

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II
CIVIL ACTION NO. 13-CI-1060

NORTON HEALTHCARE, INC.

PLAINTIFF

vs.

UNIVERSITY OF LOUISVILLE

DEFENDANT

and

COMMONWEALTH OF KENTUCKY, FINANCE
AND ADMINISTRATION CABINET

INTERVENING DEFENDANT

MOTION TO INTERVENE

The Commonwealth of Kentucky, Finance and Administration Cabinet (“the Cabinet”), by and through counsel, moves to intervene as a party defendant in this action pursuant to Kentucky Civil Rule 24. In support of its motion, the Cabinet attaches a Memorandum of Law, as well as an Answer to the First Amended Complaint in compliance with CR 24.03. Additionally, the Cabinet tenders as an exhibit to this filing a Motion to Appoint a Special Master Commissioner and requests that, should intervention be granted, this Court cause the Clerk to file said motion contemporaneous with the grant of intervention. Upon grant of intervention and the filing of the Motion to Appoint a Special Master Commissioner, the movants will properly notice said motion for this Court’s regular civil motion hour.

MEMORANDUM OF LAW

Kentucky Rule of Civil Procedure 24.01 permits intervention as a matter of right for any applicant claiming an “interest relating to the property or transaction which is the subject of the action” when the applicant “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.” CR 24.01(1)(b). A motion under CR 24.01 must be “timely.” *Id.*

Here, the Commonwealth of Kentucky, Finance and Administration Cabinet, has an indisputable interest in the subject matter of the litigation between Plaintiff, Norton Healthcare, Inc., and Defendant, University of Louisville. As the Court is well aware, of paramount significance to both claims in Norton’s Amended Complaint is the 1981 long-term lease of land from the Commonwealth to Norton for the construction of a pediatric facility, currently operating as Kosair Children’s Hospital. Indeed, Count I of Norton’s Amended Complaint is a breach of contract claim alleging that U of L breached a settlement agreement that included a proposal for amending the 1981 ground lease. Count II of Norton’s Amended Complaint is a KRS 418.040 declaratory judgment claim asking the Court to declare the rights and duties of Norton and U of L under the lease.¹ Norton specifically seeks a declaration that U of L has no authority to declare a breach under or to purport to terminate the lease agreement.

¹ In light of Norton’s claim for a declaratory judgment, the Cabinet also seeks intervention pursuant to KRS 418.075, which provides, “When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration[.]” For the reasons discussed in this motion, the Cabinet has an interest that would be affected by any declaration made regarding the parties’ rights and duties under the 1981 lease agreement.

The Commonwealth, by way of the Cabinet, possesses legal title to the leased property and serves as the “Lessor” to the 1981 ground lease agreement. The Secretary of the Finance and Administration Cabinet, in accordance with the Cabinet’s status as the central procurement and contracting agency of the Commonwealth charged with the duty to lease any real property, or any interest in real property, owned by the state, signed the agreement on behalf of the Commonwealth. *See* KRS 45A.045(4) and KRS 56.463(3). Additionally, under the terms of the lease, upon termination of the lease agreement for any reason, Norton must surrender to the Commonwealth the buildings and improvements on the premises. The Cabinet manages the Commonwealth’s real property. Any disposition of the action may impair or impede the Cabinet’s ability to protect the Commonwealth’s interest in the subject property.

Further, the Cabinet’s interest is not adequately represented by the existing parties. The Secretary of Finance signed the 1981 lease agreement on behalf of the Commonwealth for the use and benefit of the University of Louisville, a state agency. *See* KRS 164.810; *University of Louisville v. Martin*, 574 S.W.2d 676, 677 (Ky. App. 1978) (“[T]he [U]niversity [of Louisville] became a state institution of higher education in mid-1970[.]”). The University, however, is only a non-party signatory to the lease. U of L is not the lessor of the property, and, as noted, upon termination of the lease agreement, the property, its buildings and improvements, revert to the Commonwealth. Accordingly, the Cabinet, in light of its position as the Commonwealth’s real property manager, must have its own seat at the table in this litigation.

With that said, obviously, in light of U of L’s status as a state institution, the Commonwealth and the Cabinet have an interest in litigation pending against it. Further, this case involves U of L’s School of Medicine and impacts the pediatric care provided to Kentucky’s children. The Commonwealth has an interest in the health and well-being of its

citizens, particularly its children. The Cabinet therefore seeks to intervene to defend and protect this interest, providing a voice in the dispute for Kentucky's youngest citizens.

