EFiled: Aug 05 2024 05:02PM EDT
Transaction ID 73950256
Case No. 2024-0808-JTL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

STEAMFITTERS LOCAL 449 PENSION FUND, Plaintiff, v. HENRY KRAVIS, GEORGE ROBERTS, JOSEPH BAE, SCOTT NUTTALL, DAVID SORKIN, ROBERT LEWIN, ROBERT SCULLY, MARY DILLON, PATRICIA RUSSO, THOMAS SCHOEWE, XAVIER NIEL, ADRIANE BROWN, ARTURO GUTIERREZ HERNANDEZ, DANE HOLMES, JOSEPH GRUNDFEST, JOHN HESS, EVERCORE GROUP L.L.C., Defendants, – and – KKR & CO. INC., Nominal Defendant.	C.A. No. 2024-0808-JTL **PUBLIC VERSION** **FILED ON: AUGUST 5, 2024**

VERIFIED COMPLAINT

Steamfitters Local 449 Pension Fund ("Plaintiff"), by and through its undersigned counsel, based upon knowledge as to itself and information and belief, including the review of publicly available information and non-public documents

obtained pursuant to a demand to inspect books and records of KKR & Co. Inc. ("KKR" or the "Company") under 8 *Del. C.* § 220 ("Section 220"), as to all other matters, alleges as follows:

NATURE OF THE ACTION

1. This case is about two Wall Street titans who wanted to enrich themselves and their fellow private unitholders because their peers had done so. KKR's founders, Henry Kravis and George Roberts (the "Founders"), saw that the founders of The Carlyle Group ("Carlyle") and the founders of Apollo Global Management ("Apollo") had given themselves multi-hundred-million-dollar payoffs in connection with corporate restructuring transactions at their respective alternative asset management firms. Kravis and Roberts sought a similar payoff.

2. Carlyle converted from a publicly traded partnership into a corporation. Apollo converted from an "Up-C" structure into a corporation. Both restructuring transactions contemplated a ***tax-free exchange*** of the founders' partnership units into shares. A ***tax-free exchange*** had the practical effect of eliminating and rendering worthless the founders' contract right under a tax receivable agreement ("TRA") to potential future payments arising out of ***future taxable exchanges*** of partnership units. The founders of Carlyle, and then Apollo, demanded hefty compensation for the hypothetical loss of future payments from ***hypothetical future***

taxable exchanges. The founders and other private unitholders at Carlyle received $344 million for the supposed loss of their TRA rights. The founders and other private unitholders at Apollo received $570 million.

3. Kravis and Roberts similarly demanded a massive payment (a "TRA Termination Payment") to themselves and the other private unitholders of KKR in the context of a contemplated ***tax-free conversion*** of their partnership units into shares as part of KKR converting from its Up-C structure to a corporation (the "Reorganization"). Initially, the Founders sought a TRA Termination Payment valued at [redacted], which would include 8.5 million newly issued shares of KKR common stock worth over $500 million. The Founders' proposal was expressly justified with reference to Carlyle and Apollo as "two recent market comps for TRA termination payments."

4. The Founders' proposal ran into a speed bump that should have been a roadblock. Outside legal and financial advisors to KKR knew that stockholders at Carlyle and Apollo had served Section 220 demands challenging the above-referenced TRA payoffs to those firms' founders. KKR's advisors understood that

those Section 220 demands cogently argued that the payoffs could not be justified by the loss of TRA rights.[1]

5. A TRA is beneficial to unitholders in a partnership only to the extent that the unitholders are motivated to monetize their holdings by means of exchanging their units for public shares in a ***taxable*** transaction and then selling the shares. Under the Internal Revenue Code, ***taxable*** exchanges of units for shares in an Up-C structure create contingent tax assets for the corporation that the corporation can use in the future to offset taxable income. A TRA allocates the contingent future tax savings between the corporation and an exchanging unitholder. Typically, the exchanging unitholder is entitled to 85% of the value of the tax savings to the corporation, and the corporation keeps the remaining 15%. This TRA contract right to 85% of the corporation's future tax savings resulting from future ***taxable***

[1] The payoffs to the founders and pre-IPO owners of Carlyle and Apollo are currently being litigated. Vice Chancellor Zurn sustained the central claims respecting the Carlyle transaction. *See City of Pittsburgh Comp. Mun. Pen. Trust Fund v. Conway*, 2024 WL 1752419, at *1 (Del. Ch. Apr. 24, 2024) ("Plaintiff satisfies this exception by pleading Carlyle LP's general partner, acting through various defendants in this action, concealed or obfuscated material information from the conflicts committee to ensure it did not learn the Private Unitholders lacked the leverage to extract a payment for their TRA rights. At the pleading stage, Plaintiff has established that the good faith safe harbor is unavailable."). Briefing is underway on a motion to dismiss the Apollo litigation, *Anguilla Social Security Board v. Black et al.*, C.A. No. 2023-0846-JTL (Del. Ch.).

exchanges of units for shares is of no value to unitholders, including billionaire founders, who do not monetize their partnership units through ***taxable*** exchanges that provide the corporation with tax assets.

