COMMONWEALTH OF KENTUCKY
COUNTY OF FRANKLIN CIRCUIT COURT
DIVISION I
CASE NO. 21-CI-00645

TIA TAYLOR, *et al.* PLAINTIFFS

vs. **OPPOSITION TO THE KKR PARTIES' AFFIDAVIT FOR DESIGNATION OF SPECIAL JUDGE**

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

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Plaintiffs Tia Taylor, Ashley Hall-Nagy, Bobby Estes and Jacob Walson (the "Tier 3 Trust Plaintiffs") in this breach-of-trust action respectfully submit the following facts in opposition to the Affidavit for Designation of Special Judge, filed on May 16, 2022 by defendants KKR & Co. Inc. ("KKR"), Henry Kravis, and George Roberts (collectively, the "KKR Parties"). As discussed below, the KKR Parties' blatant, improper attempt at judge-shopping must be rejected outright because, procedural irregularities aside:

- Judge Shepherd conducted himself properly and within the law in considering publicly available materials in connection with the KKR Parties' purported — and frivolous — defense based on lack of personal jurisdiction; and
- the reference to this litigation on Judge Shepherd's campaign website — one among 18 newspaper headlines featured to show his independence as a judge — falls well within protected political free-speech and shows no bias.

I. PROCEDURAL BACKGROUND

This litigation over the financial improprieties at, and near collapse of, the Kentucky Retirement System Pension Fund (KRS) originated at year end 2017 when KRS members commenced an action (the "*Mayberry* Action") on behalf of KRS seeking to recover damages caused by the misconduct of KRS's trustees, hedge fund sellers (including KKR and Blackstone) and other advisors to KRS. In November 2018, after months of briefing and proceedings and extensive oral argument, Judge Shepherd denied all motions to dismiss the *Mayberry* Action, rejecting claims by KKR, Blackstone and their principals of a lack of personal jurisdiction. Nov. 30, 2018 Opinion & Order (Ex. 1) at 17–19.

Defendants later obtained appellate relief solely on a failure to plead constitutional standing of the *Mayberry* plaintiffs, whose benefits were guaranteed by the

Commonwealth. No other rulings of Judge Shepherd were disturbed. *See Overstreet v. Mayberry*, 603 S.W.3d 244 (Ky. 2020). Upon remand, the original *Mayberry* plaintiffs sought to amend to re-plead standing — a motion KKR opposed. Judge Shepherd ruled in KKR's favor and denied that motion. Dec. 28, 2020 Order (Ex. 2).

The Kentucky Attorney General then sought to intervene in the *Mayberry* Action to take over the claims. Judge Shepherd granted that motion. *See id.* When the now-dismissed original *Mayberry* plaintiffs sought leave to intervene in the Attorney General's action — a motion KKR opposed — Judge Shepherd denied intervention, ruling again in KKR's favor. *See* June 14, 2021 Order (Ex. 3).

Then different members of KRS, Tier 3 Trust beneficiaries, who have constitutional standing because their benefits are not guaranteed and vary based on investment returns, commenced two separate actions. One was a class action (*see* Ex. 5) that was removed to federal court, where it is currently stayed. The other was this breach-of-trust action (*see* Ex. 4) to recover damages to be paid to the KRS Trusts, which remains pending before Judge Shepherd and awaiting decision on over a dozen motions to dismiss filed in December 2021 by Defendants, including the KKR Parties and Blackstone.

In those motions to dismiss, KKR (and Blackstone) and their principals have renewed their claims of lack of personal jurisdiction, which Judge Shepherd rejected in 2018 in denying similar motions to dismiss in the *Mayberry* Action. The Tier 3 Trust Plaintiffs filed a separate brief opposing the KKR Parties' motion (Ex. 6), which specifically addressed their renewed claims of lack of personal jurisdiction. After months of briefing and extensive oral argument, Judge Shepherd took these matters under submission in January 2022. In recent weeks, Judge Shepherd told the parties that he was working on the motions to dismiss, and expected to issue a ruling soon.

Meanwhile, the Attorney General filed a declaratory-relief action against the hedge fund sellers, including KKR and Blackstone, involving KRS's agreements to indemnify them in connection with the contested investments. That action — a satellite litigation brought by the Attorney General — has nothing to do with the Tier 3 Trust Plaintiffs' action here. In that action, Judge Shepherd made rulings concerning KKR to which KKR takes exception, and for which the KKR Parties now attempt to have him disqualified in this separate breach-of-trust case, as well as the *Mayberry* Action.

