

05/16/2022 12:01:18 PM
JEFF@WALTONLCM.COM

FILED
MAY 16 2022
FRANKLIN CIRCUIT COURT
AMY FELDMAN, CLERK

RECEIVED
MAY 16 2022
FRANKLIN CIRCUIT COURT
AMY FELDMAN, CLERK

**COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION ONE
CASE NO. 21-CI-00645**

TIA TAYLOR, et al.

PLAINTIFFS

v.

KKR & CO. L.P., et al.

DEFENDANTS

AFFIDAVIT FOR DESIGNATION OF SPECIAL JUDGE

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION1

THE RELATED ACTIONS PENDING BEFORE JUDGE SHEPHERD4

 A. The KKR & Co. Inc. Parties and Their Personal-Jurisdiction
 Defenses.....5

 B. The *Mayberry* Case.....5

 C. The *Taylor* Cases7

 D. The Declaratory Judgment Case.....8

JUDGE SHEPHERD’S CAMPAIGN WEBSITE PROMINENTLY DISPLAYS AN
ARTICLE DESCRIBING HIS DENIAL OF DEFENDANTS’ MOTIONS TO
DISMISS THE MAYBERRY CASE.....11

JUDGE SHEPHERD’S OPINION & ORDER IN THE DECLARATORY
JUDGMENT CASE.....15

JUDGE SHEPHERD’S MISTREATMENT OF KKR & CO. INC. WAS
PREJUDICIAL AND CAUSED NUMEROUS FACTUAL ERRORS21

CONCLUSION: JUDGE SHEPHERD WILL NOT GIVE THE KKR & CO. INC.
PARTIES A FAIR AND IMPARTIAL TRIAL23

ADDENDUM: FACTUAL ERRORS IN JUDGE SHEPHERD’S OPINION &
ORDER.....27

 A. Judge Shepherd Treats KKR & Co. Inc. and Kohlberg Kravis
 Roberts & Co. L.P. as the Same Entity.....27

 B. Judge Shepherd Attributes Lobbyist Registrations by Separate
 Companies to KKR & Co. Inc.29

 C. Judge Shepherd Misinterprets the PharMerica/BrightSpring
 Transactions30

 D. Judge Shepherd Incorrectly Asserts that Prisma Employees Are
 “Dual Employees” of KKR & Co. Inc.....31

 E. Judge Shepherd Infers a Non-Existent Agency Relationship
 from a PowerPoint About a Different Company33

F. Judge Shepherd’s Errors Led Him to a Baseless Prejudgment of
an Affiant’s Honesty.35

INDEX OF EXHIBITS

Exhibit #	Description
1	March 24, 2022 Opinion and Order in <i>Commonwealth v. KKR & Co. Inc. et al.</i> , Franklin Circuit Court 21-CI-00348
2	Index of Documents Judicially Noticed by Judge Shepherd
3	Commonwealth's August 16, 2021 Motion to Amend in <i>Commonwealth v. KKR & Co. Inc. et al.</i> , Franklin Circuit Court 21-CI-00348
4	KKR & Co. Inc.'s September 7, 2021 Motion to Dismiss for Lack of Personal Jurisdiction and Memorandum in Support in <i>Commonwealth v. KKR & Co. Inc. et al.</i> , Franklin Circuit Court 21-CI-00348
5	Commonwealth's September 7, 2021 Motion for Summary Judgment and for an Expedited Hearing in <i>Commonwealth v. KKR & Co. Inc. et al.</i> , Franklin Circuit Court 21-CI-00348
6	Commonwealth's October 4, 2021 Response to KKR & Co. Inc.'s Motion to Dismiss for Lack of Personal Jurisdiction in <i>Commonwealth v. KKR & Co. Inc. et al.</i> , Franklin Circuit Court 21-CI-00348
7	KKR & Co. Inc.'s October 4, 2021 Response to Motion for Summary Judgment and for an Expedited Hearing in <i>Commonwealth v. KKR & Co. Inc. et al.</i> , Franklin Circuit Court 21-CI-00348
8	January 18, 2022 Reply Memorandum of Henry Kravis, George Roberts, and KKR & Co. Inc. In Support of Their Motion to Dismiss for Lack of Personal Jurisdiction and on Other Grounds in <i>Taylor, et al. v. KKR & Co., L.P., et al.</i> , Franklin Circuit Court 21-CI-00645
9	February 22, 2018 Affidavit of Christopher Lee
10	<i>Commonwealth of Kentucky ex rel. Beshear v. Dickerson</i> , No. 19-CI-00425, Order of Disqualification and Appointment (Sept. 27, 2019)
11	Transcript of April 17, 2018 Hearing in <i>Mayberry, et al. v. KKR & Co., L.P., et al.</i> , Franklin Circuit Court 17-CI-01348
12	Cynthia Gray, <i>Key Issues in Judicial Ethics: Commenting on Pending Cases</i> , 19 (Am. Judicature Soc'y 2001)

Concerned by recent discovery of extra-judicial conduct that they will not receive a fair and impartial trial unless they act now, KKR & Co. Inc., Henry Kravis, and George Roberts (the “KKR & Co. Inc. Parties”), defendants in multiple related cases pending before Phillip J. Shepherd, Circuit Judge of the Franklin Circuit Court, submit this affidavit of their counsel Barbara Edelman, Esq., under Section 26A.020 of the Kentucky Revised Statutes, for designation of a special judge to replace Judge Shepherd.

1. My name is Barbara Edelman. I am admitted to practice law in the Commonwealth of Kentucky and am a partner in Dinsmore & Shohl LLP. Since December 2017, I have served as counsel to the KKR & Co. Inc. Parties in this matter and in multiple related lawsuits pending before Judge Shepherd in the Franklin Circuit Court. I have personal knowledge of the facts stated in this affidavit.

INTRODUCTION

2. Section 26A.020(1) authorizes the Chief Justice to replace “a judge of any Circuit or District Court” upon receipt of a party’s “affidavit that the judge will not afford him a fair and impartial trial.” A related statute, Section 26A.015, requires that a judge recuse whenever his “impartiality might reasonably be questioned from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances.” *Abbott, Inc. v. Guirguis*, 626 S.W.3d 475, 484 (Ky. 2021); *see Commonwealth of Kentucky ex rel. Beshear v. Dickerson*, No. 19-CI-00425, Order of Disqualification and Appointment, at 8 (Sept. 27, 2019) (Minton, C.J.) (applying the “impartiality might reasonably be questioned” standard to order disqualification under Section 26A.020). *See Ex. 10 (Dickerson Order)*.

3. A reasonable observer would question Judge Shepherd’s impartiality based on the following facts and circumstances:

a. Judge Shepherd's campaign website prominently displays, alongside a "DONATE" button, an excerpt of a news article reporting on his refusal to dismiss a "high profile" case against "Wall Street money managers" who allegedly "caused Kentucky Retirement Systems to gamble as much as \$1.5 billion on risky hedge fund investments."

b. Against the backdrop of his campaign, Judge Shepherd has taken an extraordinary series of actions to summarily render judgment against the KKR & Co. Inc. Parties in a manner that runs afoul of the Code of Judicial Conduct, the Rules of Civil Procedure and Evidence, and fundamental principles of Due Process and denied the KKR & Co. Inc. Parties a fair and impartial trial;

c. In a March 24, 2022 Opinion & Order in a related case (Exhibit 1), Judge Shepherd *sua sponte* entered summary judgment against KKR & Co. Inc. on its personal jurisdiction defense, even though the plaintiff in that related case, represented by Attorney General Cameron, *had not sought summary judgment* on this issue;

d. That summary judgment against KKR & Co. Inc. was based entirely on Judge Shepherd's own internet searches, in which he "gathered," *id.* at 9, scores of documents from websites of all descriptions, reviewed them in chambers, drew incorrect inferences from them, judicially noticed those incorrect inferences as "facts," and ordered summary judgment based on those "facts," all with *no prior notice* to KKR & Co. Inc., and no opportunity for KKR & Co. Inc. to learn about his independent fact-gathering, to object to the highly unusual *sua sponte* proceeding, or to correct the incorrect inferences;

e. In the same Opinion & Order, again without notice to KKR & Co. Inc., Judge Shepherd found that the documents he gathered discredited the sworn affidavit of a KKR & Co. Inc. officer. That affidavit accurately attested that Defendant KKR & Co. L.P. is a publicly-

traded company that has no Kentucky property and no Kentucky employees and never conducted any business in Kentucky relating to the subject matter of this case.¹ Yet, according to Judge Shepherd's *in camera* analysis, the affidavit was "wholly inconsistent" with the "links/archived snapshots" that Judge Shepherd had "gathered" on the internet and was therefore not "reliable." Ex. 1, at 9, 38. The lengths to which Judge Shepherd went to try to discredit the KKR & Co. Inc. officer's sworn affidavit make it impossible for any reasonable observer to believe that Judge Shepherd could ever give KKR & Co. Inc.'s statements and positions in this case the credibility that they deserve;

f. Judge Shepherd's independent research, his factfinding based on it, and his proceeding without notice to a party to an adversarial proceeding in his court are contrary to Sections 26A.015 and 26A.020 of the Kentucky Revised Statutes, the Code of Judicial Conduct, the Rules of Civil Procedure and Evidence, and basic principles of Due Process;

g. The Opinion & Order's "findings," based on the judge's independent internet research, are factually wrong; they are the product of Judge Shepherd's incorrect assumptions regarding documents he found online—as I describe in more detail in the Addendum to this affidavit;

h. In the Opinion & Order, Judge Shepherd stated that his in-chambers research had "definitively resolve[d]" the question of personal jurisdiction over KKR & Co. Inc. in *all* of the related cases pending before him, including the instant action, in which he anticipated ruling in the "near future," Ex. 1, at 8-9; and