6. Neither Roberts nor Kravis engaged in taxable exchanges of their units since KKR's IPO in 2010. They never "sold a share of KKR stock."[2] The Section 220 documents do not indicate that Kravis or Roberts had any expressed intention of engaging in future taxable exchanges. If the Founders wanted liquidity, the Founders could use the "buy, borrow, die" strategy of borrowing against their KKR equity, which would allow them to hold their low-basis KKR units until their deaths, at which time their heirs would receive a tax-basis step up and no TRA payments would ever be due.[3]

7. The prior restructuring transactions at Carlyle and Apollo, and the challenged restructuring transaction at KKR, allowed the founders and other private unitholders to exchange their units into publicly traded shares ***tax-free***, thereby avoiding a massive tax liability. Accordingly, no tax assets were created, and there

---

[2] *See* Lydia Moynihan, *KKR's billionaire founders could look to cash out after stepping down, experts predict*, N.Y. Post (Oct. 12, 2021).

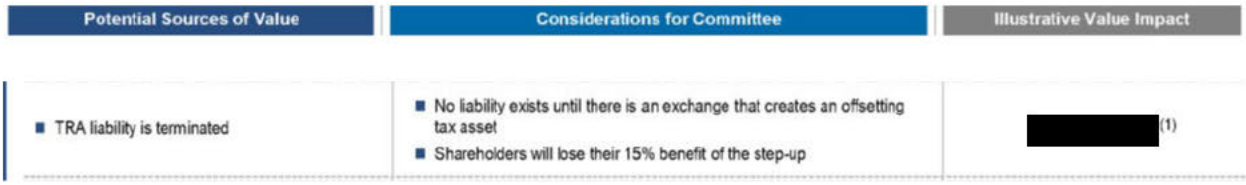
[3] *See, e.g.*, David Rae, *How The Rich Use The Buy, Borrow Die Strategy To Avoid Large Tax Bills*, Forbes (July 14, 2022).

would be no future tax savings or associated TRA payments. These ***tax-free*** restructuring transactions were intended to be value-enhancing to the firms and their investors. The founders with the largest stakes would be the largest beneficiaries.

8. For the above reasons, there was no financial logic in KKR paying the Founders and the other private unitholders for the Founders' supposed lost opportunity to engage in hypothetical future ***taxable*** exchanges that could possibly have benefitted KKR. Fully informed outside directors negotiating with the Founders at arm's-length respecting a ***tax-free*** exchange of units as part of a value-enhancing restructuring transaction should not agree to a massive payoff to the Founders premised on their lost TRA rights. KKR's outside advisors understood this.

9. KKR's Conflicts Committee retained Evercore Group L.L.C. ("Evercore") as its financial advisor. Evercore was conflicted. Evercore had represented Carlyle's founders in connection with the payoff to them for their lost TRA rights. Additionally, Evercore had represented KKR in two asset sales by a KKR portfolio company in 2021. The Conflicts Committee never asked Evercore for a conflicts disclosure, and Evercore chose to hide its conflicts despite the obvious relevance to the Conflicts Committee process.

10. Evercore understood that eliminating future taxable exchanges that otherwise would occur had negative value to KKR because the Company's future tax savings from taxable exchanges would always exceed its TRA obligations by 15%. Eliminating the TRA was thus no justification for KKR making a massive payout to the Founders and other unitholders. Evercore calculated that eliminating future taxable exchanges of all outstanding partnership units over time could cost KKR up to [redacted] in net present value based on the Company's 15% share of future tax savings under the TRA:

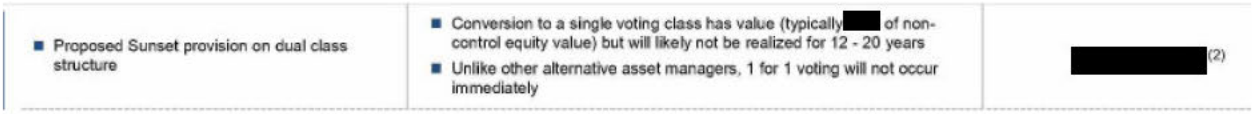


Potential Sources of Value	Considerations for Committee	Illustrative Value Impact
■ TRA liability is terminated	■ No liability exists until there is an exchange that creates an offsetting tax asset ■ Shareholders will lose their 15% benefit of the step-up	[redacted](1)

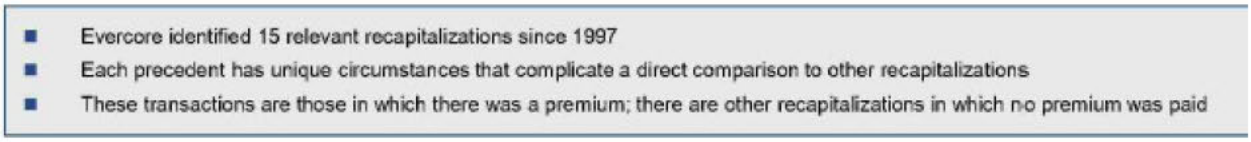
11. Evercore's understanding of this financial reality put them in an untenable position. Evercore had staked its position on the negative value to the Company of eliminating future taxable exchanges under the TRA. Yet, the Founders insisted that they wanted to be paid by the Company for the elimination of potential future taxable exchanges, as Carlyle and Apollo had done, and Evercore had helped engineer the Carlyle payment.