II. THIS IS NOTHING MORE THAN JUDGE-SHOPPING BY A DISGRUNTLED LITIGANT

KKR and Blackstone are the largest and most notoriously avaricious and dishonest hedge fund operators on Wall Street. The KKR Parties have now launched an abusive and vicious attack on a respected and experienced judge in Kentucky for doing his job in a way they don't like. The KKR Parties' efforts aim to delay and derail the claims of the Tier 3 Trust Plaintiffs who are attempting to recover damages for the Kentucky Retirement System's Trusts, which KKR and Blackstone fleeced out of hundreds of millions of dollars by selling KRS "Black Box hedge funds" — super-expensive speculations that were major contributors to the near collapse into insolvency of KRS's trusts. The KKR Parties are also seeking to delay and derail the Attorney General's claims for the Commonwealth.

This is an attempt to oust a judge who has been dealing for over four years with the contentious and complex litigations involving KRS, arising out of the worst financial scandal in the history of Kentucky, the near destruction of its public employee pension fund. Judge Shepherd has endured hundreds of filings and motions, making dozens of rulings some in favor of plaintiffs and some in favor of defendants, including the KKR Parties. That's the way litigation goes; you win some, you lose some. But here we see

abusive, aggressive judge-shopping by disgruntled litigants that did not get their way in one aspect of a separate satellite litigation on a defense — lack of personal jurisdiction — they had asserted earlier and lost in the original *Mayberry* Action, where they made no attempt to attack Judge Shepherd or oust him.

Before Judge Shepherd in the satellite litigation was an effort by the Attorney General to deal with abusive retaliatory "slap-back" lawsuits filed by KKR and Blackstone in faraway jurisdictions to punish KRS by enforcing indemnity clauses in their sales contracts to KRS relating to the hedge funds they sold to KRS. By exposing KRS to the expense, inconvenience and risks of defending these cases in foreign jurisdictions, the hedge fund defendants sought tactical advantage and leverage over KRS to pressure it not to support the litigation efforts by others from which KRS could benefit.

In a detailed, indeed scholarly 74-page opinion (*see* Ex. 7), Judge Shepherd exposed the hedge funds' tactics, explained why the underlying indemnity clauses were unenforceable and that the KKR Parties' claims regarding personal jurisdiction had no merit. The claims of KKR and its principals that they are exempt from personal jurisdiction in Kentucky are frivolous. Significantly, KKR's co-defendant Blackstone has not joined in the scurrilous attacks on Judge Shepherd.

Judge Shepherd's opinion KKR now takes exception to was handed down two months ago. Why did they delay in seeking this extraordinary relief? Why did they not ask Judge Shepherd to reconsider, if they thought his decision was wrong? Why did they not make a motion before Judge Shepherd to recuse so he could defend or explain himself?

KKR delayed attacking Judge Shepherd until the motions to dismiss the complaints filed by the Attorney General and the Tier 3 Trust Plaintiffs, which have been

briefed for months, long ago argued and were awaiting an imminent decision from Judge Shepherd. This last-minute filing is an attempt to freeze the proceedings and intimidate Judge Shepherd from ruling, part of the continuing tactics by the Wall Street hedge funds to fracture and delay the action to hold them accountable for their abuse of KRS and its Funds and Trusts. They have waived any argument to seek this extraordinary remedy of disqualifying Judge Shepherd in all these cases.

Whatever complaint KKR is now making has nothing to do with this Tier 3 Trust Beneficiaries' case. KKR's motion to dismiss this case, including on personal jurisdiction grounds, has been fully briefed and is awaiting a decision. Plaintiffs' opposition brief to KKR's motion to dismiss based on personal jurisdiction and other grounds in this case is Exhibit 6. A review of that brief will show that any claim that KKR and its principals are not subject to personal jurisdiction in Kentucky is frivolous. A review of the brief will demonstrate that the assertions being made by this Wall Street hedge fund, so far from the mark, so completely refuted by their own filings with the SEC, are false. The Tier 3 Trust Plaintiffs' detailed allegations and supporting evidence to support personal jurisdiction, all authenticated, have been submitted to Judge Shepherd in this breach-of-trust case and are detailed in that brief. The evidence submitted by the Tier 3 Trust Plaintiffs conclusively refutes the self-serving, speculative and false statements by KKR in its lawyer's affidavit.