¹ As the caption indicates, this action was originally commenced against KKR & Co. L.P. Effective July 1, 2018, KKR & Co. L.P. was converted into KKR & Co. Inc., which is the current defendant in this action.

i. Judge Shepherd's campaign website, which includes a prominent link for campaign donations on the same page, also features an inflammatory news article about pending litigation, which a reasonable observer would view as a commitment to a particular result and which would raise a serious question about Judge Shepherd's ability to be impartial.

4. Because these facts and circumstances establish that Judge Shepherd "will not afford [KKR & Co. Inc.] a fair and impartial trial," I am making this affidavit in support of the KKR & Co. Inc. Parties' request, made under KRS 26A.020(1), for the designation of a special judge to replace Judge Shepherd in this action and in the other related actions described below.

THE RELATED ACTIONS PENDING BEFORE JUDGE SHEPHERD

5. Since 2017, Judge Shepherd has presided over a series of interrelated lawsuits that concern decisions made by the Kentucky Retirement Systems ("KRS")² in 2011 to invest up to \$1.2 billion in three externally-managed portfolios of hedge fund investments. These lawsuits are identified in sections B, C, and D, immediately below, as the *Mayberry* Case, the *Taylor* Cases, and the Declaratory Judgment Case. I will refer to these lawsuits collectively as the "KRS Funds-of-Funds Cases."

6. KRS's "funds of hedge funds" investments earned hundreds of millions of dollars, net of all fees, during their lifetime. Each portfolio was managed in accordance with detailed investment guidelines established by KRS at the time of its investments. The investments met the "benchmarks" that KRS set in the governing contracts. The KRS Funds-of-Funds Cases allege that, despite their profitability, the investments were "unsuitable" for KRS; these suits contend that KRS would have done better if it had invested all its assets in the stock market instead.

² On April 1, 2021, KRS was restructured and renamed the Kentucky Public Pensions Authority ("KPPA"). For simplicity, this affidavit will refer to KPPA, KRS, and all funds managed by KRS collectively as "KRS."

A. The KKR & Co. Inc. Parties and Their Personal-Jurisdiction Defenses

7. The KKR & Co. Inc. Parties are not residents of Kentucky. Defendant KKR & Co. L.P., which in 2018 was converted into KKR & Co. Inc., is and has always been a *holding* company. It did not manage any of the “funds of hedge funds” that are at issue in these cases. Mr. Kravis and Mr. Roberts are the former Co-Chief Executive Officers, and currently the Co-Executive Chairmen, of KKR & Co. Inc.

8. From mid-2012 through late 2017, KKR & Co. Inc.’s predecessor, KKR & Co. L.P., was the indirect owner of the general partner of a partnership that indirectly owned one of the defendants in the KRS Funds-of-Funds Cases, Prisma Capital Partners L.P. (“Prisma”). KKR & Co. Inc. now indirectly owns a minority interest in Prisma.

9. Prisma is one of the investment advisers that KRS selected to manage one of the “funds of hedge funds” investments that are at issue in the KRS Funds-of-Funds Cases. KRS first invested with the Prisma-managed “fund of hedge funds” in 2011, more than a year before KKR & Co. L.P. had any legal connection to Prisma. Prisma is a separate defendant in each of the KRS Funds-of-Funds Cases. Prisma has not contested personal jurisdiction over it in these actions.

10. The KKR & Co. Inc. Parties have consistently asserted that the Kentucky courts lack personal jurisdiction over them in the KRS Funds-of-Funds Cases. There has never been discovery or any evidentiary hearing on the KKR & Co. Inc. Parties’ personal jurisdiction defense.

B. The *Mayberry* Case

11. The case originally captioned as *Mayberry v. KKR & Co. L.P.*, No. 17-CI-1348 is referred to herein as the “*Mayberry* Case.” It is the first-filed KRS Funds-of-Funds Case. The *Mayberry* case began in December 2017 as a “derivative” action by individual KRS members represented by law firms working on a contingent-fee basis.

12. The *Mayberry* plaintiffs alleged that many defendants—KRS trustees and officers, an actuarial firm, a law firm, investment management firms, and others—breached fiduciary duties and committed other torts by voting for, advising on, managing, or otherwise assisting KRS with the “funds of hedge funds” investments.

13. On November 30, 2018, Judge Shepherd denied Defendants’ CR 12 motions to dismiss the *Mayberry* Case. Judge Shepherd rejected Defendants’ argument that plaintiffs lacked constitutional standing because they had not been denied benefits and thus had suffered no concrete injury.

14. The KKR & Co. Inc. Parties had moved to dismiss the *Mayberry* complaint on multiple grounds, including for failure to allege a *prima facie* basis for exercising personal jurisdiction over them. That aspect of their motion was also denied. In that decision, Judge Shepherd stated that the KKR & Co. Inc. Parties would be permitted to “reassert” this defense of lack of personal jurisdiction later, in a motion for summary judgment, based on “facts established in pretrial discovery.” Nov. 30, 2018 Order, at 19; *see generally Powers v. Park*, 192 S.W.3d 439 (Ky. Ct. App. 2006) (affirming grant of summary judgment based on lack of personal jurisdiction).

15. A subset of the defendants filed a petition for a writ of prohibition to prevent Judge Shepherd from proceeding further with the case, on the ground that the Circuit Court lacked subject matter jurisdiction because the *Mayberry* plaintiffs did not have constitutional standing. On April 23, 2019, a three-judge Court of Appeals panel unanimously agreed, holding that the *Mayberry* plaintiffs lacked constitutional standing, granting the petition for writ of prohibition, and vacating Judge Shepherd’s November 2018 order denying the defendants’ motions to dismiss. Meanwhile, certain other defendants (former trustees and officers of KRS) filed an interlocutory appeal of the

denial of their defense of qualified immunity, which appeal was transferred to the Kentucky Supreme Court.

16. In July 2020, two-and-a-half years after *Mayberry* began, the Supreme Court unanimously held that Judge Shepherd's ruling on the motions to dismiss was erroneous, and ordered the case dismissed because the plaintiffs lacked constitutional standing. *Overstreet v. Mayberry*, 603 S.W.3d 244, 266 (Ky. 2020).

17. On remand, Judge Shepherd refused to dismiss the *Mayberry* Case. Instead, in December 2020—six months after the Supreme Court's decision—Judge Shepherd permitted the Commonwealth of Kentucky, represented by Attorney General Daniel Cameron, to file an “Intervening Complaint” on the same docket. The caption of the case was changed to *Commonwealth v. KKR & Co. L.P., et al.*, but the substantive allegations were, with few immaterial exceptions, cut-and-pasted from the earlier *Mayberry* complaint.

18. Defendants have now moved to dismiss the Commonwealth's First Amended Complaint in Intervention in this matter. These motions were fully briefed on October 29, 2021, but remain pending. The KKR & Co. Inc. Parties have again moved to dismiss for failure to allege a *prima facie* basis for exercising personal jurisdiction over them.

19. In the event the KKR & Co. Inc. Parties' motion to dismiss is denied, they anticipate renewing their personal-jurisdiction defense in a motion for summary judgment.

C. The *Taylor* Cases

20. In 2021, two new lawsuits were filed by a different group of individual KRS members (represented by another subset of the lawyers who brought the original *Mayberry* Case): a class action, *Taylor, et al. v. KKR & Co. L.P., et al.*, 21-CI-00020 (Franklin Cty. Cir. Ct.) (“*Taylor I*”), and this individual action, *Taylor, et al. v. KKR & Co. L.P., et al.*, 21-CI-00645 (“*Taylor II*,”

and collectively the *Taylor* Cases). Both of these new lawsuits contain substantially similar allegations as were made in the *Mayberry* Case, and both cases were assigned to Judge Shepherd.

