No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: KENTUCKY EMPLOYEES RETIREMENT SYSTEM,

Petitioner.

United States District Court for the Western District of Kentucky, Louisville Division, Case No. 3:22-cv-00168 (Hon. David J. Hale, J.)

United States Bankruptcy Court for the Western District of Kentucky, Louisville Division, Adv. Pro. No. 13-03019 (Hon. Joan A. Lloyd, J.)

PETITION FOR WRIT OF MANDAMUS

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Dated: April 26, 2023

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Petitioner, the Kentucky Employees Retirement System ("KERS") states that it is not required to make this disclosure. The Board of Trustees of Kentucky Retirement Systems (the "Board"), which performs the sovereign function of administering KERS, is an "Agency" of the executive branch of state government and is part of the Finance and Administration Cabinet. K.R.S. §§ 11A.010(10), 12.020(II)(9)(m).[1] The Board and KERS are both arms of the Commonwealth of Kentucky. *See Commonwealth of Kentucky v. Ky. Ret. Sys.*, 396 S.W.3d 833, 837 (Ky. 2013).

[1] Effective April 1, 2021, legislative changes were made to the governance and administrative structure of the Kentucky Retirement Systems in conjunction with creation of the Kentucky Public Pensions Authority ("KPPA"); however, the style of this case remains proper. *See, e.g.*, K.R.S. § 61.646.

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RELIEF SOUGHT

In July 2020, this Court held that pursuant to 28 U.S.C. § 959(b), Seven Counties Services, Inc. ("Seven Counties") was required to maintain its employer contributions during the pendency of its chapter 11 case (April 6, 2013 through Feb. 5, 2015). *See Ky. Emps. Ret. Sys. v. Seven Ctys. Servs., Inc.*, 823 F. App'x 300 (6th Cir. July 20, 2020) (the "July 2020 Opinion") (attached as Tab 1); Mandate, Case No. 16-5569/16-5644 (6th Cir. Sept. 22, 2020), Doc. 89 (attached as Tab 2). This Court remanded the case to the bankruptcy court to determine the "amount that Seven Counties should be ordered to pay after Seven Counties provides monthly employer reports to KERS . . . ." 823 F. App'x at 306. The parties ultimately stipulated that the principal amount of unpaid employer contributions during that period was $21,072,139.22.

Despite that stipulation, the bankruptcy court failed to follow this Court's mandate and the district court declined to correct the bankruptcy court's refusal to act. More precisely, the bankruptcy court failed to order Seven Counties to pay that amount (along with interest). *See Ky. Emps. Ret. Sys v. Seven Ctys. Servs., Inc. (In re Seven Ctys. Serv., Inc.)*, Adv. Pro. No. 13-03019 (Bankr. W.D. Ky. Mar. 2, 2022), ECF No. 283 (the "2022 Memorandum-Opinion-Order") (attached as Tab 3). When KERS sought to have that reviewed, the district court acknowledged that the bankruptcy court incorrectly interpreted the remand, but decided not to

review that decision on appeal. *See Ky. Emps. Ret. Sys. v. Seven Ctys. Servs., Inc.*, Case No. 3:22-cv-168 (W.D. Ky. Mar. 27, 2023), D.N. 18 (the "2023 Memorandum and Order") (attached as Tab 4).

As a result of these decisions, the Kentucky Employees Retirement System ("KERS" or "Petitioner") returns to this Court to enforce the mandate from the July 2020 Opinion. As described herein, Petitioner asks this Court to either: (a) enter the final judgment called for in the July 2020 Opinion (as detailed in the Conclusion herein), or (b) direct the bankruptcy court to enter such final judgment, in which case the instructions should be specific and detailed to avoid further confusion and delay. This writ will not only serve to effectuate this Court's prior mandate (its past jurisdiction), but it will also protect this Court's present and future appellate jurisdiction and KERS' rights of appeal in related proceedings, as well as save significant further time and cost to the parties and judicial resources in this now decade old matter.

ISSUES

The fundamental issues presented by this Petition are (a) whether the lower courts have failed to follow this Court's mandate, and (b) whether this Court needs to issue a writ of mandamus to enforce its prior mandate. Almost three years after the July 2020 Opinion, KERS still has not been able to obtain relief consistent with this Court's mandate, first because the bankruptcy court determined that it could

not do what this Court mandated, and second because the district court, although acknowledging the bankruptcy court's approach likely violated "ample" Sixth Circuit precedent, did not allow the appeal or purport to modify the bankruptcy court's ruling in any way. These rulings, together, prevent KERS from obtaining a final judgment consistent with this Court's July 2020 Opinion. This Court should now fully and finally resolve this matter.

STATEMENT OF FACTS

A. Overview

KERS is a governmental retirement plan that was established by the Kentucky General Assembly in 1956 and is governed by Kentucky statutes and administrative regulations—K.R.S. Chapter 61 and K.A.R. Title 105—and is administered by the Board of Trustees of Kentucky Retirement Systems (the "Board"). *See* K.R.S. §§ 61.645, 61.650; 105 K.A.R. 1:140. Seven Counties was designated by the Governor of Kentucky, by Executive Order, as a participating employer in 1979. *See Ky. Emps. Ret. Sys. v. Seven Ctys. Servs., Inc.*, 901 F.3d 718, 722-23 (6th Cir. 2018). Seven Counties filed its chapter 11 petition on April 4, 2013 for the sole purpose of seeking to withdraw from KERS.