12. In bad faith, Evercore conceived of an alternative justification for a massive payoff to the Founders and the other unitholders. According to Evercore, the Founders could be compensated for the net present value of the future benefit to

KKR of becoming a one-share, one-vote corporation upon the ***future*** relinquishment of control by the Founders. Evercore presented that the sunset of KKR's dual-class structure upon the Founders' death or disability was worth almost exactly what the Founders wanted to give up their "future TRA rights"—up to [redacted]:



13. Evercore's financial analysis of its control justification was artificial and contrived—just like the control justification itself. Evercore identified supposed "relevant" precedent transactions dating back to 1997 in which holders of high-vote stock had received a premium in dual class recapitalizations (while ignoring the far more numerous dual class recapitalizations in which no premium was paid):

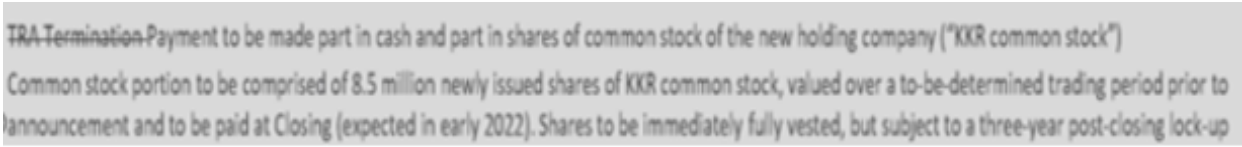


In dual class recapitalizations, control was *immediately* transferred from the holders of high-vote shares to the public stockholders. Typically, fairness opinions were issued when high-vote holders received a premium. The challenged transaction was not such a dual class recapitalization. Evercore, unsurprisingly, was unwilling to provide a fairness opinion.

14. Evercore made no attempt to identify precedents most similar in form to the unique attributes of the challenged transaction. Evercore rejected [redacted]. Nothing in the Section 220 record or the public record suggested that Kravis and Roberts, both near-octogenarians, planned on maintaining intergenerational control. They negotiated to retain absolute control for five years post-closing. Thereafter, Kravis and Roberts would retain effective working control through their high-status co-Chairmen roles coupled with the 25% voting block they would enjoy in combination with their chosen management successors.

15. The Founders never conceived of their proposed transaction as a sale of control. They insisted on retaining absolute control for a period of years. In their negotiations, the Founders and KKR management continued to point to the TRA payoffs in Carlyle and Apollo as precedents. In substance, the Founders and KKR management always structured the payoff as a TRA Termination Payment, not as a sale of the Founders' control. The payoff would be *pro rata* to all private unitholders in proportion to number of units they exchanged tax free, with nearly half of the payment going to unitholders other than the Founders, consistent with the reality that ***all*** private unitholders were being compensated for their hypothetical loss of TRA rights.

16. As a matter of form, KKR management struck the words "TRA Termination" from the defined term "TRA Termination Payment" in their presentation materials and draft transactional documents:


~~TRA Termination~~ Payment to be made part in cash and part in shares of common stock of the new holding company ("KKR common stock")
Common stock portion to be comprised of 8.5 million newly issued shares of KKR common stock, valued over a to-be-determined trading period prior to announcement and to be paid at Closing (expected in early 2022). Shares to be immediately fully vested, but subject to a three-year post-closing lock-up

However, the documentation ultimately presented to the Board stated: "The TRA entitlement is exchanged for [8.5 million] Class A Recapitalization Units in Group Partnership."

17. Kravis negotiated the final terms of the challenged transaction with the head of the Conflicts Committee in undocumented discussions over the course of a weekend. The negotiated financial term was the issuance to the unitholders of 8.5 million newly issued KKR shares worth more than $500 million (the "TRA Payoff").

18. In short, the TRA Payoff was an unjustifiable payment to the Founders and other private unitholders. The director defendants could not rely in good faith on calculations by a conflicted financial advisor who was unwilling to opine on the fairness of the challenged transaction and unable to identify analogous precedent transactions that made financial sense. Evercore aided and abetted the Founders and other director defendants in facilitating the unfair TRA Payoff.

19. As part of the Reorganization, the Board shoveled other benefits to the Founders and other senior officers with minimal, if any, analysis or negotiation. Among other unwarranted handouts, the Board used the Reorganization as a pretext to allow the Founders to divvy up 3.36 million unallocated KKR partnership units, worth approximately $220 million, that had been used to compensate KKR personnel but were forfeited when the personnel left KKR before the units vested (the "Forfeited Units Payoff," and with the TRA Payoff, the "Challenged Payoffs").

