiction over the Original Plaintiffs' action. The writ of prohibition was granted by the

Kentucky Court of Appeals in April of 2019, but later dismissed as moot by the Kentucky Supreme Court.[2]

While this matter proceeded through Kentucky's appellate courts, the doctrine of standing was being modified and restricted in cases before both the Kentucky Supreme Court and the United States Supreme Court. After the filing of this case, the Kentucky Supreme Court rendered its decision in *Commonwealth Cabinet for Health and Family Services, Department of Medicaid Services v. Sexton*, 566 S.W.3d 185 (Ky. 2018) on September 27, 2018. In *Sexton*, the Kentucky Supreme Court adopted the United States Supreme Court's analysis for constitutional standing found in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). This analysis requires a plaintiff to have suffered an injury in fact that can be causally connected to the alleged conduct, and that all Kentucky courts have a responsibility to ascertain standing to determine whether a cause is justiciable. *Sexton*, 566 S.W.3d at 188.

On June 1, 2020 and shortly before the Kentucky Supreme Court reached its decision in *Overstreet*, the Supreme Court of the United States rendered its decision in *Thole v. U.S. Bank N.A.*, 140. S.Ct. 1615 (2020). The United States Supreme Court held in *Thole* that the Plaintiffs therein lacked standing to bring their action for mismanagement of their pension plans under the Employee Retirement Income Security Act ("ERISA"). *Thole*, 140 S.Ct. at 1618. In short, because standing requires "an injury in fact that is concrete, particularized, and actual or imminent" and the plaintiffs in *Thole* were members of defined-benefit plans rather than defined-contribution plans, the plaintiffs lacked a sufficient injury because they were "legally and contractually entitled to receive those same monthly payments for the rest of their lives." *Id*. at 1619-20. Whether or not

[2] See *Overstreet v. Mayberry*, *Id.* at 265, footnotes 4 and 6.

Entered 17-CI-01348 12/28/2020 Amy Feldman, Franklin Circuit Clerk

the plaintiffs won or lost, "they would still receive the same monthly benefits that they are already slated to receive." *Id*. at 1618.

In the present matter, both interlocutory appeals and the writ of prohibition came before the Kentucky Supreme Court for oral argument, and the Supreme Court thereafter rendered its Opinion on July 9, 2020. The Supreme Court held that the Original Plaintiffs lacked standing to pursue this action, since they had a statutorily-declared inviolable contract with the Commonwealth that guaranteed their retirement payments in fixed amounts regardless of KRS mismanagement or failure. *Overstreet v. Mayberry*, 603 S.W.3d 244, 253-54 (Ky. 2020). Further, because they lacked a sufficient personal injury, the Original Plaintiffs were found to lack standing in a derivative capacity on behalf of KRS. *Id*. at 257. The Supreme Court disagreed with analogizing this situation to mismanagement of a trust, since a trust beneficiary has rights in trust assets and KRS members instead had rights to receive their fixed retirement payments. *Id*. at 262. The Supreme Court also held that the Original Plaintiffs lacked standing as taxpayers to pursue their claims on behalf of the Commonwealth. *Id*. at 264-65.

Importantly, the Supreme Court noted that it is the obligation of the Attorney General to bring lawsuits in a derivative capacity on behalf of the Commonwealth. *Id*. at 265. In discussing the role of the Attorney General, the Supreme Court stated that the Attorney General is empowered to bring suits on behalf of the Commonwealth in situations where the Commonwealth is the real party in interest. *Id*. And, the Attorney General has broad discretion to evaluate particular facts and to decide whether or not to bring suit. *Id*. The Supreme Court presumed that the Attorney General must have exercised this discretionary power to decline to pursue this action, as the Office of the Attorney General ("OAG") had not been involved in the suit up to that point. *Id*. at 266.