On April 5, 2013, Seven Counties filed a Motion for Approval of Debtor's Rejection of a Potentially Executory Contract, asserting that the relationship with KERS was an executory contract which Seven Counties could reject. Case No. 13-31442 (Bankr. W.D. Ky.), ECF No. 9. On April 29, 2013, KERS filed an Emergency Motion to Compel Debtor to Comply with its Obligations to Make Ongoing Statutorily Required Payments of Employer and Employee Contributions, pursuant to 28 U.S.C. § 959(b) (the "Motion to Compel"). Case No. 13-31442 (Bankr. W.D. Ky.), ECF No. 75. And on June 10, 2013, KERS filed an adversary proceeding captioned *Kentucky Employees Retirement System v. Seven Counties Services, Inc.*, Adv. Pro. No. 13-03019 (the "KERS Adversary"). The complaint contained three counts: counts one and two sought a determination that Seven Counties is a governmental unit and therefore ineligible for chapter 11 relief under 11 U.S.C. §§ 101(27), (41) and 109(d) Count three, like the prior Motion to Compel, sought an order compelling Seven Counties to pay and perform its statutory obligations to KERS during bankruptcy pursuant to 28 U.S.C. § 959(b).[2]

The Motion to Reject and the KERS Adversary were consolidated for trial. On May 30, 2014, the bankruptcy court issued a Memorandum Opinion which concluded that the relationship between KERS and Seven Counties was an

[2] The Motion to Compel was denied without prejudice to KERS' right to bring its request for relief in an appropriate adversary proceeding, and the request was then made in the KERS Adversary. *See* Order, Case No. 13-31442 (Bankr. W.D. Ky. May 8, 2013).

executory contract which Seven Counties could reject and as a result, Seven Counties was allowed to escape its statutory obligations to KERS. The district court affirmed the core rulings of the bankruptcy court. *See In re Seven Ctys. Servs., Inc. (Ky. Emps. Ret. Sys. v. Seven Ctys. Servs., Inc.)*, 511 B.R. 431, 453 (Bankr. W.D. Ky. 2014) (the "2014 Opinion"), *aff'd in part, rev'd in part*, 550 B.R. 741 (W.D. Ky. 2016)).

B. Prior Appeals to and Opinions of this Court

On appeal to this Court, following the certification of law by the Kentucky Supreme Court finding the relationship between KERS and Seven Counties to be " 'based on a statutory obligation,' " this Court held in its July 2020 Opinion that Seven Counties was " 'unable to reject its obligations to participate as an executory contract, which [] resolve[d] the core claim raise[d] in KERS's adversary proceeding.' " *See Ky. Emps. Ret. Sys.*, 823 F. App'x at 301-03, 306 (citing *Ky. Emps. Ret. Sys.*, 901 F.3d at 731, *certified question answered*, 580 S.W.3d 530, 532 (Ky. 2019)). This Court further held that Seven Counties was required, pursuant to 28 U.S.C. § 959(b), to pay, fulfill, and maintain its statutory employer contribution obligations to KERS during its bankruptcy, from April 6, 2013 to February 5, 2015, as well as, by implication, after bankruptcy. *Id.* at 303, 305.[3]

[3] In its August 2018 published opinion, this Court affirmed, subject to a lengthy dissent, the decision that Seven Counties, "despite the public purpose of its work," is "not a governmental unit" under 11 U.S.C. § 101(27) and is eligible to file under

This Court then specified the process to follow on remand:

> KERS requests that we order Seven Counties to pay it $30,323,775.31 for contribution obligations between April 6, 2013 and February 5, 2015. It bases this figure on Seven Counties' annual payroll and the relevant contribution rates of 24%, 27%, and 39% during the pendency of the bankruptcy proceedings. Without Seven Counties' reports regarding "creditable compensation" for the relevant period, however, we cannot check KERS's math. We leave it to the bankruptcy court to determine the amount that Seven Counties ***should be ordered to pay*** after Seven Counties provides monthly employer reports to KERS for April 6, 2013 to February 5, 2015. . . .
>
> **III. CONCLUSION**
>
> For the foregoing reasons and the reasons detailed in our prior opinion, we **AFFIRM** our decision that Seven Counties is eligible to file under Chapter 11; **REVERSE** the conclusions that Seven Counties can reject its obligation to participate as an executory contract and that Seven Counties need not maintain its statutory contribution obligations during the pendency of the bankruptcy; **DISMISS** Seven Counties' cross appeal, and **REMAND** the case for further proceedings consistent with this opinion.

823 F. App'x at 306 (italics added; bold face capitalization in original).

This Court's mandate, issued on September 22, 2020, was filed with the district court the same day and prompted the district court to issue an Order "for purposes of clarity" remanding the matter to the bankruptcy court, which was then

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Chapter 11," which resolved counts one and two of the complaint. *Ky. Emps. Ret. Sys.*, 901 F.3d at 731-32.

filed in the KERS Adversary. *See* Mandate, Case No. 3:15-cv-25 (W.D. Ky. Sept. 22, 2020), D.N. 48; Order, Case No. 3:15-cv-25 (W.D. Ky. Oct. 6, 2020), D.N. 49 and Adv. Pro. No. 13-03019 (Bankr. W.D. Ky. Oct. 6, 2020), ECF No. 202 (attached as Tabs 5 and 6).

C. The Proceedings After Remand

1. Remand to the Bankruptcy Court

A number of things happened after the mandate was issued, but of primary interest here was the reopening of the KERS Adversary in the bankruptcy court and the remand proceedings therein. Following remand from the July 2020 Opinion, KERS conducted substantial discovery to obtain the information from Seven Counties that this Court identified in its July 2020 Opinion as necessary to "check KERS's math." *See Ky. Emps. Ret. Sys.*, 823 F. App'x at 303, 306.