20. The Challenged Payoffs are not entirely fair. The Founders did not condition their proposal on the approval by a fully empowered special committee or a vote of unaffiliated stockholders. An independent third party acting at arm's-length would not have approved the Challenged Payoffs.

PARTIES

Nominal Defendant KKR & Co. Inc.

21. Nominal Defendant KKR & Co. Inc. is a publicly traded Delaware corporation with its corporate headquarters located in New York City.

22. From its 2010 listing on the NYSE until its conversion into an Up-C corporation in 2018, KKR & Co. L.P. ("KKR LP") was a publicly traded partnership.

23. In July 2018, KKR LP converted to an Up-C structure, with a publicly traded parent corporation, KKR & Co., Inc. ("KKR Inc.," and together with KKR LP, "KKR").

24. On May 31, 2022, KKR's stock was acquired by a new parent company that took KKR's pre-merger name, KKR & Co. Inc. ("New KKR"). KKR became a wholly owned subsidiary of New KKR, and public stockholders of KKR Inc. became stockholders of New KKR.

Plaintiff

25. Steamfitters Local 449 Pension Fund was a beneficial owner of shares of KKR during the consideration and approval of the challenged transaction, continuously owned shares of KKR through the merger in which its KKR shares were converted to shares of New KKR by operation of law, and has continuously remained a beneficial owner of New KKR shares.

Defendants

26. Defendants are (i) the two Founders, (ii) four other officers, two of whom are also on the Board, (iii) ten other current or former members of the Board who approved the Challenged Payoffs, either as members of the Conflicts Committee or as members of the Board, and (iv) the Conflicts Committee's financial advisor, Evercore.

The Founder Defendants

27. Henry Kravis co-founded KKR in 1976 and serves as Co-Executive Chairman. Until 2021, he served as co-CEO. He continues to be "actively involved in managing the firm and serves on each of the regional Private Equity Investment Committees."[4] As a result of the TRA Payoff, Kravis received 2,414,142 KKR shares worth approximately $158 million.[5] As a result of the Forfeited Units Payoff, Kravis received 535,185 KKR partnership units worth approximately $35 million. In sum, Kravis received KKR shares worth approximately $193 million in connection with the Challenged Payoffs.

28. George Roberts co-founded KKR in 1976 and serves as Co-Executive Chairman. Until 2021, he served as co-CEO. He continues to be "actively involved in managing the firm and serves on each of the regional Private Equity Investment Committees."[6] As a result of the TRA Payoff, Roberts received 2,659,772 KKR shares worth approximately $174 million. As a result of the Forfeited Units Payoff, Roberts received 535,184 KKR partnership units worth approximately $35 million.

---

[4] KKR & Co. Inc., Form 10-K, at 374 (Feb. 29, 2024).

[5] The value of the benefits from the Challenged Payoffs discussed herein are calculated using the closing price of $65.51 share on the date the Reorganization Agreement was signed.

[6] *Id.*

In sum, Roberts received shares worth approximately $209 million in connection with the Challenged Payoffs.

29. From KKR's IPO through the present, the Founders have maintained control over KKR. Kravis and Roberts exert control over KKR through the ownership of the "Golden Share" (*i.e.*, a single share of Series I Preferred Stock held by KKR Management LLP ("KKR Management")). As explained in the Company's Form 10-K filed on February 29, 2024, "[t]he Series I preferred stockholder has the ability to appoint and remove members of our board of directors." KKR Management is controlled by Kravis and Roberts who, as the original "Designated Members," can never be "deemed to represent less than a Majority in Interest of [KKR Management's] Class A Members."

30. Through the Golden Share, the Founders can hire and fire at will the members of KKR's unconventional, unclassified board, where directors do not have pre-established terms of service. Kravis and Roberts also comprise a majority of the nominating committee. Public stockholders do not vote on the election of directors. KKR has not issued a proxy statement for more than five years. The Golden Share also provides the Founders with blocking rights concerning various types of transactions, including transactions that could otherwise provide a check on the Founders, such as the adoption of a stockholder rights plan.

31. Even without the Golden Share, the Founders maintain effective control through a combination of (i) their status as founders, (ii) their continued roles as co-Executive Chairmen, (iii) their managerial control through officer defendants Bae, Nuttall, Sorkin and Lewin, who are all beholden to the Founders for their careers and lucrative compensation packages, and (iv) their collective 25% stock ownership with the officer defendants:

Name	KKR Shares Owned Post-Reorganization	Ownership %
Kravis	83,370,688	9.70%
Roberts	86,662,855	10.08%
Bae	18,476,431	2.15%
Nuttall	20,571,325	2.39%
Sorkin	3,247,057	0.38%
Lewin	1,209,226	0.14%
Total	**213,537,582**	**24.83%**

Other Interested Officer Defendants

32. Joseph Bae joined KKR in 1996 and is currently its co-Chief Executive Officer. Prior to that, he served as co-President and co-Chief Operating Officer from 2017 to 2021. He has been a member of the board of directors since July 2017. In 2021, Bae received a total of $559,636,148 in compensation from KKR. As a result of the TRA Payoff, Bae received 465,629 KKR shares worth approximately $31 million. As a result of the Forfeited Units Payoff, Bae received 1,150,000 KKR

partnership units worth approximately $75 million. In sum, Bae received shares worth approximately $106 million in connection with the Challenged Payoffs.