21. *Taylor I* was removed to federal court because it was a putative class action that asserted a federal RICO claim. That case has been stayed pending the outcome of the *Mayberry* Case. See *Taylor, et al. v. KKR & Co., L.P., et al.*, No. 3:21-cv-00029-KKC (E.D. Ky.).

22. *Taylor II* is pending before Judge Shepherd. Defendants' motions to dismiss the *Taylor II* complaint were fully briefed as of January 18, 2022 but have not yet been decided. Here again, the KKR & Co. Inc. Parties have moved to dismiss for lack of personal jurisdiction.

D. The Declaratory Judgment Case

23. In February 2021—after the original *Mayberry* complaint was dismissed—KKR & Co. Inc. formally demanded indemnification of the defense costs it had incurred in that action (approximately \$2.6 million) from the private Delaware company that Prisma formed in 2011, at KRS's request, to hold the portfolio of hedge fund investments that Prisma would manage. This private company is named Daniel Boone Fund LLC. The company's LLC Agreement affords Prisma and any "Affiliates" of Prisma (defined to include controlling indirect equity holders such as KKR & Co. Inc.) the right to indemnification, "solely out of" Daniel Boone Fund LLC's assets, for costs incurred successfully defending themselves from claims arising from the management of Daniel Boone Fund LLC. That demand was sent from KKR & Co. Inc.'s offices in New York to Daniel Boone Fund LLC's representative in New York.

24. In April 2021, the Commonwealth of Kentucky, represented by Attorney General Cameron, filed *Commonwealth v. KKR & Co. Inc., et al.*, 21-CI-00348 (the "Declaratory Judgment Case"). That case was also assigned to Judge Shepherd. In the Declaratory Judgment Case, the Commonwealth seeks declaratory judgment that, among other things, the unambiguous indemnification obligations of Daniel Boone Fund LLC, set forth in the company's Delaware-law-

governed LLC Agreement, violate the Kentucky Constitution and are therefore void and unenforceable. KKR & Co. Inc., Prisma, and Daniel Boone Fund LLC are defendants in the Declaratory Judgment Case.

25. On July 12, 2021, KKR & Co. Inc. filed a motion to dismiss the Commonwealth's original complaint in the Declaratory Judgment Case. KKR & Co. Inc.'s motion focused on the Commonwealth's failure to allege a *prima facie* basis for exercising personal jurisdiction over KKR & Co. Inc. KKR & Co. Inc. supported its motion with a sworn affidavit from Christopher Lee, Esq., previously the Assistant Secretary of KKR & Co. L.P.'s general partner, currently the Assistant Secretary of its successor KKR & Co. Inc., and an attorney licensed in the State of New York. *See* Addendum, ¶¶ 26-29.

26. Mr. Lee's affidavit establishes that KKR & Co. L.P., like its successor KKR & Co. Inc., was a publicly-traded company that never maintained an office in Kentucky, never had employees who resided or worked in Kentucky, and never conducted any business in Kentucky relating to KRS or Prisma. His affidavit referred only to this *parent* holding company and not to any other KKR-affiliated entity. Ex. 9 (Lee Affidavit), ¶ 1 (defining "KKR" as "KKR & Co. L.P.," which is the legal predecessor of KKR & Co. Inc.). The Commonwealth's complaint acknowledged that KKR & Co. Inc. is a "holding company." Ex. 3 (Amended Complaint), ¶ 4.

27. Rather than oppose KKR & Co. Inc.'s motion to dismiss, and the other motions to dismiss filed by other defendants, the Commonwealth amended its complaint. Ex. 3 (Commonwealth's Motion to File First Amended Complaint in Declaratory Judgment Case).

28. On September 7, 2021, KKR & Co. Inc. again moved to dismiss for lack of personal jurisdiction, and again submitted the affidavit from Mr. Lee. Ex. 4 (KKR & Co. Inc.'s Motion to Dismiss Declaratory Judgment Case). On the same day, September 7, the Commonwealth moved

for summary judgment regarding the merits of its declaratory judgment claims. Ex. 5 (Motion for Summary Judgment). The Commonwealth's submission, prepared by Attorney General Cameron, did not address KKR & Co. Inc.'s personal jurisdiction defense.

29. On October 4, 2021, the Commonwealth filed responses to the moving defendants' motions to dismiss, and on that same day the defendants submitted oppositions to the Commonwealth's motion for summary judgment. In responding to KKR & Co. Inc.'s motion to dismiss, the Commonwealth limited its argument to the dispositive question of whether the First Amended Complaint *alleged* a prima facie case of personal jurisdiction over KKR & Co. Inc. *See* Ex. 6 (Commonwealth's Opposition to Motions to Dismiss). The Commonwealth's opposition cited no evidence outside the record and made no request that Judge Shepherd take judicial notice of any facts outside the Complaint's four corners. Its opposition to the motion to dismiss also did not seek summary judgment against KKR & Co. Inc. on any issue, including the personal jurisdiction defense.

30. KKR & Co. Inc.'s October 4th opposition to the Commonwealth's motion for summary judgment likewise concentrated on the sole issue of whether the Amended Complaint failed to allege sufficient grounds for exercising personal jurisdiction over KKR & Co. Inc. *See* Ex. 7 (KKR & Co. Inc.'s Opposition to Commonwealth's Motion for Summary Judgment). The opposition accordingly requested that Judge Shepherd either deny the motion for summary judgment outright as to KKR & Co. Inc. or else defer ruling on the Commonwealth's motion as to KKR & Co. Inc. until the issue of personal jurisdiction could be resolved on a complete evidentiary record. *Id.* at 4-5 & n.6. KKR & Co. Inc. also reserved its right to defend itself on the merits in the event the Court denied its motion to dismiss for lack of personal jurisdiction. *Id.* at 5.

31. The other defendants in the Declaratory Judgment Case opposed the Commonwealth's motion for summary judgment on the merits.

JUDGE SHEPHERD'S CAMPAIGN WEBSITE PROMINENTLY DISPLAYS AN ARTICLE DESCRIBING HIS DENIAL OF DEFENDANTS' MOTIONS TO DISMISS THE *MAYBERRY* CASE

32. Before turning to Judge Shepherd's recent decision in the Declaratory Judgment Case, it is necessary to note the relevance of the KRS Funds-of-Funds cases that Judge Shepherd has drawn attention to in his re-election campaign.

33. Judge Shepherd is running for re-election in November 2022. The election is contested.³

34. The KRS Funds-of-Funds cases focus on a contentious political issue in Franklin County, namely, how to account for the fact that KRS-administered pension plans are currently facing sizable unfunded liabilities. At an early conference in the *Mayberry* Case, Judge Shepherd likened this case to "performing an autopsy" on KRS's "alarming" financial state. Ex. 11, *Mayberry* Hearing Tr. (Apr. 17, 2018), 29:25-30:3 (describing KRS's funds as having declined to "alarming levels," and stating that "what we're doing in this kind of a case, to me, you know, is almost like – you know, I mean, it's almost like performing an autopsy").

35. Judge Shepherd's campaign website, phillipshepherd.com/about, states that he has "enforced constitutional protections for our public employees' pensions. . . . I've earned the support of a bipartisan coalition of people in Franklin County who respect the rule of law and want to protect the principles guiding the judicial branch." That same website page states "I pride myself on being an independent judge who is guided by our Constitution, not partisan politics or personal interests. But you don't have to take my word for it—the record speaks for itself." Immediately

³ The Judge's opponent is Joseph Bilby. See www.joebilby.com.

below that statement, Judge Shepherd's campaign website prominently displays a newspaper article describing the Judge's November 2018 ruling that denied the defendants' motions to dismiss the first-filed *Mayberry* Case:



The headline of the article, excerpted in the image posted on the campaign website, reads: “Kentucky pension plan lawsuit will proceed / Complaint alleges Wall Street money managers duped system.” The text of the article reads: “FRANKFORT: The high-profile lawsuit alleging that Wall Street money managers and others caused Kentucky Retirement Systems to gamble as much as \$1.5 billion on risky hedge fund investments will proceed. Franklin Circuit Judge Phillip Shepherd on Friday rejected motions of three big hedge fund firms and most other defendants to dismiss the lawsuit filed 11 months ago.”

36. Judge Shepherd's campaign website touts his earlier denial of “Wall Street money managers” motions to dismiss in this case, even though the Supreme Court later reversed his

ruling. *Overstreet*, 603 S.W.3d at 266 (“[W]ithout a concrete stake in the case, the Plaintiffs lack constitutional standing to bring their claims in our courts.”).