On February 15, 2022, KERS filed its pretrial compliance items with the bankruptcy court in the KERS Adversary (No. 13-03019), including KERS's Trial Brief on Remand from Sixth Circuit (ECF No. 269) and Motion for Entry of Final Judgment on Remand from the Sixth Circuit (ECF No. 270) (the "Motion for Entry of Final Judgment") (attached as Tabs 7 and 8). In both filings, KERS requested that the bankruptcy court issue an order directing Seven Counties to pay the

employer contribution amounts to KERS, consistent with this Court's mandate, including statutory interest.[4]

On February 21, 2022, on the eve of the trial on remand, the parties filed the Stipulation on Principal Amount of Unpaid Employer Contributions on Remand from the Sixth Circuit (ECF No. 281) in the KERS Adversary (the "Stipulation") (attached as Tab 9). Therein, the parties stipulated to the "principal amount of unpaid employer contributions" for the period of the pendency of Seven Counties' bankruptcy, April 6, 2013 to February 5, 2015—the period at issue on remand—which is $21,072,139.22 (defined therein as the "Unpaid Employer Contributions"). *See* Stipulation at 2, ¶ 1. The basis for the total amount was detailed in the Stipulation. *See* Stipulation at 2-3, ¶¶ 2-3. The parties reserved all of their other rights, arguments, claims and defenses, related to and including:

> The scope of this Stipulation is expressly confined to the principal amount of Unpaid Employer Contributions and, for the avoidance of doubt, does not constitute a stipulation or agreement by the Parties to resolve or affect in any way, and the Parties expressly reserve all rights, arguments, claims, and defenses related to: (a) KERS's asserted entitlement to statutory interest on the principal amount of Unpaid Employer Contributions, pursuant to K.R.S. § 61.675(3)(b), and KERS's asserted entitlement to the entry of a final

[4] *See Ky. Emps. Ret. Sys.*, 823 F. App'x at 304 (citing Ninth and Fifth Circuit opinions holding "that § 959(b) compelled the payment of statutorily imposed interest on state sales tax monies that the debtors had collected but failed to remit to the state" in accordance with interest rates established by state law. (citations omitted)).

> judgment by [the bankruptcy court] in accordance with the Sixth Circuit Opinion, as set forth in the *Motion of Plaintiff Kentucky Employees Retirement System for Entry of Final Judgment on Remand from the Sixth Circuit* (Dkt. No. 270), which remains pending . . . .

Stipulation at 4-5, ¶ 6.[5]

As a result of the Stipulation, the trial on remand held February 22, 2022 was short. KERS presented evidence concerning statutory interest on the principal amount (which totaled $9,393,262.95 as of June 30, 2021) and the parties then presented arguments about the appropriate course of action for the bankruptcy court. *See* Order, Adv. Pro. No. 13-03019 (Bankr. W.D. Ky. Feb. 22, 2022), ECF No. 282 (attached as Tab 10); Tr. of Evid. Hr'g 2/22/22, Adv. Pro. No. 13-03019 (Bankr. W.D. Ky.), ECF No. 293 (attached as Tab 11).

On March 2, 2022, the bankruptcy court entered the 2022 Memorandum-Opinion-Order ordering two things: (1) "that the amount of Unpaid Employer Contributions, pursuant to KRS 61.510 is $21,072,139.22, per the Stipulation of KERS and Seven Counties" and (2) "that the Motion of Plaintiff [KERS] for Entry of Final Judgment on Remand from the Sixth Circuit, be and hereby is, **DENIED**." 2022 Memorandum-Opinion-Order at 5. The bankruptcy court's rationale for not adjudicating the issues on remand in accordance with the mandate was as follows:

[5] The bankruptcy court ultimately ruled that the parties' reservations of rights in the Stipulation, which only meant that they had not agreed on any other matters, meant the bankruptcy court could not decide those matters.

> Due to the expressed reservation of rights of the parties in the Stipulation, as well as the mandate on remand by the Sixth Circuit and the Order of the District Court, this Court cannot enter a final judgment herein as requested by KERS in its Motion for Entry of Final Judgment on Remand from the Sixth Circuit (ECF No. 270). The Court deems that KERS' request for a final judgment goes beyond the Sixth Circuit's mandate on remand. Issues remaining to be determined include all matters referenced above in the expressed reservation of rights by the parties in the Stipulation.

2022 Memorandum-Opinion-Order at 5 (see Tab 3 hereto).

The bankruptcy court thereby interpreted this Court's mandate on remand in a way that absolved it from entering the order requiring Seven Counties to pay, even though KERS and Seven Counties had stipulated to the principal amount of statutory employer contributions that should have been paid during bankruptcy, and even though the July 2020 Opinion clearly mandated that the bankruptcy court be the one to order Seven Counties to pay. *Ky. Emps. Ret. Sys.*, 823 F. App'x at 306. Further, KERS presented largely uncontested evidence concerning the statutory interest KERS must charge on past-due employer contributions, pursuant to K.R.S. § 61.675(3)(b) (eff. July 15, 2010), which is an additional $9,393,262.95 through June 30, 2021. *See* Tr. of Evid. Hr'g 2/22/22 at 9:25-25:25.[6]

[6] Seven Counties did not dispute the interest calculation. Instead, it made legal argument that a 2019 amendment to K.R.S. § 61.675(3)(b), which changed "shall" to "may" with respect to interest to be added by the Board on delinquent contributions, should be applied. Tr. of Evid. Hr'g 2/22/22 at 27:4-16, 30:13-16, 31:6-12.

Notwithstanding this record, the bankruptcy court determined not to order Seven Counties to pay its statutory contribution obligations KERS, or to enter a final judgment. 2022 Memorandum-Opinion-Order at 4-5.

The bankruptcy court instead concluded that "KERS' request for a final judgment [went] beyond the Sixth Circuit's mandate on remand." 2022 Memorandum-Opinion-Order at 5. This approach squarely contradicted this Court's July 2020 Opinion and its mandate, was a failure to exercise jurisdiction, and has indefinitely forestalled KERS from obtaining a final judgment ordering Seven Counties to pay its statutory employer contributions, plus interest, to KERS.