33. Scott Nuttall joined KKR in 1996 and is currently its Co-Chief Executive Officer. Prior to that, he served as co-President and co-Chief Operating Officer from 2017 to 2021. He has been a member of the board of directors since July 2017. In 2021, Nuttall received a total of $523,142,432 in compensation from KKR. As a result of the TRA Payoff, Nuttall received 575,356 KKR shares worth approximately $38 million. As a result of the Forfeited Units Payoff, Nuttall received 1,150,000 KKR partnership units worth approximately $75 million on the exchange date. In sum, Nuttall received shares worth approximately $113 million in connection with the Challenged Payoffs.

34. David Sorkin is currently a KKR Senior Advisory Partner. From 2007 through the first quarter of 2023, Sorkin served as KKR's General Counsel and/or Chief Legal Officer. In 2021, Sorkin received a total of $20,644,923 in compensation from KKR. As a result of the TRA Payoff, Sorkin received 103,464 KKR shares worth approximately $7 million.

35. Robert Lewin joined KKR in 2004 and serves as the Chief Financial Officer. Lewin has held a number of positions at KKR, including co-leading the firm's credit and capital markets businesses, serving as Treasurer and Head of

Corporate Development and most recently as Head of Human Capital & Strategic Talent. From 2006 through 2010, Lewin resided in Hong Kong, helping to launch KKR's Asia business. In 2021, Lewin received a total of $46,025,091 in compensation from KKR. As a result of the TRA Payoff, Lewin received 35,874 KKR shares worth approximately $2 million.

Conflicts Committee Defendants

36. Robert Scully has been a member of the board of directors since July 15, 2010. Scully was the chair of the "Conflicts Committee" that considered and approved the Reorganization and the Challenged Payoffs. As noted below in the Demand Futility section, Scully and his wife Nancy Peretsman have longstanding social and business connections with KKR and its Founders. Scully has received more than $3.8 million in compensation as a KKR director.

37. Mary Dillon has been a member of the board of directors since September 6, 2018. Dillon was a member of the Conflicts Committee that considered and approved the Reorganization and the Challenged Payoffs. Dillon and Kravis serve on the Executive Committee of the Business Council. The Business Council is an invitation-only group of approximately 200 of the "world's top CEOs," and the Executive Committee is comprised of approximately 20 of those CEOs. Kravis was the Chairman of the Executive Committee in 2018-2019, and

Dillon ascended to the Executive Committee in 2021. Dillon has received more than $1.5 million in compensation as a KKR director.

38. Patricia Russo has been a member of the board of directors since April 15, 2011. Russo was a member of the Conflicts Committee that considered and approved the Reorganization and the Challenged Payoffs. Russo has received over $3.1 million in compensation as a KKR director.

39. Thomas Schoewe was a member of the board of directors from April 15, 2011 until July 13, 2022. Schoewe was a member of the Conflicts Committee that considered and approved the Reorganization and the Challenged Payoffs. Schoewe received over $2.5 million during his tenure as a KKR director.

Other Approving Board Members

40. Xavier Niel has been a member of the board of directors since March 1, 2018. Niel approved the Reorganization and the Challenged Payoffs. Niel has numerous professional and personal ties to KKR and its Founders. According to Section 220 documents, "Niel and his partner, Delphine Arnault, are investors in several companies in which KKR is also an investor"; "KKR has entered into a partnership arrangement with Mediawan, a company founded by Mr. Niel"; "[redacted]

[redacted] Iliad," a French company that Niel founded and controls; and "Niel stated that when … Kravis visits France, they occasionally join each other for dinner, and that he introduced Mr. Kravis to the French President, Emmanuel Macron."

41. Adriane Brown has been a member of the board of directors since June 16, 2021. Brown approved the Reorganization and the Challenged Payoffs.

42. Arturo Gutierrez Hernandez has been a member of the board of directors since March 4, 2021. Gutierrez Hernandez approved the Reorganization and the Challenged Payoffs.

43. Dane Holmes was a member of the board of directors from March 4, 2021 until December 13, 2023 when he accepted an offer of employment with the Company as its Chief Administrative Officer. Holmes approved the Reorganization and the Challenged Payoffs.

44. Joseph Grundfest was a member of the board of directors from July 15, 2010, until June 15, 2023. Grundfest approved the Reorganization and the Challenged Payoffs. Grundfest had longstanding ties to KKR and its Founders. For example, minutes of a meeting of the outside directors not on the Conflicts Committee state that "Mr. Roberts made an anonymous donation of [redacted] to Stanford University as part of a $2 million gift by Mr. William A Franke to establish the William A. Franke Professorship in Law and Business at Stanford Law School."