The Cabinet's motion to intervene is made timely. In determining whether an application for intervention is timely, courts may consider the following factors:

“(1) [T]he point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case; (4) the prejudice to the original parties due to the proposed intervenor's failure, after he or she knew or reasonably should have known of his or her interest in the case, to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor of intervention.”

Hazel Enterprises, LLC v. Community Financial Services Bank, 382 S.W.3d 65, 68 (Ky. App. 2012) (quoting *Carter v. Smith*, 170 S.W.3d 402, 408 (Ky. App. 2004)). Here, although Norton filed suit in September 2013, case deadlines were extended, and for more than four months the entire case was stayed, to give Norton and U of L the opportunity to negotiate in an effort to reach an agreed resolution of the dispute. Further, the Court recently permitted Norton to file an Amended Complaint, and U of L filed its Answer to the Amended Complaint just this month. Thus, Norton and U of L remain in the early stages of litigation, and the Cabinet's intervention will not prejudice the original parties. The valid and significant interests of the Cabinet also warrant intervention at this juncture.

Although the Cabinet believes it has a right to intervene under CR 24.01 due to its direct interest in the action, if the Court disagrees, the Cabinet alternatively moves for permissive intervention pursuant to CR 24.02. In compliance with CR 24.03, the Cabinet tenders an Answer to Plaintiff's First Amended Complaint along with this motion. [See Exh. A]. Review of the tendered Answer demonstrates that the Cabinet's claims and defenses and the pending litigation share common questions of law and fact regarding interpretation of the 1981 Ground Lease.

The allegations pleaded by both U of L and Norton necessarily require examination of the financial condition and accounting practices of the Norton operation and specifically as they relate to Kosair Children's Hospital. Accordingly, the Cabinet herewith tenders a motion seeking appointment of a special master commissioner to examine the books of Norton, which the Cabinet will formally file upon being granted permission to intervene in this action. [See Exh. B].

WHEREFORE, the Commonwealth of Kentucky, Finance and Administration Cabinet, requests that this Court enter the attached order granting it permission to intervene as a party defendant in this action.

Respectfully submitted,

JACK CONWAY
ATTORNEY GENERAL



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*Counsel for Commonwealth of Kentucky,
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NOTICE

The foregoing motion to intervene will be heard at the regular motion hour for the Franklin Circuit Court, Division II, at the Courthouse in Frankfort, Kentucky, on Wednesday, August 6, 2014, at 9:00 a.m., or as soon thereafter as counsel may be heard.

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and accurate copy of the foregoing was this 30th day of July, 2014, served by email and by mailing a copy via first-class mail to:

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Sean Riley

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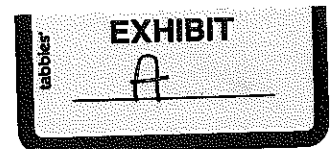
ANSWER TO FIRST AMENDED COMPLAINT

Comes the Commonwealth of Kentucky, Finance and Administration Cabinet
("the Commonwealth" or "the Cabinet"), by counsel, and for its Answer to the First
Amended Complaint states:

ANSWER

General Denials

To the extent that any allegation in the First Amended Complaint is predicated on
any publicly available document or any document attached as an exhibit to the First
Amended Complaint, the Cabinet generally denies any characterization of the document
contained in the First Amended Complaint and states that the document speaks for itself.



Nature of the Action

1. The Cabinet generally is without sufficient information or knowledge to form a belief as to the truth of the allegations regarding the particulars of the relationship or the dispute between Norton Healthcare, Inc., and the University of Louisville. The Cabinet therefore denies the allegations set forth in paragraphs 1 through 15 of the First Amended Complaint, with the exception that the Commonwealth admits that U of L and Catholic Health Initiatives (“CHI”) entered into an affiliation agreement in late 2012, the terms of which speak for itself, and that the Governor declined to approve a merger between those entities in 2011..

2. With respect to paragraph 16 of the First Amended Complaint, the Cabinet admits that U of L is not a party to the Ground Lease, that the “Lessor” under the Ground Lease is the Commonwealth of Kentucky, represented by the Secretary of the Finance and Administration Cabinet, and that the Commonwealth has not formally asserted any breach of the Ground Lease. U of L is an expressly named third-party beneficiary and non-party signatory to the Ground Lease. The Cabinet admits that no representative of the Commonwealth signed U of L’s Notice of Breach. To the extent paragraph 16 contains conclusions of law or claims for relief, no response is required.