The Tier 3 Trust Plaintiffs are entitled to have their case determined based on their filings — their evidence — without being impacted by whatever satellite litigation the Attorney General is pursuing. The Tier 3 Trust Plaintiffs' opposition to the KKR Parties' personal-jurisdiction motion in this case is independent, well-documented and requires no independent research by Judge Shepherd, who in November 2018 upheld the same

personal-jurisdiction allegations when he denied the same motion in the original *Mayberry* Action.

These pension-fund litigations have been pending in front of Judge Shepherd for over four years. In the original *Mayberry* Action, when it was being prosecuted by other members of KRS, Judge Shepherd ruled on the adequacy of the substantive allegations of wrongdoing and the question of personal jurisdiction over KKR and its principals. He rejected those claims.

It is worthwhile to examine the ***specificity*** with which Judge Shepherd rejected the arguments KKR made then. Judge Shepherd found the original *Mayberry* plaintiffs had alleged:

> … that these defendants acted in bad faith … describing use of 7.75% return rate as "willfully reckless" … describing concealment of KRS's financial condition as "deliberate, willful manipulation" … listing scenarios in which KRS trustees and officers acted "willfully or recklessly" in violation of duties and "did not act in good faith" … explaining that conflicts of interest among trustees and entities made it impossible to use good faith judgment, … explaining that each defendant "knowingly" participated in a civil conspiracy or scheme.

Nov. 30, 2018 Opinion & Order at 13, 21–22. The current Tier 3 complaint pleads all this and more. As to personal jurisdiction, Judge Shepherd noted how personal jurisdiction had been pleaded:

> Several executives of Prisma, PAAMCO, and BAAM … Kravis, Roberts, Schwarzman, and Hill — contest personal jurisdiction …. Blackstone and KKR also contest personal jurisdiction ….
>
> … Plaintiff states that each of the out-of-state defendants "participated in a years-long conspiracy, scheme, and common course of concerted conduct and enterprise with in-state Kentucky residents and actors, involving repeated travel into Kentucky by themselves or their agents for business purposes, thus subjecting themselves in the personal jurisdiction of Kentucky courts." Stated another way, the plaintiffs allege that these defendants entered into business arrangements with a Kentucky entity, and through those arrangements, engaged in a pattern of intentional or reckless

> misrepresentation, which foreseeably caused significant financial losses to KRS … members … to the benefit of these out-of-state defendants. *See* KRS 454.210(a)(4) (providing personal jurisdiction over non-residents that cause tortious injury in the Commonwealth by virtue of their business relationships, persistent courses of conduct, or substantial revenue derived from their Kentucky relationships).

Nov. 30, 2018 Opinion & Order at 17–19. The same allegations are at ¶¶ 81–96, 152–160 in the Tier 3 Trust Plaintiffs' complaint. *See* Ex. 4.

As to the liability of the Hedge Fund Sellers and their controlling principals and top executive officers, Judge Shepherd stated:

> The "Hedge Fund Seller Defendants" include the entities responsible for the sale and management of the relevant hedge funds, ***as well as several top executives of these companies***. These defendants now argue that Plaintiffs fail to identify a fiduciary duty, relying primarily on the contractual nature of the relationship between these defendants and KRS. In other words, … these parties were bound only to the terms of those contacts and there are no allegations that they breached the specific terms of those agreements.
>
> … [T]he Court finds that the [Complaint] contains allegations sufficient to imply a ***common law*** fiduciary relationship between the Hedge Fund seller Defendants and KRS ***and its members*** (referencing "superior knowledge and expertise" of the Hedge Fund Seller Defendants, KRS's dependence on said expertise, and Defendants' knowledge of that dependence). The complaint also contains sufficient allegations of a breach of those fiduciary duties. For example, Plaintiffs reference the massive fees collected by these defendants in breach of the common law fiduciary duty to not charge excessive fees.

Nov. 30, 2018 Opinion & Order at 26–27. The same allegations are at ¶¶ 122, 125, 133–135, 141–144, 215–220, 279–278 in the Tier 3 Trust Plaintiffs' complaint. *See* Ex. 4.