2. Appeal from the Bankruptcy Court's Ruling on Remand

On March 15, 2022, KERS filed a notice of appeal of the bankruptcy court's ruling and, as a precautionary matter, a motion for leave to appeal. *See* Mot. of Pl. KERS for Leave to Appeal Under 28 U.S.C. § 158(a)(3), Adv. Pro. No. 13-03019 (Bankr. W.D. Ky. Mar. 15, 2022), ECF No. 288 (attached as Tab 12). On March 27, 2023, the district court issued the 2023 Memorandum and Order in which it cited "ample Sixth Circuit precedent" that indicates the bankruptcy court's interpretation of the scope of the remand—deciding the scope was extremely limited—was in error. 2023 Memorandum and Order at 4 & 4 n.1 (see Tab 4 hereto). But the district court also found the bankruptcy court's ruling to be interlocutory and denied leave to appeal. The district court concluded the

bankruptcy court had not finished its job, suggested it was wrong to have not finished the job, but did not require the bankruptcy court to finish its job.

The bankruptcy court's ruling on remand was interpreted by the district court to be an interlocutory order that "left several issues related to that [principal] amount" unresolved, "including KERS's entitlement to statutory interest" and "whether Seven Counties should be ordered to pay." 2023 Memorandum and Order at 2-3. The bankruptcy court denied KERS' Motion for Entry of Final Judgment and decided not to adjudicate the issues beyond just ordering "the amount of Unpaid Employer Contributions, pursuant to KRS 61.510 is $21,072,139.22, per the Stipulation of KERS and Seven Counties." 2022 Memorandum-Opinion-Order at 5. The district court acknowledged this was a problem, but rather than address it left that erroneous decision in place. This has created a conundrum in which neither the bankruptcy nor district courts is going to carry out this Court's mandate, absent the bankruptcy court *sua sponte* revisiting its prior ruling and reversing course, a seemingly unlikely result.

3. Appeal from The Order Confirming Seven Counties' Plan

To further complicate matters, there is a separate but closely related appeal which has been stayed pending the outcome of this appeal. Following the 2014 Opinion, Seven Counties submitted a Disclosure Statement for Plan of

Reorganization (ECF No. 569) (the "Disclosure Statement") and later proposed a First Amended Plan of Reorganization (ECF No. 600) (the "Plan") predicated entirely upon the conclusion that Seven Counties could withdraw from KERS: "The Debtor has premised the Plan on the [2014] Opinion becoming a Final Order, or that an order terminating its obligations to make required employer contributions to KERS and/or discontinuing Seven Counties' designation as a participant in KERS will become a Final Order." Disclosure Statement at 37, § 7.2(B), Case No. 13-31442 (Bankr. W.D. Ky. Oct. 6, 2014), ECF No. 569 (attached as Tab 13). On January 6, 2015, over the objections of KERS, the bankruptcy court confirmed the Plan.[7]

KERS and the Board had tried to stop the Plan confirmation process through filing a petition for writ of prohibition with this Court. *See* Petition for Writ of Prohibition, Case No. 14-6482 (6th Cir. Dec. 9, 2014), Doc. 1-2. That petition was denied on the basis that there was already a pending appeal from the bankruptcy court's 2014 Opinion, as well as a pending request for a direct appeal and a potential future appeal from an order confirming the plan, which could serve as "adequate means to obtain the relief sought." Order, Case No. 14-6482 (6th Cir. Jan. 8, 2015), Doc. 3-2 (citing *In re Prof'ls. Direct Ins. Co.*, 578 F.3d 432, 437 (6th

[7] *See* Order and Order Confirming Debtor's First Am. Plan of Reorg, Case No. 13-31442 (Bankr. W.D. Ky. Jan. 6, 2015), ECF Nos. 623 and 624 (together, the "Confirmation Order").

Cir. 2009)) (attached as Tab 15). On February 12, 2015, just a month after the appeal from the Confirmation Order was filed, that appeal was stayed pending the outcome of the appeals of the 2014 Opinion. *See* Order, Case No. 3:15-cv-75 (W.D. Ky. Feb. 12, 2015), D.N. 23 (attached as Tab 16).

Following entry of the July 2020 Opinion, KERS quickly moved to reverse the Confirmation Order because the law of the case and mandate established by the July 2020 Opinion meant that "the cornerstone" of Seven Counties' plan—the ability to withdraw from KERS—had been reversed, such that "the entire Plan collapses." Mot. of Appellants to Reverse Order Confirming Plan Pursuant to Sixth Circuit's Mandate, Case No. 3:15-cv-75 (W.D. Ky. Oct. 19, 2020), D.N. 36. Ultimately, however, the district court entered an order that continued the prior stay of the appeal of the Confirmation Order "until the bankruptcy court resolves the calculation of contributions identified by the Sixth Circuit." Order at 4, Case No. 3:15-cv-75 (W.D. Ky. Aug. 27, 2021), D.N. 46 (the "2021 Order") (attached as Tab 17).

The district court, in continuing the stay of the appeal of the Confirmation Order, characterized the July 2020 Opinion and its effect upon the remaining proceedings before the district court as follows:

> This complex procedural background informs the Court's consideration of the appellants' pending motion to reverse the order or set the briefing schedule. At this stage, the bankruptcy court has not yet ruled how much

> Seven Counties must pay KERS in contributions. (*See* No. 13-03019-jal). This ruling might impact the Court's evaluation of whether the confirmation plan should be reversed. Given that the appeal of the order confirming the plan has already been stayed to allow for a complete resolution of the issues in the related proceeding (D.N. 23, PageID # 996), it makes little sense to set this appeal for briefing until the bankruptcy court determines the amount that Seven Counties owes KERS in contributions. The appeal of the order confirming the plan will therefore remain stayed until the bankruptcy court resolves the calculation of contributions identified by the Sixth Circuit. *See Ky. Emps. Ret. Sys.*, 823 F. App'x at 306.

2021 Order at 3-4 (footnote omitted). The district court also mapped out a process for the efficient resolution of the remaining matters, writing:

> If the bankruptcy court's decision [on remand from the July 2020 Opinion] is appealed, that appeal will be considered alongside this appeal to reduce unnecessary costs and facilitate judicial economy by considering the remaining issues together with a complete record from the bankruptcy court.

Id. at 4 (footnote omitted). But that has not happened.