Grundfest holds that chair. In addition, Grundfest created the Stanford Law School's Directors' College which was started with a [redacted] loan from Roberts. Grundfest "[redacted]" The minutes go on to say that the Law School then created the Roberts Program in Law, Business and Corporate Governance, of which Grundfest was director. The Roberts Program was replaced by the Arthur and Toni Rembe Rock Center for Corporate Governance where Grundfest remains a senior faculty member. Grundfest "has introduced business opportunities to KKR, to its funds, and to KKR principals, including Messrs. Kravis and Roberts." "Three of these situations have led to investments by Messrs. Kravis and/or Roberts in firms in which Mr. Grundfest is also an investor. Those firms are [redacted], and [redacted]" Those investments "represent approximately [redacted] to [redacted] of [Grundfest's] net worth." Grundfest received total compensation of over $3.5 million for his service on the KKR Board.

45. John Hess was a member of the board of directors from July 28, 2011, until June 15, 2023. Hess approved the Reorganization and the Challenged Payoffs. Hess also had longstanding ties to KKR and its Founders. For example, Hess admitted that he "and his family had made investments in KKR funds" and that he

and Kravis "knew each other for many years." Hess is also a member of "The Business Council" where Kravis and Dillon "serve on the Executive Committee." Hess and his wife Susan have longstanding social connections with Kravis and his wife, having attended parties with each other in the Hamptons for years. Kravis's wife, Marie-Josee Kravis, is the Chair of the Museum of Modern Art's Board of Trustees, and John Hess's sister Marlene serves as a MoMA trustee. The Hess and Kravis families are both major MoMA donors. Marlene Hess, John's sister, serves as the Vice Chair of Rockefeller University, where Henry Kravis was a long-time trustee and major donor. In 2015, Kravis pledged $100 million to Rockefeller University. Hess and Kravis are also both members of the Board of Trustees of Mount Sinai Hospital, where Hess has been a trustee at least since 2007 and Kravis has donated at least $25 million, resulting in the naming of the Marie-Josee and Henry R. Kravis Center for Clinical Cardiovascular Health and the Kravis Children's Hospital. Similarly, Hess and his family are longtime supporters of Mount Sinai Hospital with The Leon and Norma Hess Center for Science and Medicine, which was named after his parents. Kravis and Hess are so close that Kravis attended Hess's son's, Mike Hess's, wedding.

Evercore

46. Evercore is a Delaware limited liability company with principal place of business in New York, New York. Evercore was the financial advisor to KKR's Conflicts Committee in connection with the Reorganization.

JURISDICTION

47. This Court has subject matter jurisdiction over this breach of fiduciary duty action under 10 *Del. C.* § 341.

FACTUAL ALLEGATIONS

KKR Goes Public

48. In 1976, Kravis and Roberts, who are "[f]irst cousins and the closest of friends," founded KKR with Jerome Kohlberg, Jr. In 1987, Kohlberg resigned from KKR and sued Kravis and Roberts for wrongfully increasing their stake in certain deals at the expense of Kohlberg and KKR investors.

49. In 2010, Kravis and Roberts took KKR public as a publicly traded partnership. KKR LP registered an IPO of common shares (representing limited partner interests) in a dual class equity structure, which gave the Founders control. KKR LP had no material business operations of its own. Its primary asset was its equity interest in KKR Group Partnership L.P. ("KKR Group Partnership"), which conducted KKR LP's asset management activities. Kravis, Roberts, and other pre-

IPO KKR employees owned KKR Group Partnership units through a separate entity, KKR Holdings L.P. ("KKR Holdings").

50. Pre-IPO owners had the right to exchange their private KKR Group Partnership units held by KKR Holdings for public equity in KKR LP. Under the Internal Revenue Code, taxable exchanges of units create a "step-up" in basis for the Company, mostly in the form of depreciable goodwill.[7] That depreciable goodwill had the potential to be used as a valuable tax asset in a profitable business with taxable income, which the Company could then use over time to reduce the amount of taxes it paid.[8]

51. In connection with its 2010 IPO, KKR entered into a TRA with the Founders and other pre-IPO owners to allocate the tax savings created by their taxable exchanges of privately held units into public equity. The TRA created "symmetry" between the benefits the exchanging unitholder created for the

[7] The exchanges turn "non-depreciable, self-developed goodwill into depreciable goodwill." Gladriel Shobe, *Supercharged IPOs and the Up-C*, 88 U. Colo. L. Rev. 913, 938 (2017).

[8] *See* Gladriel Shobe, *Private Benefits in Public Offerings: Tax Receivable Agreements in IPOs*, 71 Vand. L. Rev. 889 (2018).