As to the conspiracy, aiding and abetting and joint enterprise allegations, they were upheld as well:

> Defendants argue that Plaintiffs fail to allege an agreement among the defendants to do the unlawful or tortious act … the Court finds that Plaintiffs sufficiently pleaded circumstances that could lead a jury to conclude that such an agreement existed. … [T]hroughout the Complaint, Plaintiffs repeated their allegation that various defendants "knowingly aided and

> abetted the breach of duties by Trustees, while participating by committing overt acts, in an ongoing scheme, civil conspiracy, common course of conduct and joint enterprise" in concert with the KRS trustees, by "acting and failing to act as alleged herein."
>
> The actions and inactions included in the Complaint include providing false or misleading information, and otherwise acting in bad faith. The Complaint also details alleged conflicts of interest among the KRS trustees and the other defendants, which could lead to a factfinder to conclude that an agreement, express or implied, existed among these parties.
>
> * * *
>
> … [T]he Court finds that Plaintiffs sufficiently plead their aiding and abetting claim …. Plaintiffs also allege that the defendants knowingly provided assistance to the breaching parties by promoting or allowing the use of false or misleading information in an effort to conceal KRS's financial status.
>
> In *Steelvest*, our Supreme Court made clear that "a person who knowingly joins with or aids and abets a fiduciary in an enterprise constituting a breach of the fiduciary relationship becomes jointly and severally liable with the fiduciary for any profits that may accrue." 807 S.W.2d at 485.

Nov. 30, 2018 Opinion & Order at 27–29. The same allegations are at ¶¶ 56–59, 125, 136, 144, 165, 169–170, 179, 224–228, 267, 352–365, and 380 in the Tier 3 Trust Plaintiffs' complaint. *See* Ex. 4.

Finally, Judge Shepherd summarized the allegations in the *Mayberry* Action that "these defendants acted in bad faith," that "these defendants 'consistently used, or allowed the use of, outdated, misleading or false estimates and assumptions of the actuarial value of the Trust Funds' actuarial assets and liabilities,'" that "this constituted 'deliberate, willful manipulation to conceal the true financial and actuarial condition and underfunded status of the KRS Plans'":

> Trustees and Officers willfully or recklessly violated their duties … and did not act in good faith or in what they honestly believed was in the best interests of KRS, and its Funds when they failed to: (i) adequately safeguard the trust funds under their control; (ii) procure adequate fiduciary insurance; (iii) invest the trust assets prudently, (iv) avoid excessive and/or unreasonable fees and expenses; (v) use realistic estimates and assumptions

> regarding the actuarial condition and future investment returns of the funds; (vi) adequately match the assets and liability of the funds; (vii) failed to protect and assure KRS' full legal rights, including the right to sue in Kentucky state court, in open proceedings, with a jury trial, if KRS's legal rights were violated by others — especially by sophisticated out-of-state sellers of investment products who might try to limit or eliminate KRS' legal remedies; or (viii) make truthful, complete, accurate disclosure of, or a fair presentation of, the true financial and actuarial condition the KRS Funds and Plans as is detailed in this Complaint.
>
> These allegations of bad faith and willful and/or reckless misconduct — when accepted as true for purposes of considering a CR 12.02 motion — allow Plaintiffs to sue ….

Nov. 30, 2018 Opinion & Order at 14–15.

Both the Kentucky Supreme Court and Judge Shepherd addressed the real-world significance of those allegations. The Kentucky Supreme Court — while dismissing the original complaint in the *Mayberry* Action on standing grounds — disturbed none of Judge Shepherd's other rulings, and characterized those factual allegations as stating "***significant misconduct***." *See Overstreet*, 603 S.W.3d at 266. Judge Shepherd later summarized what was alleged: "***severe misconduct and breaches of fiduciary duty***" involving "***self-dealing***, ***exorbitant fees***, ***conflicts of interest***." *See* Dec. 28, 2020 Order (Ex. 2) at 15. He also stated "***any party that breached its fiduciary duties and engaged in reckless conduct***, ***conflicts of interest or self-dealing should be held accountable under the law***," and that "***principles of equity and public interest require that the factual allegations … should be adjudicated on the merits***." *Id*. at 16–17.

The hedge funds and their executives are the ones alleged to have done this. They gutted this Commonwealth's public employee pension fund and breached their duties in every way imaginable. Now they want to kick Judge Shepherd out of all the cases. Why did these hedge funds wait over three-plus years to seek to disqualify Judge Shepherd in

this case in light of his prior ruling? If they thought Judge Shepherd was prejudiced against them on personal jurisdiction or other issues, they have had years to make a motion to disqualify him in this case, but did not do so.