On April 3, 2023, the Magistrate Judge for the district court ordered that the appeal of the Confirmation Order would remain stayed pending further order "for the same reasons set forth in the Court's August 27, 2021, Order," and the parties "shall file a joint status report on or before **June 2, 2023**, regarding the status of the related bankruptcy proceeding (No. 13-03019) and their joint or several

proposals regarding the continued stay of the case." Order, Case No. 3:15-cv-75 (W.D. Ky. Apr. 3, 2023), D.N. 60 (attached as Tab 18).

D. Separate Notice of Appeal

In addition to this petition, KERS has contemporaneously filed a Notice of Appeal of the district court's 2023 Memorandum and Order with the Clerk of the district court. *See* Notice of Appeal to the United States Court of Appeals for the Sixth Circuit, Case No. 3:22-cv-168 (W.D. Ky. Apr. 26, 2023), D.N. 19. The actual effect of the bankruptcy court's 2022 Memorandum-Opinion-Order was of a final judgment, leaving no further proceedings to occur and therefore no opportunity for KERS to obtain relief consistent with this Court's July 2020 Opinion and mandate. As a result, KERS submits that it was error for the district court to determine that the 2022 Memorandum-Opinion-Order was not final, and there should be a right of appeal from that ruling. *See, e.g.*, *Harrington v. Mayer (In re Mayer)*, 28 F.4th 67, 71-72 (9th Cir. 2022) (applying *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 140 S.Ct. 582, 205 L.Ed.2d 419 (2020), concluding the bankruptcy court's order denying stay relief without prejudice was final and appealable, and reversing the district court's order denying the motion for leave to appeal); *see also*, *In re Dow Corning Corp.*, 255 B.R. 445, 472 (E.D. Mich. 2000) (holding it is the effect of the trial court's ruling that determines its appealability).

LAW AND ARGUMENT

A. Overview

KERS' right to a final judgment in the KERS Adversary Proceeding in accordance with the July 2020 Opinion and mandate remains indefinitely forestalled. The bankruptcy court and district court's recent rulings have done nothing to advance the ultimate resolution of the litigation between KERS and Seven Counties. Quite to the contrary, those rulings have mired this litigation in numerous further procedural road blocks which continue to prevent KERS from obtaining the relief called for in this Court's July 2020 Opinion and mandate. Accordingly, KERS has filed this Petition seeking an extraordinary writ to both assist in carrying out the prior mandate (this Court's past jurisdiction), as well as to protect its potential future jurisdiction and KERS' appellate rights.

B. Standard to Issue a Writ

The All Writs Act permits this Court to issue a writ of mandamus. 28 U.S.C. § 1651(a); *Smoot v. Fox*, 353 F.2d 830, 833 (6th Cir. 1965). It enables this Court to issue writs " 'in aid of its existing jurisdiction or in aid of its future appellate jurisdiction.' " *In re Syncora Guarantee Inc.*, 757 F.3d 511, 515 (6th Cir. 2014) (citing *Blay v. Young*, 509 F.2d 650, 651 (6th Cir. 1974). Moreover, a writ of mandamus is appropriate "to ensure that its prior mandate is enforced and effective." Edward H. Cooper (Wright & Miller), 18B Fed. Prac. & Proc. Juris.

§ 4478.3—Law of the Case—Mandate Rule (2d ed. Apr. 2021); *see also*, *In re Fed. Communications Comm'n*, 217 F.3d 125, 133 (2d Cir. 2000) (holding mandamus is appropriate "to assure that 'the terms of the mandate [are] scrupulously and fully carried out,' and that the inferior court's actions on remand [are] not . . . inconsistent with either the express terms of the spirit of the mandate" (citing *General Atomic Co. v. Felter*, 436 U.S. 493, 497 (1978) and quoting *In re Ivan Boesky Sec. Litig. (Kidder, Peabody & Co. v. Maxus Energy Corp.)*, 957 F.2d 65, 69 (2d Cir. 1992)). And this Court may issue a writ "to a lower court in appropriate circumstances." *In re Sutton*, 652 F.3d 678, 679 (6th Cir. 2011) (citations omitted).

The Supreme Court of the United States as well as this Court have observed that " '[t]he traditional use of the writ of mandamus has been to confine a lower court to lawfully exercise its prescribed jurisdiction or compel it to exercise its authority when it is its duty to act.' " *In re King World Productions, Inc.*, 898 F.2d 56, 58 (6th Cir. 1990) (quoting *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26, 63 S.Ct. 938, 87 L.Ed. 1185 (1943)); *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380 (2004).

In the present circumstance, a writ of mandamus is warranted to either proceed with entry of the final judgment that will carry out this Court's prior July 2020 Opinion, or to compel the bankruptcy court to exercise its authority to do so.

See, e.g., *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 352-53 (1976); *McClellan v. Young*, 421 F.2d 690, 691 (6th Cir. 1970). Pursuant to the law of the case doctrine and the mandate rule, upon remand a trial court is bound to "proceed in accordance with the mandate and the law of the case as established by the appellate court." *Hanover Ins. Co. v. Am. Eng'g Co.*, 105 F.3d 306, 312 (6th Cir. 1997) (quoting *Petition of U.S. Steel Corp.*, 479 F.2d 489, 493 (6th Cir. 1973)). The trial court is required to "implement both the letter and the spirit" of the appellate court's mandate, "taking into account the appellate court's opinion and the circumstances it embraces." *Brunet v. City of Columbus*, 58 F.3d 251, 254 (6th Cir. 1995). A lower court "can choose to follow the mandate, or it can be compelled to follow the mandate by a writ of mandamus or second appeal." *In re Fraschilla*, 235 B.R. 449, 461 (B.A.P. 9th Cir. 1999) (dissent) (citing *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 98 S.Ct. 702, 54 L.Ed.2d 659 (1978) (noting that a court may be compelled to give full effect to mandate by writ of mandamus)).