37. Judge Shepherd’s campaign website also prominently features a bright orange section marked “DONATE,” which leads to a link allowing visitors to the website to make donations. This “DONATE” link appears in all caps on each page of the website:



38. Standing alone, the circumstance that Judge Shepherd is touting an interlocutory ruling in this action adverse to “Wall Street money managers,” while soliciting campaign donations, would cause a reasonable observer to reasonably question Judge Shepherd’s impartiality with respect to the KKR & Co. Inc. Parties in these cases going forward. *Abbott*, 626 S.W.3d at 484. At a minimum, Judge Shepherd’s campaign strategy creates an appearance of impropriety that requires disqualification. *See Ex. 10, Commonwealth of Kentucky ex rel. Beshear v. Dickerson*, No. 19-CI-00425, Order of Disqualification and Appointment, at 8 (Sept. 27, 2019) (Minton, C.J.) (“[T]he standard for disqualification under KRS 26A.015 and Rule 2.11 does not require actual proof of bias. Rather, the standard simply requires disqualification in circumstances where the judge’s impartiality might reasonably be questioned.”).

39. Judge Shepherd’s use of these materials on his campaign website also implicates Rules 2.10 and 4.1 of the Code of Judicial Conduct, SCR 4.300. Those Rules prohibit, among other things, (1) the making of public statements “that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court,” SCR 4.300(2.10(A)), *see id.* 4.1(A)(12) (similar); and (2) the making of “pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of

judicial office.” *id.* 4.1(A)(13) & 2.10(C). These Rules also forbid “extra-judicial explanation by a judge of his or her ruling” or other “summarizing out of court what was said in the courtroom,” and provide that “[w]hen a judge is reversed on appeal, he or she should not defend the original decision or criticize the appellate decision.” Ex. 12, Cynthia Gray, *Key Issues in Judicial Ethics: Commenting on Pending Cases*, 19 (Am. Judicature Soc’y 2001). Under these Rules, a judge “cannot, consistent with the proper exercise of his judicial powers, bind himself to decide particular cases in order to achieve a given programmatic result.” *Deters v. Jud. Ret. & Removal Comm’n*, 873 S.W.2d 200, 204 (Ky. 1994).

40. In addition, the structure of Judge Shepherd’s website promotes his own conclusion that his ruling in the *Mayberry* Case was a proper execution of the “rule of law” and was a result “guided by our Constitution.” This is indirectly a statement that “might reasonably be expected to affect the outcome” of the instant case and the *Mayberry* Case before Judge Shepherd. His website does not disclose that his ruling was overturned, which would give any reasonable observer doubt about his ability to impartially decide the *Mayberry* Case as he defends a reversed decision.

41. Second, Judge Shepherd states on his website that he has “enforced constitutional protections for our public employees’ pensions,” decided cases in accordance with the “rule of law,” and then followed that with a reference to the *Mayberry* Case, stating that his record “speaks for itself.” By proclaiming himself as the defender of protections for employee’s pensions, asserting that his decisions are consistent with the rule of law, and then directing viewers of his website to his ruling against “Wall Street money managers” in a pending case, Judge Shepherd has seemingly committed himself to favoring pension holders over parties like the KKR & Co. Inc. Parties without regard to applicable legal principles.

**JUDGE SHEPHERD'S OPINION & ORDER IN THE DECLARATORY JUDGMENT
CASE**

42. In the Declaratory Judgment Case, Judge Shepherd addressed the various competing motions on March 24, 2022. The Court's Opinion & Order is 75 pages long; 39 of those pages are devoted to the question of personal jurisdiction over KKR & Co. Inc. These pages describe an extraordinary amount of internet research that Judge Shepherd conducted independent of any arguments presented by the parties and for purposes of discrediting the sworn affidavit of Mr. Lee, the corporate officer who attested to the KKR & Co. Inc. holding company's lack of jurisdictional contacts with the Commonwealth.

43. Exhibit 2 to this affidavit lists 57 documents that Judge Shepherd (1) personally located on the internet during his independent investigation and then (2) relied upon in the Opinion & Order for purposes of finding that Mr. Lee's affidavit was unreliable⁴ and rendering judgment against KKR & Co. Inc. *sua sponte* on the issue of personal jurisdiction. Many of these documents are voluminous and complex. Altogether, these 57 documents contain approximately 6,828 pages. Ex. 2, at 10. They include the following:

- Materials apparently presented to the Alaska Retirement Management Board in 2015;
- A 2014 article by Jan Alexander, a financial reporter, in "Institutional Investor";
- "Archived" versions of the webpages from old versions of www.kkr.com and www.prismapartners.com;
- A video of a speech by KKR & Co. Inc.'s former Co-Chief Executive Officer and current Co-Executive Chairman, defendant Henry Kravis;
- Various minutes of meetings of the KRS Board of Trustees and the KRS Investment Committee, in 2015 and 2016;
- Archived internet biographies of former KRS Trustee William Cook and of various employees of Prisma and a different indirect subsidiary of KKR & Co. Inc., named

⁴ The use of the word "unreliable" is perhaps charitable in that, as discussed *infra*, Judge Shepherd strongly intimated that Mr. Lee had submitted a false affidavit.

Kohlberg Kravis Roberts & Co. L.P., which is an entity separate and distinct from Defendant KKR & Co. Inc.;

- Kentucky lobbyist registration records that identify three employees of the separate and distinct subsidiary, Kohlberg Kravis Roberts & Co. L.P.;
- SEC filings by a former owner of Prisma, Aegon USA;
- SEC filings by KKR & Co. Inc.; and
- Press releases regarding a five-year-old acquisition of a Louisville, KY company (“PharMerica”), and its subsequent merger with “BrightSpring.”

44. The Commonwealth cited not one of these 57 documents in its briefing in support of its motion for summary judgment in the Declaratory Judgment Case. *See* Ex. 5. Indeed, the Commonwealth *did not seek summary judgment* on the issue of personal jurisdiction. *Id.*

45. The Judge’s Opinion & Order acknowledges that Judge Shepherd found these documents on his own: “the Court has reviewed . . . materials available to the general public,” “*sua sponte.*” Ex. 1 (Opinion & Order), at 7 & n.12.

46. Judge Shepherd speculated about the meaning of these 57 documents. At least 16 times, his Opinion & Order employs terms like “seem,” “appear,” “possibility” and “implication” to describe the factual findings that he made based on these documents. For example:

a. “*Seems.*” The Opinion & Order asserts that an SEC filing “describes” defendant Girish Reddy’s role “as one that seems to be a managerial/leadership function more closely associated with KKR than Prisma,” Ex. 1, at 27; it “seems clear” that two “Senior Advisors” “would not be considered KKR employees,” *id.* at 28; and it “seems unlikely that KKR dual employee status . . . would, or even could, be altered on a client-by-client basis,” *id.* at 29.

b. “*Appears.*” The lobbyist registration entries “appear to indicate” various things to Judge Shepherd, Ex. 1, at 11-12; a subsidiary’s “acquisition” of PharMerica “appeared to” provide resources, *id.* at 14; a subsidiary “appears to have operated in a dual role,” *id.* at 23; a

“renaming/rebranding” “appears to be” a “first significant step,” *id.*; Prisma “appears to have maintained a standalone website through at least February 8, 2014,” *id.* at 24; an online biography “appear[s] to show” an individual “serving in a role as a KKR member/partner,” *id.* at 27; individuals designated as “consultants” on a website “appear to be largely associated with KKR Capstone,” *id.* at 28 n. 80; increased investment by KRS in August 2016 “appears to have been related to a ‘strategic partnership,’” *id.* at 30; defendant Girish Reddy “appears to have been considered a KKR Member,” *id.* 43 n. 94; KKR & Co. Inc. “appears to have purposefully sought out” connections with Kentucky, *id.* at 44; and KKR & Co. Inc. “appeared to hold itself out as having a Louisville office,” *id.* at 47.

c. “*Possibility*” and “*implication*.” Judge Shepherd perceived a “possibility that former Prisma employees were ... considered employees of KKR,” *id.* at 27; he also opined that various sources “create an implication that the depth of the KRS and KKR Prisma relationship was increasing *prior* to the May 2015 votes by the KRS Investment Committee,” *id.* at 31 n. 84.

47. Judge Shepherd did not require authentication of any of the 57 documents but assumed that “if called upon to do so, the Attorney General could present adequate testimony to authenticate any Wayback Machine screenshots.” *Id.* at 9 n.14; *see Weinhoffer v. Davie Shoring, Inc.*, 23 F.3d 579, 584 (5th Cir. 2022) (“Our sister circuits’ decisions that the Wayback Machine is not self-authenticating are persuasive in the context of judicial notice.”)