They have delayed because they still hoped to get this case, the Tier 3 trust beneficiary case, dismissed by Judge Shepherd, who has denied other requests for relief by plaintiffs and ruled in KKR's favor several times. However, Judge Shepherd has not approved a proposed "seal-and-secret" protective order submitted to him by KKR and Blackstone that would have blocked public access to the evidence and discovery in a case involving a public pension fund. When Judge Shepherd did not sign the agreed-to "seal-and-secret" order submitted by KKR and Blackstone, it became apparent to KKR that they were about to lose the motions to dismiss Judge Shepherd said he would be issuing soon. Only then did the KKR Parties take this extraordinary attempt at disqualification.

Judge Shepherd has been dealing with these cases for over four years. His invested time and his accrued knowledge are irreplaceable. What retired judge is there that for $400 per day will be able to take the months required to try to re-learn all this — and then preside over cases that may well last many more years? Given his years of work and effort on, and knowledge about this case, ***Judge Shepherd is the right "special judge" for these cases***.

III. JUDGE SHEPHERD'S CAMPAIGN WEBSITE IS NOT IMPROPER AND DOES NOT SHOW BIAS

Judge Shepherd is in the middle of an election campaign. The law recognizes that judicial candidates have protected political free-speech rights not subject to review by litigants with axes to grind. *See*, *e.g.*, *Winter v. Wolnitzek*, 834 F.3d 681, 688 (6th Cir. 2016) ("the First Amendment establishes that a State may not prevent judicial candidates

from publicly taking a stance on 'matters of current public importance'"); *Blau v. Wolnitzek*, 482 S.W.3d 768, 773 n.3 (Ky. 2016) ("Speech concerning public issues and the qualifications of candidates for elective office commands the highest level of First Amendment protection."). The Kentucky Supreme Court rules explicitly allow a judicial candidate's campaign committee to raise campaign funds. *See* SUP. CT. R. 4.300, Cannon 4. Judge Shepherd's campaign website is controlled by his campaign, Friends of Phillip Shepherd. How do we know that Judge Shepherd is personally responsible for what is put on this website?

The fusillade aimed at Judge Shepherd's campaign website is wrong and, frankly, misleading. The KKR Affidavit flatly suggests that Judge Shepherd is improperly fundraising off the Fund of Hedge Funds cases. The facts are otherwise.

"The First (and Fourteenth) Amendment to the United States Constitution gives candidates for elective office, whether executive, legislative, or judicial, freedom on the campaign trail to explain why they are the superior candidate for the job." *Winter*, 834 F.3d at 688. Judge Shepherd's campaign website displays a photographic collage of newspaper headlines about *18 different cases* to support the campaign's political argument that Judge Shepherd is "an independent judge who is guided by our Constitution, not partisan politics or personal interests." The headline to which KKR points is but one of these 18 and is by no means the centerpiece of the collage. More to the point, inclusion of the photograph of that headline does *not* in any way run afoul of Canon 4.1(A)(12) or (13), which prohibit "any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending" and "pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office." To assert that this snippet evinces such bias that

four years of judicial work must be thrown away is absurd, particularly in view of the "strict scrutiny standard" that attaches to "core political speech." *Blau*, 482 S.W.3d at 773. "States have a compelling interest in preserving public confidence in the integrity of the judiciary." *Id*. In this instance, public confidence in the integrity of the judiciary would be ill-served by disqualification on such flimsy grounds at the behest of these uber-powerful oligarchs — especially in the midst of a contentious political season.

KKR's complaint about the "CONTRIBUTE" button is no less baseless. Kentucky Supreme Court Rule 4.4(A) expressly permits a judicial candidate to "establish a campaign committee to manage and conduct a campaign for the candidate." According to the Comments to Rule 4.4, "[t]his Rule recognizes that judicial candidates must raise campaign funds to support their candidacies, and permits candidates, other than candidates for appointive judicial office, to establish campaign committees to solicit and accept reasonable financial contributions or in-kind contributions [and that] campaign committees may solicit and accept campaign contributions, manage the expenditure of campaign funds, and generally conduct campaigns." So, soliciting contributions through the campaign website is entirely appropriate. The placement of the "CONTRIBUTE" button is not problematic, nor is it, as KKR suggests, strategically placed to associate it with any particular statement. The website is designed with a fixed header and scrolling content, so any content on the site that is scrolled to the top will appear next to the header with the "CONTRIBUTE" button. This particular website design (which was very likely created by the campaign committee, not Judge Shepherd personally) does not create the appearance of bias and is not in any other way improper.

KKR's attack on Judge Shepherd's campaign website attempts to create a misleading impression that is inconsistent with the facts on the ground for the purpose of intimidating the judiciary. It should be seen — and swiftly rejected — for what it is.