Entered 17-CI-01348 12/28/2020 Amy Feldman, Franklin Circuit Clerk

Upon determining that the Original Plaintiffs did not have standing to bring their suit, the Supreme Court decided that it did not need to reach the issue of immunity or other issues. *Id*. at 251. Accordingly, the Supreme Court "dismiss[ed] this case" and "remand[ed] this case to the circuit court with direction to dismiss the complaint." *Id*. at 249-51; *Id*. at 266. The Supreme Court's ruling became final on July 30, 2020.

Following entry of the Supreme Court's decision on July 9, 2020, but prior to the decision becoming final on July 30—multiple parties have filed motions attempting to revive this case. The OAG filed its Motion to Intervene on Behalf of the Commonwealth of Kentucky on July 20, 2020. The OAG argues that it has an unconditional right to intervene in this case, and argues in the alternative that the Court should allow it to permissively intervene. Further, the OAG asserts that its Motion is timely, arguing that it filed its Motion less than ten days after the Supreme Court rendered its decision and that the case was stayed pending litigation of the standing issue at the appellate courts.

Also after the Kentucky Supreme Court's ruling but before its finality, Plaintiffs filed their Motion for Leave to File Second Amended Complaint on July 29, 2020. In an effort to allege more particular injuries in response to the Supreme Court's decision, Plaintiffs propose to amend their Complaint in several respects. First, they seek to add an assertion that Plaintiffs' Cost of Living Allowance ("COLA") benefits were eliminated by the legislature in 2013 as a result of the financial condition of KRS. Second, they seek to add a claim that all Plaintiffs hold health insurance coverage—funded in part by mandatory personal contributions from KRS members—which are not protected by any inviolable contract and thus are not guaranteed in the same manner as their defined benefit payments. Third, the Plaintiffs seek to amend their Complaint to add three plaintiffs who were enrolled in KRS after January 1, 2014 and thus are not enrolled in a defined benefit plan

Entered 17-CI-01348 12/28/2020 Amy Feldman, Franklin Circuit Clerk

and whose benefits are not protected by an inviolable-contract statutory provision. Rather, these new Plaintiffs' monthly benefits upon retirement depend upon the performance of KRS assets, and therefore would have their retirement benefits reduced though mismanagement of KRS funds.

ANALYSIS

The Court finds that the Kentucky Supreme Court's ruling requires the dismissal of all claims filed by the original Plaintiffs and that it would be an abuse of discretion to allow those parties to revive their action by filing a Second Amended Complaint after the Supreme Court's ruling directing dismissal of their claims. Nevertheless, this Court further finds that the Kentucky Attorney General has the right to intervene in this action to assert all claims of the Commonwealth, and that his intervention is not precluded by the ruling of the Supreme Court dismissing the private claims asserted by the original Plaintiffs for lack of standing.

I. The Writ of Prohibition Entered by the Court of Appeals is Moot and Therefore No Longer Deprives this Court of Jurisdiction

As a preliminary point, several Defendants assert that the decision in *Overstreet* left the writ of prohibition issued by the Court of Appeals undisturbed. The Court disagrees. Rather, the Kentucky Supreme Court in *Overstreet* clearly stated that the writ of prohibition entered by the Court of Appeals finding that this Court was acting outside of its subject-matter jurisdiction due to a lack of standing by the Original Plaintiffs is no longer in effect. In two footnotes, the Supreme Court states that the writ of prohibition is now moot. Footnote four states that the Supreme Court entered an order simultaneous with its decision that dismissed the writ of prohibition case as moot. *Overstreet*, 603 S.W.3d 244, n.4 (Ky. 2020). Footnote six explicitly states that "[o]ur dismissal of this case renders the Writ Case moot." *Id.* n.6. Further, the writ issued by the Court of Appeals never became final. It was appealed to the Kentucky Supreme Court, where the Court explicitly held that it was no longer in effect. Moreover, the Supreme Court of Kentucky explicitly remanded

Entered 17-CI-01348 12/28/2020 Amy Feldman, Franklin Circuit Clerk

this case to this Court, obviously recognizing the jurisdiction of this Court to rule on matters properly brought before it under the Civil Rules. Accordingly, the Court is not prevented from considering the pending Motion to Amend and Motion to Intervene.