48. Based on these extra-judicial materials he located on the internet, Judge Shepherd found that the affidavit sworn to by Mr. Lee—the Assistant Secretary of KKR & Co. Inc., and a licensed lawyer with over 10 years of personal knowledge of KKR & Co.’s affairs—was not “reliable.” Ex. 1 (Opinion & Order), at 38. Judge Shepherd found that Mr. Lee’s “statements” were “contradict[ed]” by, and “wholly inconsistent” with, the “links/archived snapshots” that the Judge

had found online. *Id.* at 9, 37-38. Judge Shepherd indicated that he did not believe KKR & Co. Inc. had even acted in “good faith” by contesting personal jurisdiction. *Id.* at 44 (stating that “the sheer number of KKR contacts with the Commonwealth,” which Judge Shepherd had incorrectly found based on his internet research, “leaves the Court mystified as to how this Defendant could make a good faith claim that it was not subject to the jurisdiction of the Kentucky courts”).

49. Judge Shepherd’s factual findings are based on repeated misreadings of the documents he discovered online. I summarize his major interpretive errors below, *see infra* ¶¶ 55-59, and describe them in further detail in the Addendum. Here, I focus first on the profound *procedural* violations that Judge Shepherd’s Opinion & Order represents—violations of the Code of Judicial Conduct; the Kentucky Rules of Evidence; and basic principles of Due Process.

50. Judge Shepherd’s independent research efforts were in contravention of the Kentucky Code of Judicial Conduct. Rule 2.9 states: “A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.” SCR 4.300 (Rule 2.9(C)). KRS 26A.015 further requires that a judge recuse whenever he has “personal knowledge of disputed evidentiary facts.” KRS 26A.015(2)(a); *see also Marchese v. Aebersold*, 530 S.W.3d 441, 449 (Ky. 2017) (“[T]he trial judge’s undertaking to obtain and use as evidence extrajudicial information relating to a party in the case [a prior criminal conviction] caused her disqualification from proceeding further as the presiding judge in this matter.”); *Alred v. Commonwealth of Kentucky ex rel. Judicial Conduct Comm’n*, 395 S.W.3d 417 443 n.92 (Ky. 2012) (“Because Judge Alred gathered information about the impending matters from extrajudicial sources, he was required to recuse when those cases came before him as a judge.”). Appellate courts in other jurisdictions have correctly concluded that such extra-judicial research is not only improper but should result in the judge’s disqualification. *See State v. Dorsey*,

701 N.W.2d 238 (Minn. 2005) (trial judge should have recused herself because she questioned the veracity of a witness’s testimony based on her own extra-judicial knowledge and investigation); *see generally Liteky v. United States*, 510 U.S. 540, 544 (1994) (describing “extrajudicial source” doctrine in judicial disqualifications).

51. Judge Shepherd’s *sua sponte* factual findings—including his finding that the “links/archived snapshots” he found online were “more inherently reliable” than Mr. Lee’s affidavit—also offend the Kentucky Rules of Evidence. Rule 201 states that a “fact,” in order to be “judicially noticed,” “must be one *not subject to reasonable dispute*” and must also be either “[g]enerally known within the county” or else “[c]apable of *accurate and ready determination* by resort to sources whose accuracy cannot reasonably be questioned.” Kentucky Rule of Evidence 201(b) (emphases added). Judge Shepherd’s Opinion & Order does not cite, much less apply, this rule in the course of its 39 pages of factual findings based on documents selected from the internet.⁵ Nor does his Opinion & Order cite or apply the controlling Kentucky Supreme Court decisions concerning Rule 201, which “construe KRE 201 as setting a high standard for admitting evidence by judicial notice.” *Marchese*, 530 S.W.3d at 447 (holding that trial judge erred in taking judicial notice of civil party’s prior criminal conviction). Under Rule 201 and the Kentucky Supreme Court’s caselaw, Judge Shepherd was *not* permitted to “[judicially] notice the truth of allegations

⁵ In footnote 12, Judge Shepherd cited one Kentucky Supreme Court case: “The Kentucky Supreme Court has held that in considering a motion to dismiss courts may ‘properly *sua sponte* consider documents available to the general public.’ *Fox v. Grayson*, 317 S.W.3d 1, 18, footnote 82 (Ky. 2010).” The *Grayson* decision does not concern wide-ranging judicial investigation into archived websites, the contents of which have not been verified. On the contrary, the documents judicially noticed, in *Grayson*, were legislative-history documents published by and available from the Kentucky Legislative Research Commission. Moreover, *Grayson* was decided at the motion to dismiss stage (the Supreme Court reversed the dismissal), and therefore provides no authority for *granting summary judgment* based on judicially noticed “facts” gleaned from the Court’s independent internet research.

or findings made in” the documents he found on the internet. *Id.* (quoting *Rogers v. Commonwealth*, 366 S.W.3d 446, 451-52 (Ky. 2012)).

52. Judge Shepherd’s decision to conduct his internet research behind the scenes, without notice to KKR & Co. Inc., in order to grant *sua sponte* summary judgment to the Commonwealth on an issue as to which the Commonwealth had submitted no evidence, was also directly contrary to the Rules of Evidence, the Code of Judicial Conduct, and basic principles of Due Process. Kentucky Rule of Evidence 201(e) provides that “[a] party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed” KRE 201(e); *see also Commonwealth v. Howlett*, 328 S.W.3d 191, 194 (Ky. 2010) (reversing dismissal of DUI case, where judge *sua sponte* took judicial notice of the breathalyzer manufacturer’s guidelines, because “when it is requested that judicial notice be taken of a fact, the other party” must be “afforded the opportunity to respond”); Ky. Evid. L. Handbook § 1.00[4][d] (“It is significant and poses a problem when notice is taken at the initiative of the court If a court acts on its own initiative, the parties should be informed of the facts noticed and given an opportunity to respond.”). Rule 2.6 of the Code of Judicial Conduct states: “A judge shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law.” SCR 4.300 (Rule 2.6(A)). And it is an “elementary and fundamental requirement of due process” that a defendant must be given “notice of the case against him and an opportunity to meet it.” *Jones v. Bailey*, 576 S.W.3d 128, 150 (Ky. 2019).

53. In sum, Judge Shepherd’s conduct—his *sua sponte* internet research, his use of that research to discredit the sworn affidavit of a KKR & Co. Inc. officer, and suggestion that he “definitively resolved” merits issues against KKR & Co. Inc. for all purposes, without providing KKR & Co. Inc. either notice or an opportunity to be heard—was so antithetical to the Code of

Judicial Conduct, the Rules of Evidence, and the principles of Due Process that it would cause a reasonable observer to question whether Judge Shepherd will conduct a fair and impartial trial of the claims against the KKR & Co. Inc. Parties.

54. Judge Shepherd previously acknowledged that the KKR & Co. Inc. Parties would have the right to seek summary judgment on the issue of personal jurisdiction, *even if* their pending motions to dismiss were denied. *See* Nov. 30, 2018 Order, at 19 (acknowledging that the KKR & Co. Inc. Parties would be permitted to “reassert” their defense of lack of personal jurisdiction later, in a motion for summary judgment, based on “facts established in pretrial discovery”). The March 24 Opinion & Order in the Declaratory Judgment Case has now made perfectly clear that such motions by the KKR & Co. Inc. Parties will *not* receive a fair hearing before Judge Shepherd, since he has now “definitively resolved” the issue based on his own independent internet research.

**JUDGE SHEPHERD’S MISTREATMENT OF KKR & CO. INC. WAS PREJUDICIAL
AND CAUSED NUMEROUS FACTUAL ERRORS**

55. In addition to the grave procedural errors represented by the Opinion & Order, Judge Shepherd also committed numerous factual errors in his rush to “definitively resolve” KKR & Co. Inc.’s personal jurisdiction defense. Ex. 1, at 9. The Judge misconstrued many of the materials he gathered, none of which actually contradict Mr. Lee’s affidavit. In the Addendum, I describe a number of these errors in more detail. I do so to illustrate why a reasonable observer would have serious doubts about Judge Shepherd’s ability to impartially decide these factual issues if and when they are later presented to him in this action and the other KRS Funds-of-Funds Cases.