Company and the "tax liability they have borne."[9] The TRA contained standard market provisions whereby the Company would share the benefits of the "step-up" by paying the exchanging unitholder "85% of the amount of cash savings, if any," that the Company realized from its use of tax assets created by the taxable exchanges of KKR units for shares.[10] KKR kept the remaining 15% of the cash tax savings realized from its use of tax assets created by these taxable exchanges.[11] "The idea is that everybody wins."[12]

---

[9] *See* Jeffrey J. Rosen & Peter A. Furci, *Monetizing the Shield: Tax Receivable Agreements in Private Equity Deals*, Debevoise & Plimpton Priv. Equity Rep., at 9 (Fall 2010) ("The structure described above reserves to the existing owners the tax benefits (or 85% of the tax benefits) associated with a basis step-up that results from a ***taxable*** exchange on which the existing owners were taxable—in short it has a certain symmetry because existing owners receive tax benefits associated with a tax liability they have borne.").

[10] KKR & Co. Inc., Form 10-K, at 60 (Mar. 7, 2011).

[11] *See* Amy S. Elliott, *IPO Agreements that Shift Basis Step-Up to Sellers Proliferate,* 132 TAX NOTES 334, 388 (2011) (explaining that there is "no magic" to the eighty-five percent standard and "[i]t was something that was developed in the early deals that has stuck"); Joshua Ford Bonnie & William R. Golden, Simpson Thacher & Bartlett LLP, *UP-C Initial Public Offering Structures: Overview*, Practical Law, at 3 (2018).

[12] V&E, *What's Up with Up-C? 8 Things You Need to Know* (Jul. 26, 2018), https://plus.velaw.com/2018/07/26/whats-up-with-up-cs-8-things-you-need-to-know/. *See also* Gregg D. Polsky & Adam H. Rosenzweig, *The Up-C Revolution*, 71 Tax. L. Rev. 415, 437 (2018) ("It is a win-win for the exchanging owners and *Newco*."); KPMG, *Unlocking Value Beyond a Traditional IPO* (Sept. 30, 2019),

52. The Company was obligated to make TRA payments to the private unitholders only: (i) when exchanges were ***taxable*** to the exchanging unitholders and therefore created tax assets;[13] and (ii) after KKR was able to actually use such tax assets to reduce its taxable income,[14] which, due to tax amortization rules, would have occurred over a 15-year period or longer after a taxable exchange, depending on when the Company was able to actually use the tax assets.[15] If KKR did not have sufficient taxable income in a year to use the tax assets, then no TRA payments were due.[16]

---

https://frv.kpmg.us/content/dam/frv/en/pdfs/2018/executive-view-up-cstructures.pdf.

[13] KKR & Co., Inc., Form 10-K, at 95 (Feb. 19, 2021).

[14] *See* Tax Receivable Agreement, Article II, Determination of Realized Tax Benefit (July 14, 2010). *See also* KKR & Co. Inc., Form 10-K, at 95 (Feb. 19, 2021) (stating that the increase in tax basis and amount of TRA payments depend on "the extent to which such exchanges are taxable and the amount and timing of our taxable income").

[15] *See* I.R.C. 197.

[16] KKR & Co. Inc., Form 10-K, at 275 (Feb. 19, 2021) (noting that if KKR's subsidiaries "do not have taxable income aside from any tax benefit from the exchanges, they will not be required to make payments under the tax receivable agreement for that taxable year because no tax savings will have been actually realized").

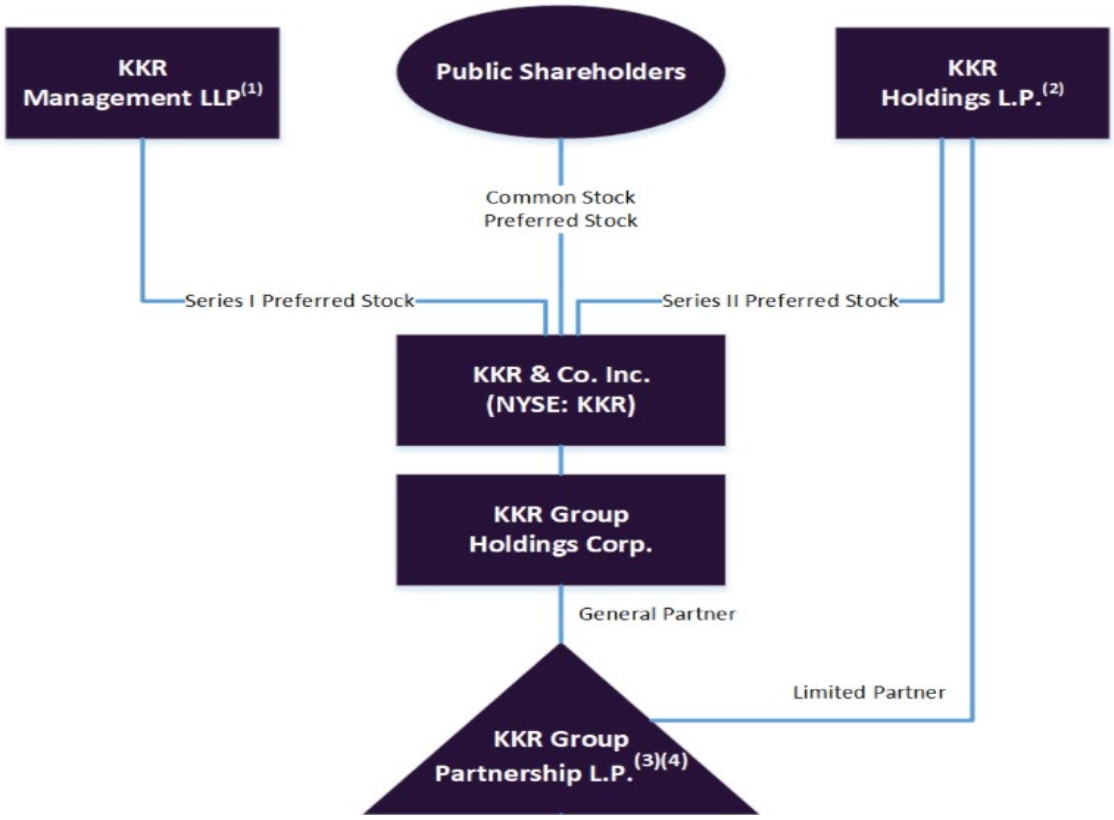
53. If a unitholder engaged in a ***tax-free*** exchange of their KKR partnership units for KKR common units for any reason, then the exchanging unitholder would avoid individual tax liability, and no tax assets would be created for the Company. Therefore, the Company would not realize any tax benefit or owe any TRA liability from a non-taxable exchange, even if the Company had taxable income eligible for reduction in future periods. As the Company's public disclosures stated, "if an exchange is not taxable for any reason ... increased deductions will not be available."[17]