II. Plaintiffs' Motion for Leave to File Second Amended Complaint Is Denied, and the Original Plaintiffs are Dismissed

Upon review of the Supreme Court's ruling in *Overstreet*, the Court denies the Original Plaintiffs' Motion to Amend and therefore dismisses them from this action. Granting leave to amend is largely a matter left to the discretion of the circuit court: "whether a party may amend his complaint is discretionary with the circuit court, and we will not disturb its ruling unless it has abused its discretion." *Kenney v. Hanger Prosthetics & Orthotics, Inc.*, 269 S.W.3d 866, 869-70 (Ky. Ct. App. 2007). When deciding whether to grant leave to amend a complaint, a circuit court "may consider such factors as the failure to cure deficiencies by amendment or the futility of the amendment itself." *Id*. at 869 (*quoting First National Bank of Cincinnati v. Hartman*, 747 S.W.2d 614, 616 (Ky. Ct. App. 1988)). Further, a circuit court should consider whether the proposed amendment "would prejudice the opposing party or would work an injustice." *Id*. (*citing Shah v. American Rubber Corp.*, 655 S.W.2d 489, 493 (Ky. 1983)).

The ruling in *Overstreet* demonstrates that the Supreme Court intended to terminate the complaint brought by the Original Plaintiffs. The Supreme Court opinion does not provide for any post-appellate amendments to the complaint to cure the defects in standing. Again, the United States Supreme Court issued its opinion in *Thole* on June 1, 2020, shortly before the Kentucky Supreme Court rendered its decision in *Overstreet*. The plaintiffs in *Thole*, as members of a defined-benefit retirement plan, lacked a concrete injury in fact based on alleged mismanagement of their pension plans because they were "legally and contractually entitled to receive those same monthly payments for the rest of their lives." *Thole*, 140 S.Ct. at 1619-20. As the PAAMCO

Entered 17-CI-01348 12/28/2020 Amy Feldman, Franklin Circuit Clerk

Defendants note in their Objection to Further Proceedings, the Original Plaintiffs submitted a Motion For Leave to Submit New Authorities to the Kentucky Supreme Court in light of *Thole* prior to its decision in *Overstreet*. This was done in an effort to respond to and comply with the recently-rendered *Thole* decision. However, this request was denied by the Kentucky Supreme Court, and it instead rendered its decision adopting the reasoning in *Thole* without further briefing.

The *Overstreet* opinion itself prevents the Original Plaintiffs from continuing in this case. The Kentucky Supreme Court reversed this Court's Opinion and Order and remanded the case "with direction to dismiss the complaint." *Overstreet*, 603 S.W.3d at 249-50, 266. Accordingly, the language of the *Overstreet* opinion as well as the procedural history of this case further reflects a directive by the Supreme Court of Kentucky to disallow the Original Plaintiffs to proceed in this matter by further amending their complaint.

Further, federal caselaw lends support to the idea that it is not beyond the discretion of this Court to disallow the Original Plaintiffs from adding additional plaintiffs or adding additional claims through amendment to ensure that at least some plaintiff in this action has constitutional standing to bring this suit. "Threshold individual standing is a prerequisite to all actions." *Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 423 (6th Cir. 1998). In *Lans v. Gateway 2000, Inc.*, the Federal District Court of Washington, D.C. discussed FRCP 15(a)—the federal analogue to Kentucky's CR 15.01—and noted that while there is a general rule permitting free amendment of complaints, the D.C. District Court declined amendment because plaintiffs sought to add a plaintiff who had standing to sue in order to "retroactively create jurisdiction." *Lans v. Gateway 2000, Inc.*, 84 F.Supp.2d 112 (D.D.C. 1999), *aff'd*, 252 F.3d 1320 (Fed. Cir. 2001). In *Summit Office Park v. United States Steel Corp.*, the United States Court of Appeals for the Fifth Circuit determined that if a plaintiff never had standing to assert a claim, then the plaintiff does not have standing to

Entered 17-CI-01348 12/28/2020 Amy Feldman, Franklin Circuit Clerk

substitute new plaintiffs or a new cause of action by amending a complaint. *Summit Office Park v. United States Steel Corp*., 639 F.2d 1278, 1282-83 (5th Cir. 1981).