IV. THE "INDEPENDENT RESEARCH" ISSUE IN THE SATELLITE LITIGATION IS AN OVERBLOWN NON-ISSUE AND DOES NOT WARRANT JUDGE SHEPHERD'S REMOVAL

With regard to KKR's criticism of Judge Shepherd's independent research in this satellite litigation, it is really a case of "no harm" — "no foul." As pointed out earlier, there is no question KKR and its top principals are subject to personal jurisdiction. Judge Shepherd has previously so ruled in the original *Mayberry* Action in November 2018, a decision based not only on the allegations of that complaint but also judicially noticeable filings and other statements by KKR. In addition, the separate opposition brief filed by the Tier 3 Trust Plaintiffs in the motion-to-dismiss proceedings in this case is an even more detailed presentation of the KKR corporate structure, its control of Prisma, *i.e.*, KKR Prisma, their office in Kentucky and the KKR and KKR Prisma officers who work and live there. Personal jurisdiction over KKR and its principals is clear beyond doubt — based on allegations and evidence all of it already before Judge Shepherd in the original *Mayberry* Action, the Attorney General's post-*Mayberry* case, and in this breach-of-trust case by the Tier 3 Trust Plaintiffs. If Judge Shepherd independently confirmed some of these facts already before him in the other cases — there was no harm to KKR. Its personal-jurisdiction claims are false and frivolous.

The KKR Parties also mount a scathing attack on Judge Shepherd's March 24, 2022 Opinion and Order granting the Commonwealth's Motion for Summary Judgment on grounds that the Court's limited and disclosed use of publicly-available information gleaned from internet searches is disqualifying. It isn't.

The actual legal issues, after the smoke has been cleared, are:

- Did Judge Shepherd commit error by conducting his own online review of certain "materials available to the general public," principally "filings with the Securities and Exchange Commission"?
- Should the KKR Parties have raised the alleged error with Judge Shepherd in the first instance to permit the Court to consider and rule on their objections?
- Did the KKR Parties waive their right to seek relief in connection with the alleged error by failing to raise them with Judge Shepherd?

The answers, as explained below, are:

- Judge Shepherd did not commit error — and even if he did, it was inconsequential and curable.
- The KKR Parties could and should have raised the alleged error with Judge Shepherd and sought to have them cured. They did not do so, apparently because they opted instead for the "nuclear option."
- By failing to bring the alleged errors to the attention of the Court, the KKR Parties waived appellate review — including through this disqualification procedure.

It is beyond obvious that a great deal of thought and work has gone into the KKR Parties' "Hail Mary" legal maneuver. But shorn of hyperbole and unsupportable innuendoes, what we are left with is a group of extremely well-heeled defendants who don't like their chances on the merits and thus are intent on throwing over the chess board rather than play on under the established rules that are supposed to apply equally to the highest and lowest among us.

Judge Shepherd's March 24, 2022 Opinion and Order states that "the Court has reviewed the exhibits provided by Defendants as well as, particularly as it relates to KKR's Motion, materials available to the general public." Ex. 7 at 7. The Opinion and Order further states that "the Court has conducted a thorough review of the record, gathered from the pleadings and publicly-available information (including numerous filings with the Securities and Exchange Commission ("SEC")), describing KKR's connections with the Commonwealth." *Id.* at 9.

The KKR Parties now assert that this review of publicly-available documents was not only improper, but so prejudicial to their ongoing defense of the Black Box hedge fund cases that disqualification of Judge Shepherd after 4-plus years on the case is the only possible remedy. But they fail to say which documents Judge Shepherd shouldn't have seen[1] — or how they were prejudiced by an experienced judge reading SEC filings created by their own attorneys. **How were they fundamentally prejudiced**? **What information did Judge Shepherd gain that he should never have been permitted to see**?[2] **What information was so toxic that it can only be remediated by disqualification**? **They don't say**. **And that is because ultimately their complaint is about process, not substance, and process**

[1] The KKR Parties list 57 documents they assert Judge Shepherd judicially noticed, and suggest that Judge Shepherd found all of these documents on his own. But the vast majority of these documents had previously been brought to Judge Shepherd's attention by the parties in one or more of the Black Box hedge fund cases. The amount of information and number of public filings placed before the Court in the aggregate has been staggering. It is certainly proper for the Court to review public documents previously tendered in cases in which the KKR Parties have been parties.