56. Judge Shepherd’s most fundamental error was that he misread the documents he found as referring to the *party* KKR & Co. Inc., when in fact the documents refer to *other* separate and legally distinct *non-party* subsidiaries or affiliates of KKR & Co. Inc., such as non-party Kohlberg Kravis & Roberts & Co. L.P. *See* Addendum, ¶¶ 2-6. No plaintiff in any related case

before the Judge has named Kohlberg Kravis Roberts & Co. L.P., or any other current subsidiary or affiliate of KKR & Co. Inc., as a defendant—and for good reason. Kohlberg Kravis Roberts & Co. L.P. did not contract to provide investment services to any entity connected to KRS, and has not demanded indemnification from anyone.

57. I note that Judge Shepherd made this fundamental error even though the KKR & Co. Inc. Parties *pointed out this mistake to him* in this case, where plaintiffs similarly attempted to confuse the identity of the *party*, KKR & Co. Inc., with *non-party* Kohlberg Kravis Roberts & Co. L.P. *See* Addendum ¶ 5.

58. Judge Shepherd continued this error in finding that Prisma was the agent of KKR & Co. Inc. for jurisdictional purposes. *See* Ex. 1 (Opinion & Order), at 35-36 (“[I]t is difficult to see how, at a minimum Prisma wasn’t KKR’s agent by 2015-2016 . . .”). As established in Section E of the Addendum, Judge Shepherd’s categorization is incorrect because this conclusion rests on a presentation connecting Prisma with Kohlberg Kravis Roberts & Co. L.P. Not only does this incorrect finding lead Judge Shepherd to the wrong conclusion with respect to personal jurisdiction, it potentially has consequences for KKR & Co. Inc. with respect to the merits of this case and the *Mayberry* Case. Since principals can, under certain circumstances, bear liability for the actions of their agents, Judge Shepherd’s finding that Prisma was KKR & Co. Inc.’s agent potentially impacts KKR & Co. Inc.’s defenses and liability in this action and the *Mayberry* Case. Yet Judge Shepherd reached that conclusion while deciding a different issue in the Declaratory Judgment Case, without even granting KKR & Co. Inc. the opportunity to brief the issue in that action.

59. Judge Shepherd’s errors were not only harmful to the KKR & Co. Inc. Parties through the entry of the Opinion & Order, but they also wrongly disparaged Christopher Lee, the

Assistant Secretary of KKR & Co. Inc., who tendered an accurate affidavit in support of KKR & Co. Inc.'s motion to dismiss the Declaratory Judgment Case on personal jurisdiction grounds. *See* Addendum, ¶¶ 26-29. As discussed more fully in the Addendum hereto, Judge Shepherd faulted Mr. Lee for not responding to questions that Judge Shepherd raised in his own research and then answered himself in the Opinion & Order without giving Mr. Lee or the KKR & Co. Inc. Parties an opportunity to address them. Judge Shepherd then also intimated that he believed that Mr. Lee testified falsely in his affidavit. The efforts undertaken by Judge Shepherd in an effort to discredit Mr. Lee's testimony would lead a reasonable observer to question Judge Shepherd's impartiality and his ability to ever give arguments or evidence from KKR & Co. Inc's representatives the fair and impartial analysis they deserve.

CONCLUSION: JUDGE SHEPHERD WILL NOT GIVE THE KKR & CO. INC. PARTIES A FAIR AND IMPARTIAL TRIAL

60. The KKR & Co. Inc. Parties have challenged personal jurisdiction in this case and each of the other related cases pending before Judge Shepherd. They intend to seek summary judgment on this defense in the event that their motions to dismiss are denied. The Judge has now plainly pre-judged this issue based on his own improper extra-judicial research. His disqualification is required because his "impartiality" "might reasonably be questioned from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances." *Abbott*, 626 S.W.3d at 484.

61. As I noted above, a "reasonable observer" in this case would consider the following "facts and circumstances":

a. Judge Shepherd is campaigning for re-election, and his campaign website advertises his previous denial of motions to dismiss filed by "Wall Street money managers" in a

“high profile” and still-pending case such that any substantive decision in favor of a “Wall Street money manager” in this action would come at Judge Shepherd’s political expense;

b. Underscoring the political relevance of the prior decision to his re-election campaign, the Judge is continuing to tout that ruling on his campaign website and solicit donations based on the same even though the Supreme Court reversed him;

c. A ruling in favor of KKR & Co. Inc. on its personal jurisdiction defense would dilute Judge Shepherd’s campaign message and potentially harm his bid for re-election;

d. Instead of denying the Commonwealth’s motion for summary judgment for failure to present evidence or argument against KKR & Co. Inc. regarding personal jurisdiction, the Judge undertook his own extra-judicial fact-finding mission, in which he conducted internet research that yielded 57 documents encompassing approximately 6,828 pages, which he then reviewed and erroneously construed to grant summary judgment to the Commonwealth *sua sponte* on the issue of personal jurisdiction;

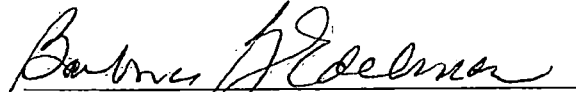
e. In doing so, Judge Shepherd violated the Code of Judicial Conduct, the Rules of Evidence, and basic principles of due process;

f. The Judge went to great lengths to impeach the testimony of an affiant (Mr. Lee), the Assistant Secretary of KKR & Co. Inc., based on the Judge’s misreading of the factual materials he independently gathered; and


g. The Judge’s Opinion & Order states that his independent research has “definitively resolve[d]” the question of personal jurisdiction over KKR & Co. Inc., not only in the Declaratory Judgment Case but also in this action and the *Mayberry* Case, where he indicated he will rule on personal jurisdiction over the KKR & Co. Inc. Parties “in the near future.” Ex. 1 (Opinion & Order), at 8-9;

62. A “reasonable observer,” who was “informed of” the foregoing facts and circumstances,” “might reasonably ... question[]” Judge Shepherd’s ability to be impartial as to the KKR & Co. Inc. Parties. *Abbott*, 626 S.W.3d at 484. His disqualification from the KRS Funds-of-Funds Cases is therefore necessary because he “will not afford” the KKR & Co. Inc. Parties with “a fair and impartial trial.” Ky. Rev. Stat. Ann. § 26A.020.

Respectfully Submitted,


Barbara B. Edelman, Esq.
**Counsel for KKR & Co. Inc., Henry Kravis,
and George Roberts**

I hereby certify that I have served via electronic mail all counsel of record in the KRS
Funds-of-Funds Cases.


Barbara B. Edelman, Esq.

COMMONWEALTH OF KENTUCKY }
 }
COUNTY OF FAYETTE }

Subscribed and sworn to before me by Barbara B. Edelman, Esq. on this the 16th day of
May, 2022.

Notary ID#: 616709
My commission expires: 2/23/2023



KIMBERLY ADKINSON
Notary Public, Kentucky
State At Large
My Commission Expires
February 23, 2023
Notary ID# 616709


NOTARY PUBLIC, STATE AT LARGE

ADDENDUM: FACTUAL ERRORS IN JUDGE SHEPHERD’S OPINION & ORDER

1. This Addendum describes in further detail the numerous factual errors made by Judge Shepherd as a result of his extra-judicial internet research. It is not my intention to litigate or appeal these factual findings, but rather to demonstrate the extent of Judge Shepherd’s partiality against KKR & Co. Inc. The substance of Judge Shepherd’s errors will be addressed in more detail on KKR & Co. Inc.’s pending appeal in the Declaratory Judgment Case.

A. Judge Shepherd Treats KKR & Co. Inc. and Kohlberg Kravis Roberts & Co. L.P. as the Same Entity.

2. Judge Shepherd’s opinion—like the briefing in the actions before him—uses the shorthand “KKR” to refer to the *party* KKR & Co. Inc. *See* Ex. 1 (Opinion & Order), at 1.

3. But throughout his opinion, Judge Shepherd confuses KKR & Co. Inc. with *non-party* subsidiaries of KKR & Co. Inc. that have separate legal forms, e.g., Kohlberg Kravis Roberts & Co. L.P. The following table illustrates some of the critical differences between the party (KKR & Co. Inc.) and one such non-party (Kohlberg Kravis Roberts & Co. L.P.):

Attribute	KKR & Co. Inc.	Kohlberg Kravis Roberts & Co. L.P.
Nature of company	Holding company with no operations.	Operates an asset management business as an SEC-registered investment adviser.
Ownership & Governance	Publicly traded on NYSE with 12 independent directors on its board of directors.	Indirectly majority owned subsidiary of KKR & Co. Inc.
Employees	None.	Over 900 employees.
Connections to Kentucky	None.	A few employees have registered as lobbyists in Kentucky. Is an investment adviser to a private equity fund (unrelated to any case before Judge Shepherd) in which the Kentucky Teachers Retirement Fund has invested.