As for the Original Plaintiffs' request to amend their complaint to state additional claims, the United States Court of Appeals for the Eleventh Circuit declined similar amendment in *Canon Latin America, Inc. v. Lantech (CR), S.A.* There, the plaintiff sought to reopen a case following dismissal on remand to the district court and amend their complaint to include additional claims not included in either their original or first amended complaint. *Canon Latin America, Inc. v. Lantech (CR), S.A.*, 382 Fed.Appx. 797, 798-99 (11th Cir. 2010). The Eleventh Circuit held that it was not an abuse of discretion for the district court to deny the plaintiff's motion to amend its complaint where the claim it sought to amend was not pled at the outset and did not include the claim in its amended complaint. *Id*. The court noted that the plaintiff "could have—and should have—sought amendment to state its claim for damages stemming from breach of the forum selection clause long ago in the litigation."

In the instant case, the Original Plaintiffs could have included each of these claims at the outset of litigation, but they did not do so. Their proposed claims related to deprivation of their COLA benefits and their insurance benefits lacking contractual protection could have been brought at the start of this suit. These harms existed when this suit was brought, but the Original Plaintiffs did not include them in either their original complaint or its first amended complaint. As in *Canon*, the Court exercises its discretion in disallowing amendment to add additional claims.

In sum, the Court declines to allow the Original Plaintiffs to file a Second Amended Complaint for two reasons. First, the Court observes the circumstances surrounding the *Overstreet* opinion and the procedural history of this case reflects an intent by the Kentucky Supreme Court to not allow the Original Plaintiffs to continue. Second, the discretion to permit amendment to a

Entered 17-CI-01348 12/28/2020 Amy Feldman, Franklin Circuit Clerk

complaint lies with a trial court; other trial courts, for persuasive reasons, have declined to permit amendment in cases similar to the one presently before the Court. Accordingly, the Court denies the Original Plaintiff's request to file a Second Amended Complaint to add new parties or claims to allow them to proceed in this action.

III. The Attorney General's Motion to Intervene Is Granted

Notwithstanding the Supreme Court's direction to dismiss the complaint of the Original Plaintiffs, the Court finds that the Supreme Court did not address the other issue now before this Court: whether the Attorney General may file an Intervening Complaint. As noted above, the Supreme Court instructed this Court upon remand to "dismiss the complaint." *Overstreet*, 603 S.W.3d at 249-51, 266. The Supreme Court also stated in its decision that "[b]ecause we find that Plaintiffs lack an injury in fact sufficient to support constitutional standing, we dismiss this case and do not reach the immunity issue." *Id*. at 251. However, the subsequent action of the Attorney General, in filing his motion to intervene, is in no way precluded by the ruling of the Supreme Court.

Instead, the Supreme Court discussed at length the role of the Kentucky Attorney General to pursue lawsuits on behalf of the people of the Commonwealth. As the Supreme Court notes in *Overstreet*, the Attorney General is empowered by KRS 15.020 "to represent the Commonwealth in cases in which the Commonwealth is the real party in interest." *Overstreet*, 603 S.W.3d at 265. The Supreme Court observed that it the Attorney General who performs this role and not individuals such as the Original Plaintiffs. *Id*. 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." *Id*. The Attorney General's "authority necessarily includes the 'broad powers to initiate and defend actions on behalf of the people of the