3. With respect to paragraph 17 of the First Amended Complaint, the Cabinet is without sufficient information or knowledge to form a belief as to the truth of Norton’s averments regarding its course of dealing with U of L or that it has not breached the Ground Lease, and the Cabinet therefore denies same. The Cabinet denies the allegation that the Ground Lease does not impose upon Norton a continuing obligation to have an affiliation agreement in place with U of L. The Cabinet denies the allegation that the

recited language in the Ground Lease does not impose any legal obligations on Norton. To the extent that the allegations set forth a claim for relief, the Cabinet is not required to respond.

4. The Cabinet is without sufficient information or knowledge to form a belief as to the truth of the allegations in paragraph 18 of the First Amended Complaint, and therefore denies same.

5. To the extent paragraph 19 of the First Amended Complaint is a request for relief, the Commonwealth does not need to respond.

6. The Cabinet is without sufficient information or knowledge to form a belief as to the truth of the allegations in the first two sentences of paragraph 20 of the First Amended Complaint, and therefore denies same. With respect to the final sentence of paragraph 20, the Cabinet denies that Norton has no obligation to enter into any affiliation agreement with U of L. To the extent that the allegations contain a request for relief, the Cabinet is not required to respond.

Parties

7. The Cabinet admits the allegations in paragraphs 21 and 22 of the First Amended Complaint.

Jurisdiction and Venue

8. The Cabinet states that paragraph 23 of the First Amended Complaint is a legal conclusion. Nevertheless, the Cabinet does not deny that this Court maintains jurisdiction over this matter.

9. The Cabinet admits that Franklin County is a proper venue for this action, as alleged in paragraph 24 of the First Amended Complaint.

Facts

10. The Cabinet is without sufficient information or knowledge to form a belief as to the truth of the factual allegations regarding the settlement negotiations and alleged settlement agreement set forth in paragraphs 25 through 36 of the First Amended Complaint, and therefore denies same.

11. The Cabinet is without knowledge or information to form a belief as to the truth of the specific allegations in paragraphs 37 and 38, but generally admits that U of L and Norton have been partners in a long term arrangement to operate the Children's Hospital and are partners to the 2008 Affiliation Agreement.

12. The Cabinet admits that the Commonwealth recognized that there were substantial benefits that would come from the construction of a pediatric hospital in Louisville, Kentucky; the Cabinet is without sufficient information or knowledge to form a belief as to the truth of the remaining allegations in paragraph 39 of the First Amended Complaint, and therefore denies same.

13. With respect to paragraphs 40 through 45, the Cabinet admits that Norton entered into a Ground Lease agreement with the Commonwealth in 1981, a copy of which is attached as Exhibit D to the First Amended Complaint. The Cabinet states that the terms of the Ground Lease and the terms of the other contracts referenced in paragraphs 40 through 45 speak for themselves, and the Cabinet denies generally Norton's allegations that purport to characterize or paraphrase selected provisions of the agreements. The Cabinet denies the allegation in paragraph 45 that nothing in the Ground Lease imposes on Norton a continuing obligation to be a party to an affiliation agreement with U of L.

14. With respect to paragraphs 46 through 51 of the First Amended Complaint, relating to Norton's construction and operation of KCH and support for U of L, the Cabinet admits that Norton constructed KCH following execution of the Ground Lease, as set forth in paragraph 46; the Cabinet is without sufficient information and knowledge to form a belief as to the truth of the remaining allegations in paragraphs 46 through 51 of the First Amended Complaint.

15. The Cabinet is without sufficient information and knowledge to form a belief as to the truth of the allegations in paragraphs 52 through 55 of the First Amended Complaint, relating to the alleged non-exclusive role of U of L at KCH.

16. With respect to the first sentence of paragraph 56 of the First Amended Complaint, the Cabinet states that the terms of the 2008 Master Affiliation Agreement speak for themselves. The Cabinet is without sufficient information and knowledge to form a belief as to the truth of the allegation in the second sentence of paragraph 56, and therefore denies same.