Relevance to Declaratory Judgment Case	Is seeking indemnification.	None.
--	-----------------------------	-------

4. *No party* in any related case before Judge Shepherd has named Kohlberg Kravis Roberts & Co. L.P., or any other current subsidiary of KKR & Co. Inc., as a defendant—and for good reason. Kohlberg Kravis Roberts & Co. L.P. did *not* contract to provide investment services to KRS or to any KRS funds. It has *not* demanded indemnification from anyone.

5. In this action, the plaintiffs made a similar improper attempt to blur the lines between the *party* KKR & Co. Inc. and the *non-party subsidiary* Kohlberg Kravis Roberts & Co. L.P. The KKR & Co. Inc. Parties pointed out the error in their reply brief (submitted to Judge Shepherd himself) in support of their motion to dismiss the complaint in the instant case:

[T]he references . . . to “KKR” predominantly refer to another separate entity, non-defendant Kohlberg Kravis Roberts & Co. L.P.—which, unlike defendant KKR & Co. Inc., has employees and operations.⁶

6. Judge Shepherd’s March 24 Opinion & Order, in the Declaratory Judgment Case, does not cite or consider KKR & Co. Inc.’s briefing in this action. Instead, Judge Shepherd repeatedly misreads the documents that he discovered on the internet as referring to the holding company party (KKR & Co. Inc.) when, in fact, the documents are clearly referring to the *non-party* Kohlberg Kravis Roberts & Co. L.P.

⁶ Ex. 8 (KKR & Co. Inc. Parties’ Reply Brief in Support of Motion to Dismiss *Taylor II* Complaint), at 2-3; *see also id.* at 7 n.7 (“More fundamentally, the www.kkr.com website does not even belong to the KKR holding company named as a defendant here, but rather to Kohlberg Kravis Roberts & Co. L.P., a different entity not named as a defendant in this lawsuit.”); *id.* at 9 (an August 2015 presentation is irrelevant because “[i]t is a presentation . . . by a different KKR affiliate—‘Kohlberg Kravis Roberts & Co. L.P.’—which is not a Defendant in this case”); *id.* at 10 (“Nothing in this presentation has the slightest relevance to the *Taylor* plaintiffs’ claims. There is no allegation anywhere that KRS ever purchased the ‘Customized Portfolio Solutions’ product, or any other products or services, from Kohlberg Kravis Roberts & Co. L.P. This presentation therefore cannot possibly support specific jurisdiction.”); *id.* (“A contact with Kentucky, by the Kohlberg Kravis Roberts & Co. L.P. subsidiary, is not a contact by KKR & Co. Inc. for purposes of establishing personal jurisdiction.”).

B. Judge Shepherd Attributes Lobbyist Registrations by Separate Companies to KKR & Co. Inc.

7. Judge Shepherd of his own volition accessed the website of the Kentucky Ethics Commission and found that three employees of *Kohlberg Kravis Roberts & Co. L.P.* are registered as executive agency lobbyists (EALs). *See* Ex. 1 (Opinion & Order), 12-13.

8. Judge Shepherd then made two factual findings: First, he found that these registrations are evidence that employees of the *party KKR & Co. Inc.* were doing business in Kentucky. *See id.* Second, he finds, as a “certain fact[,],” that *KKR & Co. Inc.* “has represented to the Ethics Commission that it is presently engaging in direct communications with one or more public officials in Kentucky’s executive branch” Ex. 1 (Opinion & Order), at 12.

9. These factual findings are erroneous—which *KKR & Co. Inc.* would have pointed out if given notice and the opportunity to respond. *KKR & Co. Inc.* has engaged in no such communications with Kentucky. The registrations were made by employees of *Kohlberg Kravis Roberts & Co. L.P.*

10. Moreover, contacts between *Kohlberg Kravis Roberts & Co. L.P.* and the Kentucky executive branch have nothing to do with the claims in any action before Judge Shepherd. Notably, *Kohlberg Kravis Roberts & Co. L.P.* currently provides investment services to a private equity fund that is unrelated to the “funds of funds” at issue in these related cases. A *different* public pension fund in Kentucky, namely, Kentucky Teachers Retirement Fund (“Kentucky Teachers”) is an investor in that private equity fund. Kentucky Teachers has nothing to do with any of the actions before Judge Shepherd, and none of the Commonwealth’s claims arise out of *Kohlberg Kravis Roberts & Co. L.P.*’s work for the private equity fund in which Kentucky Teachers is an investor. Thus, the lobbying registrations of *Kohlberg Kravis Roberts & Co. L.P.* are irrelevant for

purposes of establishing specific jurisdiction in any of the KRS Funds-of-Funds Cases. But KKR & Co. Inc. was given no opportunity to explain any of this in the Declaratory Judgment Case.

C. Judge Shepherd Misinterprets the PharMerica/BrightSpring Transactions

11. Next, Judge Shepherd's Opinion & Order describes the results of his online research into two transactions: a purchase of equity in Louisville-based PharMerica Corporation (in 2017) and the merger of PharMerica with BrightSpring Health Services, Inc. ("BrightSpring") sixteen months later. Ex. 1 (Opinion & Order), at 12-14.

12. No party to any of the KRS Funds-of-Funds Cases, pending before Judge Shepherd, had ever mentioned these transactions. None of the claims, in any of the actions before him, "arises out of" these two transactions.

13. Judge Shepherd's Opinion & Order found that KKR & Co. Inc. "has directly impacted Kentucky residents" by these transactions. Ex. 1 (Opinion & Order), at 44. A closer examination of the documents, however, reveals that here again it is a different company, and *not* KKR & Co. Inc., that was the entity involved. Judge Shepherd's opinion cites two of BrightSprings' SEC S-1 Registration Statements, each of which is over one hundred pages long. Ex. 1 (Opinion & Order), at 14 n.29 (citing pages 166-168 of the October 18, 2021 S-1 filed by BrightSpring). But he missed the following definition on page iii of both documents:

"KKR Stockholder" means *KKR Phoenix Aggregator L.P.*, an investment entity owned by investment funds and other entities affiliated with Kohlberg Kravis Roberts & Co. L.P.

No party has ever made a claim against *KKR Phoenix Aggregator L.P.* in any of the related cases before Judge Shepherd.

14. Moreover, there is good reason why no party to any action before Judge Shepherd has ever submitted any evidence regarding the PharMerica/BrightSpring transactions: None of plaintiffs' claims have any relation to (much less, arise out of) either of these transactions.

D. Judge Shepherd Incorrectly Asserts that Prisma Employees Are “Dual Employees” of KKR & Co. Inc.

15. From mid-2012 through late 2017, KKR & Co. Inc. was the indirect owner of the general partner of a partnership that indirectly owned Prisma Capital Partners L.P. (“Prisma”). Prisma is an investment adviser engaged by KRS in 2011 to manage one of the “funds of hedge funds.” Prisma is a separate defendant in these related actions. After being acquired by indirect subsidiaries of KKR & Co. Inc. in mid-2012, Prisma did business under the trade name “KKR Prisma.” Prisma has not contested personal jurisdiction in any of the actions before Judge Shepherd.

16. Judge Shepherd’s Opinion & Order erroneously found as fact that Prisma’s employees were also employees of KKR & Co. Inc. during the time that KKR & Co. Inc. indirectly owned Prisma. *See* Ex. 1 (Opinion & Order), at 26-35. The finding is erroneous. KKR & Co. Inc. never had employees.

17. Judge Shepherd based his erroneous factual finding—that Prisma employees were also “dual employees” of KKR & Co. Inc.—on documents he located in the online archives of the Alaska Retirement Management Board, on obsolete versions of the www.kkr.com website, purportedly archived in the “Wayback Machine,” and on KKR & Co. Inc.’s SEC filings.

18. For example, Judge Shepherd’s opinion cites and relies upon page 286 of a 421-page document entitled “Agenda and Materials” for a meeting of the Board of Trustees of the Alaska Retirement Board on April 23 and 24 of 2015. *Id.* at 28 & n.82.⁷ But this presentation does not even *mention* KKR & Co. L.P. (as the company was then known⁸). Instead, what the

⁷ https://treasury.dor.alaska.gov/docs/treasurydivisionlibraries/armb/meetings-minutes/board-of-trustees/meeting-packets/2015/04_23-24_2015packet.pdf?sfvrsn=b8b1e5fe_3.