Entered 17-CI-01348 12/28/2020 Amy Feldman, Franklin Circuit Clerk

Commonwealth.'" *Id.* (*quoting Commonwealth ex rel. Conway v. Thompson*, 300 S.W.3d 152, 173 (Ky. 2009)). "It is the Attorney General's responsibility to file suit to vindicate public rights, as attorney for the people of the State of Kentucky." *Conway*, 300 S.W.3d at 173; *see also Commonwealth ex rel. Beshear v. Commonwealth ex rel. Bevin*, 498 S.W.3d 355, 361 (Ky. 2016) (noting that the Attorney General is empowered to bring suit to vindicate the public interest of the Commonwealth).

Our Civil Rules provide for intervention under two mechanisms: intervention as of right and permissive intervention. Under certain circumstances, a court must permit a party to intervene as a matter of right: "[u]pon timely application anyone *shall* be permitted to intervene in an action: (a) when a statute confers an *unconditional* right to intervene." CR 24.01(1) (emphasis added). In other circumstances, a court has discretion to permit intervention: [u]pon timely application anyone *may* be permitted to intervene in an action: (a) when a statute confers a *conditional* right to intervene or (b) when an applicant's claim or defense and the main action have a question of law or fact in common." CR 24.02 (emphasis added). CR 24.02 "provides trial courts with discretion to allow intervention in cases if the interest of the movant so warrants, even if the asserted interest fails to satisfy the dictates of CR 24.01." *A.H. v. W.R.L.*, 482 S.W.3d 372, 375 (Ky. 2016).

In *Hancock v. Terry Elkhorn Mining Co., Inc.*, residents of Johnson County, Kentucky living near two state highways sought to enjoin the defendant mining company and others from driving trucks that violated the roads' weight limits. *Hancock v. Terry Elkhorn Mining Co., Inc.*, 503 S.W.2d 710, 711 (Ky. Ct. App. 1973). In reversing the Johnson Circuit Court, the Kentucky Court of Appeals—then the highest court in the Commonwealth—determined that the Attorney General had the right to intervene in the case. *Id.* at 715. The Court of Appeals observed that KRS

Entered 17-CI-01348 12/28/2020 Amy Feldman, Franklin Circuit Clerk

15.020 obligates the Attorney General to "exercise all common law duties and authority pertaining to the office of the attorney general," and that such common law duties include "protecting the interest of all the people" of Kentucky. *Id*. Further, in discussing CR 24.01 and whether the plaintiffs' interests were protected in the absence of the Attorney General, the Court of Appeals observed that "the individuals who filed this action really had two interests they were seeking to protect." *Id*. While the plaintiffs had personal interests in their homes and property, they also had "a public interest involving their concern over the continued destruction of the state highways by overweight trucks." *Id*. Thus, because the Attorney General is charged with protecting the interests of the population broadly, the Court of Appeals reversed the circuit court and permitted the Attorney General to intervene under CR 24.01. *Id*.

The Court finds that the Attorney General has been granted a statutory right to intervene sufficient to satisfy CR 24.01(1). The Attorney General is not only empowered by KRS 15.020 to appear in cases such as the present case, "[the Attorney General] *shall* also commence all actions or enter his appearance in all cases, hearings, and proceedings…in which the Commonwealth has an interest." However, even if KRS 15.020 did not grant the Attorney General this right, the Court in its discretion finds that the Attorney General holds a strong interest in the subject matter of this case in his capacity as the attorney for the Commonwealth to allow him to permissively intervene. Similar to the plaintiffs in *Hancock*, the Original Plaintiffs here both have a personal interest in protecting their retirement payments, but also a public interest in ensuring that KRS assets—funded in part by taxpayer dollars—are managed in a prudent fashion. It is for that reason that the Attorney General has an interest in this action, and in light of *Overstreet* this interest would no longer be adequately pursued without the Attorney General being permitted to intervene.