17. With respect to paragraph 57 of the First Amended Complaint, the Cabinet denies that Norton is under no obligation to have an affiliation agreement in place with U of L. The Cabinet is without sufficient information and knowledge to form a belief as to the truth of the remaining allegations in paragraph 57, and therefore denies same.

18. With respect to paragraph 58 of the First Amended Complaint, the Commonwealth admits that U of L entered into an affiliation with CHI and that the Governor rejected a proposed merger between U of L and CHI. The Commonwealth admits U of L engaged in an RFP process. The Commonwealth is without sufficient

information and knowledge to form a belief as to the truth of the remaining allegations in paragraph 58, and therefore denies same.

19. With respect to paragraph 59 of the First Amended Complaint, the Commonwealth admits that U of L entered into a contractual agreement with CHI, and states that the terms of those documents speak for themselves.

20. The Cabinet is without sufficient information and knowledge to form a belief as to the truth of the allegations in paragraphs 60 through 63 of the First Amended Complaint, and therefore denies same.

21. With respect to paragraph 64 of the First Amended Complaint, the Cabinet admits that neither the Governor nor the Cabinet sent the letter referenced and attached to the First Amended Complaint as Exhibit A.

22. The Cabinet admits that Exhibit F to the First Amended Complaint is a true and accurate copy of the Attorney General's publicly released statement regarding the proposed merger and states that the document speaks for itself. The Cabinet agrees that land owned by the Commonwealth, including the land that is subject to the Ground Lease, constitutes a public asset. To the extent paragraph 65 contains conclusions of law, the Commonwealth is not required to respond.

23. The Cabinet is without sufficient information and knowledge to form a belief as to the truth of the allegations in paragraphs 66 through 68 of the First Amended Complaint. Further, to the extent paragraph 68 contains a conclusion of law, the Commonwealth is not required to respond.

24. The Cabinet is without sufficient information and knowledge to form a belief as to the truth of the allegations in paragraph 69 of the First Amended Complaint.

25. With respect to the first sentence of paragraph 70 of the First Amended Complaint, the Cabinet denies the allegation that the Ground Lease does not contain a “covenant” to operate KCH for the use and benefit of U of L. The Cabinet admits that the second sentence of paragraph 70 contains a selective quotation from the Ground Lease. As to the third and final sentence of paragraph 70, the Cabinet denies that Norton’s only duty under the Ground Lease would be to make KCH available for the programs and use of U of L.

26. The Cabinet is without sufficient information and knowledge to form a belief as to the truth of the allegations in paragraph 71 of the First Amended Complaint.

27. The Cabinet is without sufficient information and knowledge to form a belief as to the truth of the allegations in paragraph 72 of the First Amended Complaint.

28. Paragraph 73 of the First Amended Complaint contains conclusions of law to which the Cabinet is not required to respond, except the Cabinet denies that nothing in the Ground Lease requires Norton and U of L to remain parties to an affiliation agreement.

29. The Cabinet is without sufficient information and knowledge to form a belief as to the truth of the allegations in paragraph 74 of the First Amended Complaint.

30. The Cabinet generally is without sufficient information and knowledge to form a belief as to the truth of the allegations in paragraphs 75 through 83 of the First Amended Complaint. However, the Cabinet admits that a copy of Norton’s letter of intent with the University of Kentucky is attached to the First Amended Complaint as Exhibit G, as set forth in paragraph 75, and states that the document speaks for itself.. Additionally, with respect to paragraph 81, the Commonwealth specifically denies that

Norton's proposed collaboration with the University of Kentucky must be deemed to have been authorized by the Commonwealth due to UK's status as an arm of the Commonwealth.

Claims for Relief

Count I (Breach of Contract and Implied Covenant of Good Faith and Fair Dealing)

31. In response to the allegations in paragraph 84 of the First Amended Complaint, the Cabinet incorporates by reference the above answers to paragraphs 1 through 83 of the First Amended Complaint as if fully set forth herein.

32. The Cabinet is without sufficient information and knowledge to form a belief as to the truth of the allegations in paragraphs 85 through 90 of the First Amended Complaint. Further, to the extent these paragraphs contain requests for relief, the Commonwealth is not required to respond.

33. To the extent Norton and U of L agreed to jointly propose amendments to the Ground Lease to the Commonwealth, as alleged in paragraph 85 of the First Amended Complaint, the Commonwealth states that no such proposals have been jointly tendered.