⁸ KKR & Co. was a limited partnership until July 1, 2018, when it converted to a Delaware corporation.

presentation actually states, on page 283, is: “Employees of KKR Asset Management LLC, KKR Prisma and KKR Capital Markets LLC located in the United States are dual employees of those entities *and Kohlberg Kravis Roberts & Co. L.P.*”

19. Judge Shepherd’s opinion also misinterpreted various SEC filings made by KKR & Co. Inc. For example, the opinion cites page 159 of KKR & Co.’s 2017 annual 10-K report, which stated that “certain” “sellers” of Prisma “are employees of KKR.” Ex. 1 (Opinion & Order), at 27 n.77. But the *definition* of “KKR” on page 3 of that report makes clear that “references to ‘KKR,’ ‘we,’ ‘us,’ [and] ‘our’ . . . refer to KKR & Co. L.P. *and its consolidated subsidiaries.*” The SEC filings, in other words, use the term “KKR” to refer not just to KKR & Co. Inc. but also to *all* KKR & Co.’s subsidiaries—including Prisma (at the time) and to the more than 600 subsidiaries listed in Exhibit 21.1 of the 2017 10-K report.

20. If Judge Shepherd had given notice of his intent to rely on SEC filings in this way, KKR & Co. Inc. could have pointed out this clear definitional error. KKR & Co. Inc. could also have alerted Judge Shepherd to the many cases that have considered and rejected just this kind of misreading of SEC filings. The KKR & Co. Inc. Parties did in fact point this out to Judge Shepherd in this case when these same SEC filings were cited by the plaintiffs in that action. Ex. 8 (KKR & Co. Inc. Parties’ Reply Brief In Support of Motion to Dismiss *Taylor II*), at 8 n.8 (citing many such cases, including *Vasquez v. Whole Foods Mkt., Inc.*, 302 F. Supp. 3d 36, 51 (D.D.C. 2018) (the word “we” used in SEC filings “cannot reasonably be read to mean” that the parent holding company was doing business in the forum)). By not giving any notice of his extra-judicial research, or of the incorrect factual findings he was making based on that research, Judge Shepherd foreclosed KKR & Co. Inc. from explaining that the party KKR & Co. Inc. does not have employees and does not have ties to Kentucky.

E. Judge Shepherd Infers a Non-Existent Agency Relationship from a PowerPoint About a Different Company

21. Based on his internet research, Judge Shepherd then made the *sua sponte* factual finding that Prisma “acted as” the “agent” of KKR & Co. Inc. when Prisma was managing KRS’s “fund of hedge funds” investments. Ex. 1 (Opinion & Order), at 35-36. The Commonwealth had neither pled this agency theory in its First Amended Complaint in the Declaratory Judgment Case (*see* Exhibit 3) nor argued it in its Opposition to KKR & Co. Inc.’s Motion to Dismiss (*see* Exhibit 6).

22. “Agency,” under Kentucky law, requires evidence of a “contract either express or implied, by which” the principal “confides to” the agent “the management of some business to be transacted in [the principal’s] name, or on [the principal’s] account, by which the [agent] assumes to do the business, and to render an account of it.” *GGNSC Stanford, LLC v. Rowe*, 388 S.W.3d 117, 122 (Ky. Ct. App. 2012). “The agent is a substitute or representative of his principal and derives his authority from him.” *Id.* Although agency is a “legal concept,” the existence of an agency relationship necessarily depends on “required factual elements,” including “the manifestation by the principal that the agent shall act for him, the agent’s acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking.” Restatement (Second) of Agency § 1 (1958).

23. If KKR & Co. Inc. had been given notice that Judge Shepherd was considering granting summary judgment on these factual issues, then KKR & Co. Inc. could have submitted evidence in this regard.

24. Judge Shepherd based his factual finding—that Prisma was an “agent” of KKR & Co. Inc.—on a presentation dated November 2, 2016, which Judge Shepherd found on KRS’s

website.⁹ This is a 14-page document that appears to be a presentation by Prisma (doing business under the trade name “KKR Prisma”) and that appears to summarize the financial performance of KRS’s “funds of hedge funds” investments in fiscal year 2016. Judge Shepherd’s opinion ignores the definition of the term “KKR,” which is given in bold font on page 2: “*Kohlberg Kravis Roberts & Co. L.P.* (together with its affiliates, ‘KKR’)” (emphasis added). Instead, Judge Shepherd’s opinion relies on the fine print on page 3 (emphasis added):

KKR has adopted internal information-sharing policies and procedures which address both (i) the handling of confidential information and (ii) the internal information barrier that exists between the public and private sides of KKR. Both KKR Prisma and KKR’s fixed income, mezzanine, special situations and public equity professionals are on the public side of KKR, while KKR’s private equity professionals and other affiliated business activities are on the private side of KKR. KKR has compliance functions to administer KKR’s internal information-sharing policies and procedures and monitor potential conflicts of interest. *Although a customized solutions managed by KKR Prisma may leverage KKR’s private side executives, KKR’s internal information-sharing policies and procedures referenced above, as well as certain legal and contractual constraints, could significantly limit their ability to do so.* Accordingly, as a result of such restrictions, the investment activities of KKR’s other businesses may differ from, or be inconsistent with, the interests of and activities which are undertaken for the account of a customized solution, and there can be no assurance that any customized solution will be able to fully leverage the resources and industry expertise of KKR’s other businesses. Additionally, there may be circumstances in which one or more individuals associated with KKR will be precluded from providing services to a customized solution because of certain confidential information available to those individuals or to other parts of KKR or because of internal policies and procedures.

25. Judge Shepherd’s opinion interprets the emphasized language (contained in eight-point font, in the middle of lengthy disclaimers) as *proof* that Prisma and its employees must have been acting as *agents* of the *holding company* KKR & Co. Inc. But this boilerplate language refers to nothing more than the *possibility* of Prisma employees working with *Kohlberg Kravis Roberts & Co. L.P.* employees, and even notes the “legal and contractual constraints” that could

⁹<https://kyret.ky.gov/Investments/Annual%20Asset%20Program%20Reviews/2016AbsoluteReturnAnnualReview.pdf>

“significantly limit” Prisma employees’ “ability to do so.” Moreover, even if it were true that Prisma employees worked with *Kohlberg Kravis Roberts & Co. L.P.* employees in connection with Prisma’s services to Daniel Boone Fund LLC or KRS, that would not prove that either subsidiary was an *agent* of the parent holding company, which is the party named as a defendant in all of the related actions pending before Judge Shepherd.

F. Judge Shepherd’s Errors Led Him to a Baseless Prejudgment of an Affiant’s Honesty.

26. Judge Shepherd has also pre-judged the credibility of Christopher Lee, Esq., who in 2018 was the Assistant Secretary of KKR Management LLC (at that time, the sole general partner of KKR & Co. L.P.), and who is now the Assistant Secretary of KKR & Co. Inc. In 2018, Mr. Lee provided an affidavit relevant to personal jurisdiction, which affidavit KKR & Co. Inc. re-submitted as an exhibit to its motion to dismiss the Declaratory Judgment Case. Ex. 9 (Lee Affidavit).

27. Judge Shepherd’s opinion faults Mr. Lee for not answering, in his affidavit, questions that occurred to Judge Shepherd during the course of his independent online investigation—none of which had been presented to Mr. Lee for rebuttal. For example: Did Prisma use the logo “KKR Prisma”? Did Prisma pay a licensing fee to use the KKR trademark? Ex. 1 (Opinion & Order), at 37. A reasonable observer would question the impartiality of a judge that faults a party for not answering his questions, when those questions are stated for the first time in the judge’s final judgment against that party.

28. More troubling still, Judge Shepherd’s opinion then, in so many words, calls Mr. Lee a liar. Judge Shepherd’s opinion claims that his own independent internet research on these issues is “more inherently reliable” than the sworn affidavit of Mr. Lee, the Assistant Secretary with over 10 years of personal knowledge of KKR & Co.’s affairs addressed in that affidavit. Ex.

1 (Opinion & Order), at 38. Indeed, Judge Shepherd’s opinion states that he believes that his independent research “contradict[s]” Mr. Lee’s “statements,” *id.*, which he finds to be “wholly inconsistent” with Judge Shepherd’s independent internet research, *id.* at 9.

29. Judge Shepherd is mistaken about Mr. Lee and about Mr. Lee’s affidavit. As already described, the various documents that Judge Shepherd found online used the term “KKR” to refer to *non-party* affiliates and subsidiaries, such as Kohlberg Kravis Roberts & Co. L.P. Mr. Lee’s affidavit, by contrast, referred to the *party* to this case, the parent holding company KKR & Co. L.P. (now, KKR & Co. Inc.). Mr. Lee’s affidavit accurately states that KKR & Co. L.P. never maintained an office in Kentucky, never had any employees who resided or worked in Kentucky, and never conducted any business in Kentucky relating to KRS or Prisma. His affidavit makes clear that he is referring to the *parent* holding company. Ex. 9 (Lee Affidavit), ¶ 1 (defining “KKR” as “KKR & Co. L.P.”).