As the OAG notes in its Motion to File Intervening Complaint, the conduct of the Defendants in this case is alleged to have caused severe financial damage to the Commonwealth by diminishing the KRS asset pool by several hundred million dollars and further contributing to KRS's 25-billion-dollar shortfall. As the Supreme Court stated in *Conway*, the Attorney General is the attorney for the people of Kentucky, and it is clear that the Commonwealth has an interest in intervening in this case. Thus, the Court finds both that KRS 15.020 grants the Attorney General a statutory right to intervene in this case under CR 24.01(1), and that without his intervention that interests in this case would not be adequately represented. In the alternative, the Court finds that the Attorney General has a sufficiently strong interest to intervene under CR 24.02. The Attorney General filed his Motion prior to the Supreme Court's decision becoming final, and thus his Motion is timely.

The Court notes that the Supreme Court's ruling in this case was based in large part on the U.S. Supreme Court's holding in *Thole*, a decision which had not been rendered at the time of the filing of this action. More importantly, the *Thole* case had not been decided when the OAG originally declined to participate as a plaintiff in this action. At the time former Attorney General Beshear declined to participate in the original litigation, it appeared that the interests of the Commonwealth were adequately represented by highly competent counsel who were aggressively litigating those claims. There was no controlling case law that indicated the original Plaintiffs lacked standing at the time the Attorney General's office originally declined to join in the litigation. This change in circumstances justifies the change in position on the part of the Attorney General.

Moreover, this Court further recognizes that the newly elected Attorney General Cameron should not be bound by the initial decision made by his predecessor—General Beshear—prior to this change in the law of standing. Had this Court originally decided the standing issue on the same

Entered 17-CI-01348 12/28/2020 Amy Feldman, Franklin Circuit Clerk

grounds adopted by the Kentucky Supreme Court (denying the named Plaintiffs' standing to sue), it would have been duty-bound to allow the Attorney General to intervene (upon the filing of a motion to intervene prior to finality). The passage of time during the appellate proceedings should make no difference in the Court's ruling on a motion to intervene by the Attorney General, who came forward with the motion to intervene within days of the Supreme Court ruling, and prior to its finality.

The intervening Complaint tendered by the Attorney General mirrors the original claims of the Plaintiffs that allege extremely serious violations of fiduciary and other common law duties on the part of certain KRS Board members and advisors and the defendant hedge fund managers engaged by the Board to manage these retirement investments. If those allegations are true, thousands of public employees have had their retirement savings depleted by investments that included self-dealing, exorbitant fees, conflicts of interest, and risky non-prudent investment strategies. Moreover, if the claims can be proven, then the state itself is now on the hook for replenishing the staggering losses of public funds that resulted from these alleged breaches of duties.

The ruling in *Thole* holds that retirees whose funds were depleted have no standing, because they are still entitled to their full defined benefit pension; the Commonwealth of Kentucky will simply have to come up with the money to fund these benefits from other sources. Of course, this means that the Commonwealth will have to make up the funds depleted from these alleged breaches of fiduciary duties by one of two methods: raising taxes or cutting services. While such actions may (or may not) make the individual Plaintiffs whole, there can be no question that such remedial actions would inflict a serious financial injury on state government, and the public as a

Entered 17-CI-01348 12/28/2020 Amy Feldman, Franklin Circuit Clerk

whole. This is why the Kentucky Supreme Court went to great pains to specifically point out that the Attorney General has standing to pursue such claims.

Kentucky law has long recognized that "there is no wrong without a remedy". *See Conrett's Ex'r v. Rice*, 187 S.W.2d 544 (Ky. 1945). Here, unless the Court grants the Attorney General's Motion to file the Intervening Complaint, there could be a serious wrong with no remedy. Under the law, the hedge fund managers and officers, directors, and advisors to the Kentucky Retirement Systems, who allegedly breached their fiduciary duties to the public, must be held accountable. Any party that breached its fiduciary duties and engaged in reckless conduct, conflicts of interest, or self-dealing should be accountable under the law. Those breaches of duty are unproven at this early stage of the litigation, but in ruling on the Motion to Intervene, the Court must assume the validity of the claims asserted. These alleged breaches of duty potentially resulted in the depletion of hundreds of millions of dollars of public funds, which the taxpayers of the Commonwealth will be obliged to indemnify.