In deciding whether to grant a writ, this Court has taken "a flexible approach," which considers the following factors, but has " 'never required that every element be met in order for mandamus to issue' ":

> (1) whether the party seeking the writ has adequate other means to attain the desired relief, (2) whether the petitioner will be irreparably damaged or prejudiced if the writ is not granted, (3) whether the district court's order is clearly erroneous as a matter of law, (4) whether the district court's order incorporates an oft-repeated

> error or manifests a persistent disregard of the federal rules, and (5) whether the district court's order raises new and important problems, or issues of law of first impression.

Syncora, 757 F.3d at 515 (quoting *In re Lott*, 424 F.3d 446, 449 (6th Cir. 2005); quoting *In re Perrigo Co.*, 128 F.3d 430, 435 (6th Cir. 1997) (citing *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 304 (6th Cir. 1984)).

1. No Other Adequate Means

In this case, the first element is satisfied because, following entry of the bankruptcy court's 2022 Memorandum-Opinion-Order, KERS timely filed a notice of appeal and a motion for leave to appeal with the district court. And on March 27, 2023, the district court entered its 2023 Memorandum and Order denying leave to appeal the 2022 Memorandum-Opinion-Order as interlocutory, even though the district court highlighted the error in the bankruptcy court's interpretation of the remand and, by implication, the bankruptcy court's failure to carry out the mandate. As a result, KERS is in the unusual situation in which it appears there might be no other adequate means (other than a writ) to obtain a final judgment.

The 2022 Memorandum-Opinion-Order indicates the bankruptcy court has no intention of doing (and does not believe it can do) anything further to carry out the mandate—to exercise its "prescribed jurisdiction" on remand from this Court. And the district court declined to exercise its discretion to correct that error, even though it recognized the error. As noted above and as discussed more fully at

pages 27 to 31 below, KERS has filed a separate Notice of Appeal from the district court's 2023 Memorandum and Order. However, if it is ultimately determined that the 2023 Memorandum and Order is not a final appealable order, then KERS's only remaining option would be a writ. *See, e.g.*, *Gibson v. Kassover (In re Kassover)*, 343 F.3d 91, 92, 96 (2d Cir. 2003) (holding that "28 U.S.C. § 1292(a)(1) does not vest us with jurisdiction to review a district court's exercise of discretion in denying leave to appeal an interlocutory order of a bankruptcy court, including injunctions, under 28 U.S.C. § 158(a)(3)," but noting that "denial of leave to appeal an interlocutory order of a bankruptcy court . . . may still be subject to a petition for a writ of mandamus." (citing *Richardson Greenshields Sec., Inc. v. Lau*, 825 F.2d 647, 652 (2d Cir. 1987)).

Seeking a certification by the district court for an interlocutory appeal would be futile and therefore is an inadequate remedy. This Court has previously held that the failure to seek an interlocutory appeal, when doing so would not be "fruitful," does not preclude mandamus relief. *Syncora*, 757 F.3d at 516 n.2 (citing *In re Chimenti*, 79 F.3d 534, 538–39 (6th Cir. 1996)). Moreover, KERS did seek an appeal to the district court, which was denied as interlocutory.[8] Because the standard for granting an interlocutory appeal from district court under 28 U.S.C.

[8] KERS asserts it has a right of appeal from the 2022 Memorandum-Opinion-Order as a final order; however, KERS filed its motion for leave to appeal as a precautionary matter.

§ 1292(b) is the same standard used for interlocutory appeals from bankruptcy courts under 28 U.S.C. § 158(a)(3)[9], asking the district court to certify an interlocutory appeal to this Court, after it already declined to grant leave to hear an appeal from the bankruptcy court, would have been futile.

2. Irreparable Damage or Prejudice

In this case, the bankruptcy court's refusal to address the critical issues following the trial after remand should be considered final for purposes of appeal to the district court. The district court, however, has since determined that it was interlocutory because the bankruptcy court did not decide all the remanded issues. It is precisely that failure to carry out the mandate, which the district court left in place, that has created the present conundrum in which it appears neither lower court will take any further action. Only a successful appeal from the district court's ruling, or a writ, which permits this Court to reverse and correct this violation of the mandate will satisfactorily protect KERS's rights based on this Court's July 2020 Opinion. Absent the issuance of a writ, KERS will be irreparably harmed to the extent it is not able to obtain a final judgment in the KERS Adversary; thus, meeting the second element of the *Bendectin* writ analysis.

[9] *Simon v. Amir (In re Amir*), 436 B.R. 1, 8 (B.A.P. 6th Cir. 2010).

A final ruling on the remanded issues will also protect this Court's future jurisdiction over KERS's appeal from the Confirmation Order on Seven Counties' Plan. The district court has stayed that appeal through successive orders since February 12, 2015, just a month after that appeal was filed, as detailed at pages 13-16 above. Thus, so long as the issues remanded—the ruling on "how much Seven Counties must pay KERS in contributions"—are not resolved (and the district court has not acted to advance that resolution), the longer it may be until the district court takes up the Confirmation Order appeal. That is a problem because not only should Seven Counties be ordered to pay its employer contribution obligations that accrued during its bankruptcy (the issue in the KERS Adversary), but it should also be currently participating in and performing all of its statutory obligations to KERS from and after February 5, 2015. In other words, the longer a final resolution is delayed, the longer Seven Counties continues to violate and fail to perform its statutory obligations to KERS, which the Kentucky Supreme Court and this Court have already decided must be performed. Thus, the second element identified in *Bendectin* is present.

3. The Bankruptcy Court 2022 Memorandum-Opinion-Order is Clearly Erroneous as a Matter of Law and Circumvents this Court's Mandate

The fundamental error is the bankruptcy court's refusal to order Seven Counties to pay its statutorily prescribed employer contribution obligations, in direct contradiction of this Court's mandate. The district court has already observed that the bankruptcy court's approach does not follow "ample" Sixth Circuit precedent. The failure to fully adjudicate the remanded issues in keeping with the letter and spirit of the July 2020 Opinion and mandate was erroneous. KERS seeks a writ to either have this Court carry out its own mandate, or to compel the bankruptcy court to do so.