Count II (Declaratory Judgment)

34. In response to the allegations in paragraph 91 of the First Amended Complaint, the Cabinet incorporates by reference the above answers to paragraphs 1 through 90 of the First Amended Complaint as if fully set forth herein.

35. With respect to paragraph 92 of the First Amended Complaint, the Cabinet admits that KRS 418.040 provides a mechanism for parties to seek a judicial declaration of rights.

36. With respect to paragraph 93 of the First Amended Complaint, the Cabinet admits that an actual, justiciable and present controversy exists between the parties; the remainder of paragraph 93 is a request for relief to which the Cabinet is not required to respond.

37. Paragraph 94 of the First Amended Complaint is a request for relief to which the Cabinet is not required to respond.

38. The Cabinet denies that Norton has no obligation to remain a party to an affiliation agreement with U of L under the terms of the Ground Lease. The Cabinet is without sufficient information and knowledge to form a belief as to the truth of the remaining allegations in paragraph 95 of the First Amended Complaint. Further, to the extent paragraph 95 contains a request for relief, the Cabinet is not required to respond.

Request for Relief

39. The Cabinet specifically denies that Norton is entitled to a declaration that Norton has no obligation to be a party to an affiliation agreement with U of L under the terms of the Ground Lease.

40. The Cabinet denies any allegations which are not otherwise expressly admitted herein.

AFFIRMATIVE DEFENSES

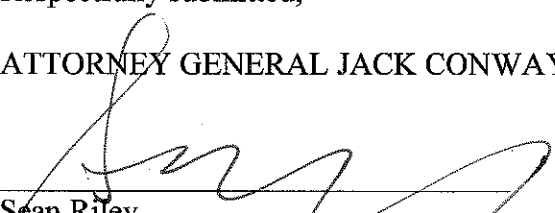
41. The Cabinet reserves the right to assert all defenses, affirmative or otherwise, about which it presently lacks sufficient information, but which may become available to it during the course of this litigation.

WHEREFORE, the Commonwealth of Kentucky, Finance and Administration Cabinet, prays for the following relief:

- (a) Judgment in its favor;
- (b) A declaration that:
 - a. Norton and U of L must maintain an affiliation with respect to the operation of Kosair Children's Hospital; and
 - b. Upon termination of the lease for any reason, the building, structures, fixtures and building equipment upon the premises become property of the Commonwealth of Kentucky, Finance and Administration Cabinet.
- (c) Trial by jury on any claims or issues not otherwise appropriate for Court resolution;
- (d) Its attorneys' fees and costs incurred herein; and
- (e) Any other relief to which it is entitled.

Respectfully submitted,

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*Counsel for Commonwealth of
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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and accurate copy of the foregoing was this 30th day of July, 2014, served by email and by mailing a copy via first-class mail to:

Counsel for Plaintiff:

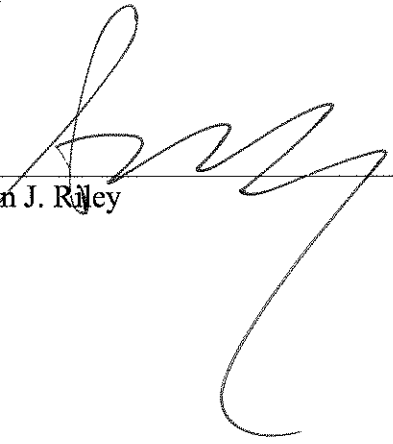
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Sean J. Riley

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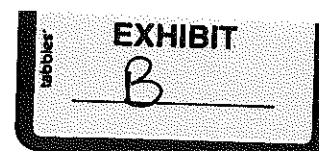
COMMONWEALTH OF KENTUCKY, FINANCE
AND ADMINISTRATION CABINET

INTERVENING DEFENDANT

MOTION TO APPOINT
SPECIAL MASTER COMMISSIONER

The Commonwealth of Kentucky, Finance and Administration Cabinet (“the Commonwealth” or “the Cabinet”), by and through counsel, moves the Court to appoint a special master commissioner in this action to perform a full and fair accounting for the operations and finances of Kosair Children’s Hospital (“KCH”) and Plaintiff, Norton Healthcare, Inc. (“Norton”). In support of its Motion, movant states as follows:

1. This action was commenced on September 6, 2013, on a Complaint by Norton against the University of Louisville (“U of L” or “the University”).
2. Each circuit court in the Commonwealth has authority to appoint a master commissioner to act as a receiver and perform other duties, including the execution of judicial sales under the terms of a court order or judgment. *See* KRS 31A.010(1); CR 53.01; CR 53.02(1)-(2). Additionally, with express authority from the Chief Justice, a



circuit court may refer other duties to a master commissioner in “special cases.”¹ *See* CR 53.01; CR 53.02(3).