This Court does not believe that the Kentucky Supreme Court intended its ruling in *Overstreet* to be applied so as to provide a free pass, or "get out of jail free" card, for fiduciaries who breached their duties to the public and the taxpayers. Accordingly, this Court must grant the Attorney General's motion to file an Intervening Complaint. While some or all of the Defendants may have valid defenses on the merits, the Attorney General is entitled to his day in court to prove these allegations.

CONCLUSION

While this case has been ongoing since 2017 and has passed through each appellate level before finding itself again before this Court, the case has not progressed beyond a motion to dismiss. At the motion to dismiss stage, the Court is required to view the allegations in the

Entered 17-CI-01348 12/28/2020 Amy Feldman, Franklin Circuit Clerk

complaint in a light most favorable to the plaintiff. *Gall v. Scroggy*, 725 S.W.2d 867, 869 (Ky. Ct. App. 1987). With that in mind, the Court notes that while the Original Plaintiffs lack standing to pursue their claims by being members of defined benefit plans, each iteration of their Complaint contains allegations of severe misconduct and breaches of fiduciary duties of Defendants related to management of KRS assets. The Kentucky Supreme Court observed as much in *Overstreet*, recognizing that "Plaintiffs allege significant misconduct." *Overstreet*, 603 S.W.3d at 266. Fiduciary duties exist in all circumstances where there is a "special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence."*Steelvest, Inc. v. Scansteel Service Center, Inc.* 807 S.W.2d 476, 485 (Ky. 1991) (*quoting Security Trust Co. v. Wilson*, 210 S.W.2d 336, 338 (Ky. 1948)).

Serious breaches of fiduciary duties have been alleged in this case, and the Court believes that statute, case law, the Civil Rules, as well as principles of equity and public interest, require that the factual allegations in this case—and the defenses asserted by all Defendants—should be adjudicated on the merits and not dismissed on a legal technicality. Because the Attorney General is empowered by statute, the Civil Rules, and the decision of the Kentucky Supreme Court in this case, to intervene in suits such as these, the Court finds that the Attorney General must be allowed to take over this case and pursue these claims on their merits.

Being sufficiently advised, **IT IS ORDERED:**

1. The claims of the Original Plaintiffs adjudicated by final decision of the Kentucky Supreme Court in *Overstreet* are **DISMISSED** for lack of standing;
2. The Motion of the Original Plaintiffs to File a Second Amended Complaint is **DENIED;**

3. The Motion for Leave to File Second Amended Complaint, to the extent that it seeks to add new claims of the Tier 3 movants (Ashley Hall-Naqy, Tia Taylor and Bobby Estes), who seek to join in the claims of the original Plaintiffs and assert related claims on behalf of state employees who are part of the defined contribution, rather than defined benefit, pension program, is **DENIED** without prejudice;
4. The motion of the Attorney General to file the Intervening Complaint is **GRANTED** under CR 24.01 and CR 24.02, and the Intervening Complaint of the Attorney General is hereby **FILED** of record as of this date**.**

So **ORDERED** this the 28th day of December, 2020.

/s/ HON. PHILLIP J. SHEPHERD
electronically signed
12/28/2020 2:27:20 PM ET

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

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Entered 17-CI-01348 12/28/2020 Amy Feldman, Franklin Circuit Clerk

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Entered 17-CI-01348 12/28/2020 Amy Feldman, Franklin Circuit Clerk

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Entered 17-CI-01348 12/28/2020 Amy Feldman, Franklin Circuit Clerk

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Entered 17-CI-01348 12/28/2020 Amy Feldman, Franklin Circuit Clerk