

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION AT LONDON
CIVIL ACTION NO. 6:18-277-KKC**

DERIC LOSTUTTER,

PLAINTIFF,

v.

COMMONWEALTH OF KENTUCKY, ET AL.,

DEFENDANTS.

*** **

COMMONWEALTH OF KENTUCKY'S MOTION TO DISMISS

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), the Defendant, Commonwealth of Kentucky,¹ moves the Court to dismiss all claims brought against it by the Plaintiff, Deric Lostutter, in his Second Amended Complaint (DE 12).² A memorandum of law in support of this motion and a proposed order are attached.

¹ Lostutter filed his original complaint against only one named defendant, the "Commonwealth of Kentucky." (DE 1.) Lostutter later filed an amended complaint against the Commonwealth of Kentucky and added the Governor, Attorney General, and Parole Board Director, each in their official capacities. (DE 10.) Lostutter also named the Governor in his official capacity as a member of the Kentucky Parole Board, but such a designation is incorrect as the Governor is not a member of the board. *See* KRS § 439.320(1) (establishing membership of the board). Because Lostutter "is only suing the latter three defendants in their official capacities," "all of his claims are against the Commonwealth." (DE 13 at 1-2.) Therefore, the Court ordered service by the United States Marshal only on the "Commonwealth of Kentucky." (DE 13 at 3.) The named defendants interpret the Court's order to mean that all named defendants are consolidated as the "Commonwealth of Kentucky."

² Lostutter filed a Second Amended Complaint without complying with the requirement of Fed. R. Civ. P. 15(a)(2) that he first secure consent of the opposing parties or the Court's leave. (*See* DE 12.) Through this motion, the Commonwealth provides notice that it consents to Lostutter's filing of his Second Amended Complaint, and the Commonwealth's motion to dismiss is directed to the claims contained within the Second Amended Complaint (and to the extent required, all other complaints).

Respectfully submitted,

/s/ Kristin L. Wehking

Kristin L. Wehking
Office of Legal Services
Justice and Public Safety Cabinet
125 Holmes Street
Frankfort, Kentucky 40601
(502) 564-7554
Kristenl.wehking@ky.gov

*Counsel for Defendant
Commonwealth of Kentucky*

CERTIFICATE OF SERVICE

On November 29, 2018, I electronically filed this Motion to Dismiss through the ECF system, and I mailed this Motion to Dismiss and the notice of electronic filing, via first-class U.S. mail, postage prepaid, to:

Deric Lostutter
26 Saylor Street
Manchester, Kentucky 40962

/s/ Kristin L. Wehking
Counsel for Defendant