The bankruptcy court's decision to not rule on the issues remanded to it is the type of "judicial usurpation of power" that a writ exists to address, particularly when the ruling (compounded by the district court's decision not to review it on appeal) effectively denies relief to KERS contrary to this Court's July 2020 Opinion. Although KERS respectfully disagrees with the conclusion that the bankruptcy court's 2022 Memorandum-Opinion-Order is not final for the purpose of taking an appeal—as evidenced by the need to file an appeal from the district court's analysis of that issue and to file this mandamus petition—the failure to carry out this Court's mandate is the core problem.

Given that, on remand, the parties stipulated to the principal amount of employer contributions that should have been paid (solving the "math" problem), and presented largely undisputed evidence on the statutory interest calculations, the record has been made. All that remains to be done is for a court to enter the final judgment consistent with this Court's July 2020 Opinion. And because of the confusion and delay in the courts below, it would be best for this Court to simply rule upon these issues and enter judgment. This Court has previously held that it has "discretion to decide whether to address an issue that the district court did not reach if the question is purely a legal one and the record has been fully developed prior to appeal," and in making this decision the Court "should consider whether the resolution of the issue is clear and whether injustice might otherwise result." *Blue Cross & Blue Shield Mut. of Ohio v. Blue Cross and Blue Shield Ass'n*, 110 F.3d 318, 335 (6th Cir. 1997) (citations omitted). Although this is not the ordinary course, this is no ordinary case, and in all likelihood remanding this matter to the courts below will spawn even more delay with no assurance that the mandate will ever actually be carried out.

Because the parties have stipulated to and had a full and fair opportunity to offer all evidence relevant to the issues remanded in the KERS Adversary; because there are no unresolved factual disputes; and because injustice would result if this Court does not carry out the mandate, this Court should proceed to enter judgment

in favor of KERS on count three of its complaint ordering Seven Counties to pay and perform its statutory obligations. *See id.* at 335-36 (" 'Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, . . . or where 'injustice might otherwise result.' ' " *Singleton v. Wulff*, 428 U.S. 106, 121 [] (1976) (quoting *Hormel v. Helvering*, 312 U.S. 552, 557 [] (1941)) quoting *United States v. Baker*, 807 F.2d 1315, 1321 (6th Cir. 1986)).

Moreover, as in *Syncora*, "[t]he deprivation of meaningful and timely appellate review itself constitutes substantial and irreparable prejudice[.]" *Syncora*, 757 F.3d at 515 (citing *In re Bendectin*, 749 F.2d at 304). And the bankruptcy court's ruling, due its effect and denial of KERS's request for entry of a final judgment in violation of the mandate, coupled with the fact that the bankruptcy court does not intend to conduct any further proceedings, is both final and erroneous. *See In re Wohleber*, 833 F. App'x 634, 639 (6th Cir. 2020); *Card v. Principal Life Ins. Co.*, 17 F.4th 620, 623 (6th Cir. 2021) (holding that if a court rules it lacks jurisdiction, that reasoning "leaves no doubt that the court 'was finished with this case.' " (quoting *Kowalski v. Boliker*, 893 F.3d 987, 994 (7th Cir. 2018)); *Sunshine Heifers, LLC v. Citizens First Bank (In re Purdy)*, 870 F.3d 436, 442-43 (6th Cir. 2017) ("When a superior court determines the law of the case and issues its mandate, a lower court is not free to depart from it." (citing *Waste Mgmt.*

of Ohio, Inc. v. City of Dayton, 169 F. App'x 976, 986 (6th Cir. 2006)). Accordingly, the third and fourth factors of the *Bendectin* analysis are also present.

In the event this Court would ultimately determine the bankruptcy court's order was interlocutory and there is no right of appeal, KERS may have no option left other than to pursue its final judgment consistent with this Court's July 2020 Opinion by writ. No higher court will have reversed or instructed the bankruptcy court to take any action (notwithstanding the district court's acknowledgment of an error) and the bankruptcy court seems very unlikely to *sua sponte* reverse course on ordering Seven Counties to pay KERS. In other words, to the extent there ultimately is no appellate jurisdiction to review the bankruptcy court's 2022 Memorandum-Opinion-Order, then the only remaining option is for KERS to challenge the bankruptcy court's denial of a final judgment by writ. And rather than await the outcome of yet another appeal, KERS simultaneously files this mandamus petition in order to put all the issues before this Court, and because a writ is appropriate to ensure compliance with this Court's mandate.

C. Appeal of the District Court 2023 Memorandum and Opinion

The amount that Seven Counties has to pay KERS, consistent with this Court's July 2020 Opinion, is the natural conclusion of the KERS Adversary and a "discrete dispute" for purposes of appeal. However, the bankruptcy court denied a final judgment to KERS, did not state that its ruling was "without prejudice," and

did not state there would be any further proceedings or opportunity (in the bankruptcy court or elsewhere) for KERS to obtain a final judgment. Because the district court declined to intervene, the practical effect is that absent this Court reversing the ruling, this was the bankruptcy court's final word. Accordingly, the district court's ruling in the 2023 Memorandum and Order should be appealable as of right consistent with applicable circuit precedent. *See, e.g.*, *Huntington Nat'l Bank v. Richardson (In re Cyberco Holdings, Inc.)*, 734 F.3d 432, 437 (6th Cir. 2013) (citing *In re Dow Corning Corp.*, 86 F.3d 482, 488 (6th Cir. 1996) and holding that there was appellate jurisdiction under 28 U.S.C. § 158(d)(1) to address the BAP's decision to dismiss Huntington Bank's appeal because it was based on a finding that the bankruptcy court's orders "were interlocutory, nothing more" and thereby "fully resolved the appellate proceedings by deciding the jurisdictional question and left nothing for the bankruptcy court to do." (citing *Schwartz v. Kujawa (In re Kujawa)*, 323 F.3d 628, 629 (8th Cir. 2003)). As a result, KERS has filed a separate Notice of Appeal of the 2023 Memorandum and Order.

