

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
FRANKFORT DIVISION
CASE NO. 3:18-cv-00008-GFVT**

COMMONWEALTH OF KENTUCKY,)
ex rel. MATTHEW G. BEVIN, GOVERNOR,)
)
SCOTT W. BRINKMAN, in his official capacity)
as Acting Secretary of the CABINET)
FOR HEALTH AND FAMILY SERVICES,)
)
STEPHEN P. MILLER, in his official capacity)
as Commissioner of the DEPARTMENT)
FOR MEDICAID SERVICES,)
)
Plaintiffs)
)
v.)
)
RONNIE MAURICE STEWART, GLASSIE)
MAE KASEY, LAKIN BRANHAM, SHANNA)
BALLINGER, DAVE KOBERSMITH, WILLIAM)
BENNETT, SHAWNA NICOLE McCOMAS,)
ALEXA HATCHER, MICHAEL WOODS, SARA)
WOODS, KIMBERLY WITHERS, KATELYN)
ALLEN, AMANDA SPEARS, DAVID ROODE,)
SHEILA MARLENE PENNEY, and QUENTON)
RADFORD)
)
Defendants.)
)
KENTUCKY ASSOCIATION OF HEALTH)
PLANS, INC.)
)
Intervening Plaintiff.)

**REPLY IN SUPPORT OF MOTION OF KENTUCKY
ASSOCIATION OF HEALTH PLANS, INC. TO INTERVENE AS PLAINTIFF**

The Kentucky Association of Health Plans, Inc. (“KAHP”) submits this Reply in Support of its Motion to Intervene as a Plaintiff in this action.

ARGUMENT

I. KAHP MAY INTERVENE AS A MATTER OF RIGHT UNDER FED. R. CIV. P. 24(A)(2).

Under Fed. R. Civ. P. 24(a)(2), a party is entitled to intervene as a matter of right when: (i) the motion to intervene is timely; (ii) the applicant has an interest in the property or transaction that is the subject matter of the litigation; (iii) disposition of the action as a practical matter may impair or impede the applicant's ability to protect that interest; and (iv) the parties already in litigation cannot adequately protect that interest. *Triax Co. v. TRW, Inc.*, 724 F.2d 1224, 1227 (6th Cir. 1984). "Rule 24 is broadly construed in favor of potential intervenors." *Purnell v. Akron*, 925 F.2d 941, 950 (6th Cir. 1991). Defendants do not dispute that KAHP's Motion was timely, or that any judicial disposition of the matter may impair KAHP's ability to protect its interests. Instead, Defendants blithely assert that, in their estimation, KAHP does not have a "substantial interest" in the litigation, and that the Commonwealth will protect KAHP's interest in any event. Defendant's Mem. Of Law in Opposition to the Motion of Kentucky Ass'n of Health Plans, Inc. to Intervene as Pl. ("Response") at 4, 6.

A. KAHP and Its Members Have a Substantial Interest in the Subject Matter of this Action.

Defendants argue that the very entities which must comply with Kentucky HEALTH, which would incur significant costs depending on the outcome of this action, do not "have an interest sufficient to justify intervention as a matter of right." Response at 4.¹ But Defendants' lowly assessment of KAHP's interest does not carry the day, given the Sixth Circuit's "rather expansive notion of the interest sufficient to invoke intervention of right," (*Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997)), which interest is "construed liberally" under

¹ Defendants also suggest that a "presumption" alters the respective burdens of proof. But whatever presumption arguably applies, and its alleged effect, is immaterial given the substantial interest in the subject matter of the pending action which KAHP has demonstrated here.

Rule 24(a). *Hatton v. County Bd. of Ed. of Maury County, Tenn.*, 422 F.2d 457, 461 (6th Cir. 1970). And, the economic interests which KAHP has asserted are sufficient to support intervention under Fed. R. Civ. P. 24(a). *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 135 (1967).

Citing to a secondary source, Defendants further claim that this Court should simply ignore the Supreme Court's *Cascade* precedent because: "[w]ith an occasional rare exception, both the commentators and the lower courts have refused to regard *Cascade* as a significant precedent." Response at 6. But Defendants conveniently fail to note that among the exceptions cited in that secondary source is an opinion from this very judicial district. § 1908.1 7C Fed. Prac. & Proc. Civ. § 1908.1 (3d ed.) (citing to *United States v. First Nat. Bank & Tr. Co. of Lexington, Ky.*, 280 F. Supp. 260, 263 (E.D. Ky. 1967), which based its holding on *Cascade*).