[2] Trial judges are routinely exposed to inadmissible, even highly prejudicial, evidence proffered by a party. But our system of justice reposes trust in trial judges to be able to set such things aside and to carry out their duties impartially.

errors are curable. But the KKR Parties chose deliberately not to file a motion under CR 59.01(a) or attempt any other curative measures, but rather to try to use the issue as a weapon to blow the Fund-of-Hedge-Fund Cases out of the water.

Many courts have held that judicial notice of public documents, like SEC filings, is proper. *See, e.g.*, *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1275–81 (11th Cir. 1999) (holding courts may take judicial notice of public SEC filings); *Cortec Indus., Inc. v. Sum Holding LP*, 949 F.2d 42, 47 (2d Cir. 1991) (same). As a federal district court in Kentucky explained:

> This information comes from Amcor plc's Form 10-K filing. Although this form is not attached to the Complaint, the Court takes judicial notice of it pursuant to Rule 201 of the Federal Rules of Evidence. Fed. R. Evid. 201. The facts contained in the 10-K are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned and, as such, are "not subject to reasonable dispute." Moreover, because this information is amenable to judicial notice, the Court may consider it without converting Amcor's motion to dismiss into a motion for summary judgment.

Clegg v. Amcor Rigid Packaging USA, LLC, 2022 WL 23215, at *1, n.1 (E.D. Ky. Jan. 3, 2022).

The KKR Parties, however, insist on an absolutist position prohibiting any judicial research. But that isn't, and shouldn't be, the law. Careful and limited independent research by judges can advance the truth-finding function of the judiciary if the facts of the research and conclusions drawn from it are transparent, the sources reliable and the parties are not deprived of the opportunity to be heard. The *per se* prohibition urged by the KKR Parties would require judges to put on blinders to filter out what the rest of the world can readily see. The better view rejects this *per se* rule in favor of a commonsense view that transparency and reliability — coupled with the opportunity for a party to object

to the reliability of the source — should be the standard in respect to issues such as standing or personal jurisdiction.

Judge Jack Weinstein (who not incidentally was also the primary author of *Weinstein's Federal Evidence*: *Commentary on Rules of Evidence for the United States Courts* supported this commonsense view in his opinion in *Commodity Futures Trading Commission v. McDonnell*:

> In deciding **jurisdictional**, standing and other issues fundamental to the present litigation, the court has engaged in extensive background research, but not on the specific frauds charged. This is appropriate.
>
> The ABA has issued the following opinion related to individual research by the court:
>
> > Easy access to a vast amount of information available on the Internet exposes judges to potential ethical problems. Judges risk violating the Model Code of Judicial Conduct by searching the Internet for information related to participants or facts in a proceeding. **Independent investigation of adjudicative facts generally is prohibited unless the information is properly subject to judicial notice.** The restriction on independent investigation includes individuals subject to the judge's direction and control.
> >
> > Committee on Ethics and Responsibility, Independent Factual Research by Judges Via Internet, Formal Opinion 478, Dec. 8, 2017 (ABA).
>
> It is appropriate and necessary for the judge to do research required by a case in order to understand the context and background of the issues involved so long as the judge indicates to the parties the research and conclusions, **by opinions and otherwise**, so they may contest and clarify. *See Abrams, Brewer, Medwed, et al*., EVIDENCE CASES AND MATERIALS (10th Ed. 2017) (Ch. 9 "Judicial Notice"). It would be a misapprehension of the ABA rule to conclude otherwise.

287 F. Supp. 3d 213, 230 (E.D.N.Y. 2018) (emphasis added). Here, Judge Shepherd did "indicate to the parties the research and conclusions," and he did nothing to prevent the KKR Parties from seeking to "contest and clarify."

The Supreme Court's opinion in *Marchese v. Aebersold*, 530 S.W.3d 441 (Ky. 2017), does not support the KKR Parties' position. In that case the trial judge consulted "some *undisclosed* source to obtain extrajudicial information" then refused "to allow Marchese to respond to the newly-disclosed evidence and ordering him to leave the courtroom." *Id.* at 446. Judge Shepherd did nothing of the kind. He disclosed the fact that he had conducted what he considered appropriate independent research,[3] and there is nothing to suggest that he would have cavalierly declined to hear a CR 59 motion. In *Marchese*, the Court observed that the trial judge deprived Marchese of "an opportunity to be heard"; that was the primary sin demanding expiation by disqualification. In stark contrast, Judge Shepherd disclosed the fact that he had performed what he considered to have been appropriate research — and in so doing he afforded the KKR parties "an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed." KY. R. EVID. 201(e). That the KKR Parties decided for their own reasons not to raise the matter and ask to be heard is on them, not on Judge Shepherd.