3. A case “may be regarded as special due to complexity of issues, . . . matters of account involving complex or numerous transactions, or similar exceptional circumstances.” CR 53.02(3); *see also* Administrative Procedures of the Court of Justice (“AP”) IV, Sec. 4(1).

4. Here, in its Counterclaim, U of L makes several allegations against Norton that are financial in nature, including an allegation that Norton has breached its affiliation agreement with U of L, and therefore its ground lease agreement with the Commonwealth, by refusing to reimburse U of L for accumulated cost deficits over the last five years. *See* U of L Counterclaims, ¶¶ 32-39.² U of L further contends that Norton, beginning in 2010, hid from U of L and the public information concerning the operations and finances of KCH by consolidating the Hospital’s separate operations into one set of financial statements for the entire Norton “system,” thereby concealing the revenues, expenses, and surplus generated by KCH and permitting Norton to use such surplus for the benefit of Norton’s other facilities. *See id.*, ¶ 23. Thus, this litigation implicates matters of account involving complex and numerous transactions, qualifying it as a “special case” within the meaning of CR 53.02(3).

5. Reference of the case to a special master commissioner for the purposes of performing a full and accurate accounting for the operations and finances of KCH and Norton would help the Court and the parties evaluate U of L’s claims of breach, and

¹ A master commissioner in a “special case” or proceeding must be qualified as an attorney. CR 53.02(3).

² In U of L’s Amended Answer to Norton’s First Amended Complaint, U of L adopted and incorporated by reference the counterclaims set forth in its original Answer.

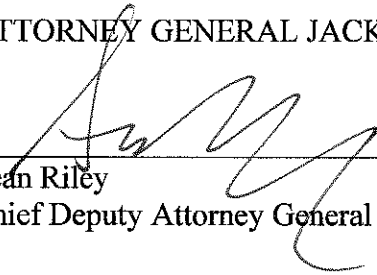
therefore would aid the Court and the parties in resolving the case. A full accounting of Norton itself is necessary in light of the allegations that Norton has consolidated KCH's separate operations into one set of financial statements for the entire Norton "system" and used KCH surplus for the benefit of Norton's other facilities. *See id.*

6. In the alternative, the Cabinet asks the Court to appoint an expert witness pursuant to KRE 706(a) to perform the same duties and functions outlined above. *See Maclean v. Middleton*, 419 S.W.3d 755, 760-61 (Ky. App. 2014).

WHEREFORE, the Commonwealth of Kentucky, Finance and Administration Cabinet asks the Court, in accordance with KRS Chapter 31A, CR 53, and the Administrative Procedures of the Court of Justice, to appoint a special master commissioner and order a report prepared on the issues raised herein.

Respectfully submitted,

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**ORDER GRANTING THE COMMONWEALTH'S
MOTION TO INTERVENE AS DEFENDANT**

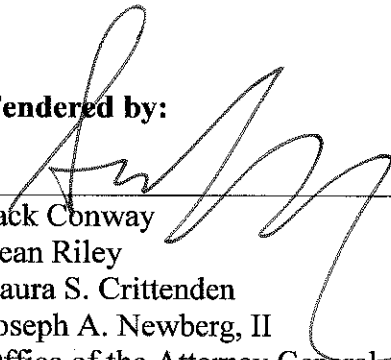
The Court, having considered the Commonwealth of Kentucky, Finance and Administration Cabinet's motion to intervene as a party defendant, and being otherwise sufficiently advised;

IT IS HEREBY ORDERED that the motion shall be and is GRANTED. The Commonwealth of Kentucky, Finance and Administration Cabinet, is hereby permitted to intervene as a party defendant. The Clerk of the Franklin Circuit Court is instructed to file the Answer tendered with the Commonwealth's motion as of the date of entry of this Order.

Entered this ____ day of August, 2014.

JUDGE, FRANKLIN CIRCUIT COURT

Tendered by:



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