KAHP has a substantial economic interest in the outcome of this litigation, which readily qualifies as an interest sufficient to support intervention as of right under Fed. R. Civ. P. 24(a).

B. KAHP's Interests Are Not Adequately Represented by the Existing Plaintiffs.

The Sixth Circuit has set a low bar here, holding that the burden of proving inadequate representation sufficient to warrant intervention is "minimal." *Grubbs v. Norris*, 870 F.2d 343, 347 (6th Cir. 1989). That minimal hurdle is met here, where the existing Plaintiffs cannot adequately represent KAHP's interests, as the economic consequences of any ruling that alters the regulatory burden of administering Medicaid will fall squarely on KAHP's members, and not the Commonwealth. The Plaintiffs – state officials representing the interests of the general public – are of necessity less able to advocate the position of the regulated business community.

As stated in KAHP's Motion, courts have regularly allowed industry intervenors where they are not adequately represented by state regulatory agencies. *Nat'l Wildlife Fed'n v. Hodel*, 661 F.Supp. 473, 474 (E.D. Ky. 1987). While Defendants claim this this case is "outdated," they

offer no authority overturning this opinion. Response at 9. KAHP's interests in this litigation differ significantly from the Commonwealth's interests. Any resolution of this matter between the existing Plaintiffs and Defendants should necessarily reflect the interests of the KAHP's member health plans which will be required to execute any such resolution.

KAHP respectfully requests that it be granted intervention of right under Fed. R. Civ. P. 24(a) and be allowed to participate as an Intervening Plaintiff in this case.

II. ALTERNATIVELY, THE COURT SHOULD GRANT KAHP LEAVE TO INTERVENE PURSUANT TO FED. R. CIV. P. 24(B)(2).

Permissive intervention may be granted in any action if: (i) the motion to intervene is timely; (ii) it reflects a claim or defense for a question of law or fact in common with the main action; and (iii) it will not unduly delay or prejudice the adjudication of the original parties' rights. Fed. R. Civ. P. 24(b)(1), (3). The requirements of this rule are to be liberally construed in favor of intervention. *See United States v. Marsten Apts.*, 175 F.R.D. 265, 267 (E.D. Mich. 1997) (compiling cases regarding liberal construction of Rule 24); *Warheit v. Osten*, 57 F.R.D. 629, 630 (E.D. Mich. 1973) ("It is well understood that the rule should be read to allow intervention in **as many situations as possible.**") (emphasis added).

Despite this inherently deferential standard, Defendants rely heavily on *Ark Encounter, LLC v. Stewart*, 311 F.R.D. 414, 417 (E.D. Ky. 2015), issued by this Court, to assert that the Court should not allow KAHP to intervene here. Response at 12-13. But *Ark Encounter* is readily distinguishable from the facts in this case. In *Ark Encounter*, the putative intervenors were taxpayers whose only asserted interest in the litigation was their displeasure with how their taxes were being spent. *Id.* at 422. While this Court acknowledged the Sixth Circuit's typically deferential standard for intervention, the *Ark Encounter* intervenors' asserted interest, premised solely on taxpayer standing, was "such a narrow instance, [that] the Court is deeply concerned that

too permissive a standard for intervention would allow any Kentucky taxpayer to intervene in nearly any suit involving the administration of the state's tax laws." *Id.*

Here, KAHP's intervention is not on behalf of taxpayers opposed to having their tax dollars support Medicaid but, rather, on behalf of the very health plans which will be implementing the Medicaid Expansion according to the Governor's Executive Order, subject to any Court order affecting that implementation.

KAHP respectfully requests that, if the Court declines to grant intervention as of right under Rule 24(a), that it be granted permissive intervention under Rule 24(b).

CONCLUSION

For the reasons set forth above and in its Motion, KAHP respectfully requests that the Court grant its Motion to Intervene as Plaintiff, and enter the Order submitted with that Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was filed this 23rd day of April, 2018, using the Court's ECF system and will be served on the following:

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