An order of an intermediate appellate court that leaves "nothing more for the bankruptcy court to do" is final for purposes of appeal. *Ritzen Grp., Inc.*, 140 S.Ct. at 592 (holding, on appeal from this Court, that a bankruptcy court's order denying relief from the automatic stay constitutes a final, immediately appealable order) (citing *Bullard v. Blue Hills*, 575 U.S. 496, 501, 135 S.Ct. 1686, 191 L.Ed.2d 621

(2015)). And with respect to the district court's 2023 Memorandum and Order, "[q]uestions of jurisdiction are legal questions," such that dismissal of an appeal is reviewed de novo. *Shapiro v. Woodberry (In re Woodberry)*, No. 21-1043, 2021 WL 6502178, at *1 (6th Cir. Nov. 1, 2021) (citing *Crider v. Dobbs (In re Crider)*, 205 F.3d 1339, No. 98-2376, 2000 WL 191823 (6th Cir. Feb. 10, 2000) (unpublished table decision)). Here, the district court's 2023 Memorandum and Order denied KERS's motion for leave to appeal and dismissed its appeal from the bankruptcy court's 2022 Memorandum-Opinion-Order without any mention of remand.

If this Court were to determine the district court was incorrect to conclude the bankruptcy court's order was interlocutory, then there is a right of appeal to this Court pursuant to 28 U.S.C. § 158(d). But given the ambiguity created by the conflicting lower court rulings, and due to the potential for the irreparable harm of those rulings precluding KERS from obtaining the relief to which this Court's July 2020 Opinion and mandate held KERS is entitled, KERS has filed both this mandamus petition and a notice of appeal. *See Gibson*, 343 F.3d at 92, 96.

The lower courts' rulings, if left in place, function like a de facto injunction that prevents KERS from obtaining a final judgment consistent with this Court's July 2020 Opinion, in violation of the mandate, such that appellate jurisdiction may also be appropriate pursuant to 28 U.S.C. § 1292(a)(1). *See, e.g.*, *In re*

Wheeling-Pittsburgh Steel Corp., 67 B.R. 735 (W.D. Pa. 1986); *Nosik v. Singe*, 40 F.3d 592, 596 (2d Cir. 1994); *In re Professional Sales Corp.*, 56 B.R. 753 (N.D. Ill. 1985) (bankruptcy court order designated as a temporary injunction was nonetheless appealable where order set on date for a hearing). KERS was denied relief on a significant issue, contrary to this Court's mandate, and was given no other opportunity to obtain relief before either the bankruptcy or district courts. Whether under 28 U.S.C. § 158(d), § 1291, § 1292(a)(1), or the *Gillespie* doctrine[10], considering that the outcome of the KERS Adversary also has a direct effect on the appeal from the Confirmation Order and Plan, which remains pending and continues to be stayed by the district court due to the status of the remand of the KERS Adversary, the rulings below should be considered final and reviewable for purposes of appeal. *See, e.g.*, *United States v. Lee*, 786 F.2d 951, 956 (9th Cir. 1986) ("[a] decision is final for purposes of appeal if an appeal is the only method of obtaining review." (citations omitted)). Moreover, the fact that even the district and bankruptcy courts cannot seem to agree on the scope of the remand, yet the district court did not instruct the bankruptcy court to revisit what it suggested was

[10] "In certain close cases where finality cannot be conclusively resolved, the [Sixth Circuit] has determined that the 'danger of denying justice by delay outweighs the inconvenience and costs of piecemeal review, particularly when the questions on appeal are fundamental to the further outcome of the case.' " *Vause v. Capital Poly Bag, Inc.*, 886 F.2d 794, 797 (1989) (quoting *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148 (1964)).

an erroneous view of the remand from this Court, indicates that there is definite and urgent need for this Court to intervene.

CONCLUSION

Neither lower court has granted relief to KERS consistent with this Court's July 2020 Opinion, or has identified any path forward or further proceedings toward that relief. On remand, the bankruptcy court declined to enter a final judgment ordering Seven Counties to pay KERS the undisputed principal and interest. Because the district court will not hear an appeal, this Court should grant this petition to ensure that its mandate is carried out.

For the foregoing reasons, this Court should grant a writ of mandamus which either (a) enters judgment in favor of KERS for the stipulated principal amount of $21,072,139.22 in unpaid employer contributions that accrued during the pendency of the bankruptcy, from April 6, 2013 to February 5, 2015, plus statutory interest at the actuarial rates of return in the amount of $9,393,262.95 as of June 30, 2021, plus interest continuing to accrue pursuant to K.R.S. § 61.675(3)(b) (2010) from and after that date, or (b) remands to the bankruptcy court with an explicit directive to enter such a final judgment in the KERS Adversary (No. 13-03019) against Seven Counties and in favor of KERS.

Respectfully submitted,

Dated: April 26, 2023

/s/ Daniel R. Swetnam

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Dated: April 26, 2023

By: */s/Daniel R. Swetnam*
Daniel R. Swetnam

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April, 2023, true and accurate copies of the foregoing *Petition for Writ of Mandamus* were sent by first-class U.S. Mail, postage pre-paid, to:

Honorable Joan A. Lloyd
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Honorable David J. Hale
U.S. District Court
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Louisville, KY 40202-2227

and was served by the Notice of Docket Activity sent by the ECF system and/or by email and first-class U.S. Mail, postage pre-paid, to the following persons:

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13.	Disclosure Statement for Plan of Reorganization Submitted by Seven Counties Services, Inc., Case No. 13-31442 (Bankr. W.D. Ky. Oct. 6, 2014), ECF No. 569
14.	[Intentionally omitted]
15.	Order, Case No. 14-6482 (6th Cir. Jan. 8, 2015), Doc. 3-2
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