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[3] KKR's corporate structure is so unusual and Byzantine that it takes concentrated study to understand that, until very recently, all roads led back to Kravis and Roberts who personally controlled, and personally reaped great profits from, KKR & Co., Inc. The KKR Parties assert that KKR & Co., Inc. has no employees and no business operations. But it (and its predecessor entities) made Kravis and Roberts two of the richest and most powerful humans on earth. That Kravis and Roberts chose to operate through a series of entities acting as their controlled agents does not immunize their conduct or create a form of antimatter shield that repels judicial inquiry with respect to that conduct. We attach as Exhibit 6 the Tier 3 Trust Plaintiffs' Opposition to the KKR Parties' Motion to Dismiss in this breach-of-trust action. Of particular note is the detailed examination therein of the orders given by KKR & Co., Inc.'s top leadership to the operating companies "cross sell" financial products — and KKR's attempt to cross sell its private equity products to KRS after and because KKR Prisma personnel had been installed inside KRS pursuant to a secret self-dealing contractual arrangement. To say that KKR engaged in "purposeful availment" is an understatement. That Judge Shepherd was able to cut through the paper structure and get to the real substance of KKR's activities in Kentucky constituted an unacceptable danger to KKR's entire *modus operandi*.

V. THE KKR PARTIES HAVE WAIVED APPELLATE REVIEW OF THIS ISSUE

But what if Judge Shepherd did inadvertently cross some murky line or it could be said that he improperly accessed a source or even a few? Or that he should have denied Defendants' motions to dismiss rather than granting summary judgment? These are the **process issues** mentioned above. And there are established processes to deal with them — processes that the KKR Parties could have utilized but chose not to. For example, CR 59.01(a) permits a new trial in case of "[i]rregularity in the proceedings of the court … by which the party was prevented from having a fair trial." That is what the KKR Parties ultimately say happened. They should have used this or some other procedure to bring the alleged "irregularity," or mistaken conclusion, to Judge Shepherd's attention. That they chose this path instead is more than telling.

Payne v. Hall, 423 S.W.2d 530 (Ky. 1968) stands for the proposition that a party who fails to present the trial court with an opportunity to consider and rule upon alleged errors waives its right to seek appellate review on those points. "The trial court was given no opportunity to pass on these contentions, which is a prerequisite here to appellate review." *Id.* **The KKR Parties waived their right to seek ordinary appellate review by their failure, apparently deliberate**, **to bring the alleged errors to Judge Shepherd's attention through a Rule 59 motion or otherwise**. **The same waiver rule should apply to the extraordinary appellate review they now seek**. And, if it be their intention to manufacture a faux controversy to make it appear that the proper relationship between a judge and parties before him is irretrievably broken, that is on them, not on Judge Shepherd. And they should not be rewarded for their own inappropriate conduct.

VI. CONCLUSION

The timing and procedural irregularities of the KKR Parties' request to remove Judge Shepherd are particularly alarming in light of the fact that Judge Shepherd is in the midst of a re-election campaign. Rather than have the Supreme Court drawn into these cases in the middle of a political campaign, we suggest a swift rejection of the KKR Parties' request for Supreme Court intervention and that the traditional procedure of recusal motion practice be followed. That is, the KKR Parties make a motion in front of Judge Shepherd to disqualify him in whatever litigation they believe he should be disqualified from hearing. Allow Judge Shepherd to go ahead and rule on the pending motions to dismiss in this breach-of-trust case and the Attorney General's case, all of which have been fully briefed, argued and pending decisions for over five months. If the KKR Parties lose — and as of now, no party knows if they would win or lose — then they can pursue whatever appellate remedies they think they have either in the Attorney General's satellite lawsuit they are complaining about (which does not involve the Tier 3 Trust Plaintiffs) or any ruling he might make on the motions to dismiss the two separate cases in front of him or on any motion to recuse him in those cases. Following that traditional practice, which the KKR Parties are now attempting to circumvent, will allow Judge Shepherd to explain whatever conduct is challenged and decide the long pending motions before him in the main lawsuits.

For all the foregoing reasons, the KKR Parties' request to designate a special judge should be denied.

Dated: May 23, 2022

Respectfully submitted,

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