KKR Converts to an Up-C Corporate Structure

54. In 2018, KKR converted to an "Up-C" corporate structure. The public investors owned common stock of a parent corporation, KKR Inc., which held KKR Group Partnership units on behalf of the public stockholders. Like KKR LLP, KKR Inc. had no business operations of its own. The Founders, other pre-IPO owners, and employees who received partnership units as compensation continued to hold their equity interests through KKR Holdings, which held KKR Group Partnership units. The Founders retained control of KKR Inc. through their ownership of KKR Management, which held a single Series I preferred share that KKR referred to as

[17] KKR & Co., Inc., Form 10-K, at 282 (Feb. 23, 2018).

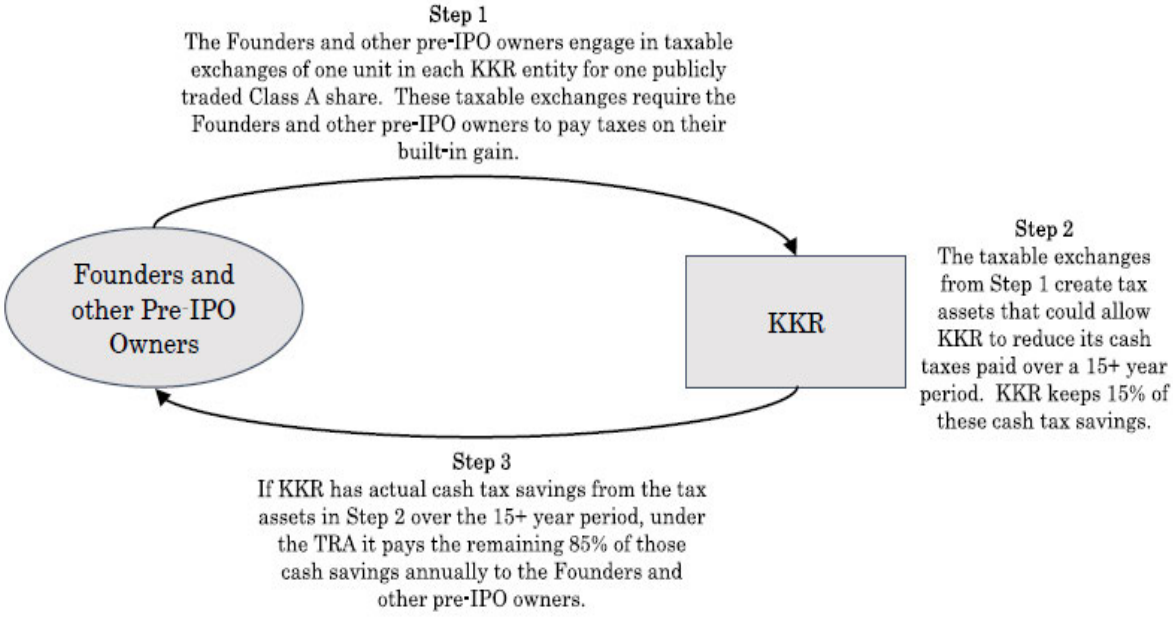
the "Golden Share." A simplified diagram of KKR's Up-C corporate structure is depicted below:[18]



55. The Founders and other private unitholders retained the right to exchange their private units for public shares. Under KKR's Third Amended and Restated Exchange Agreement, the number of public KKR shares issued to a unitholder must be "an amount equal to the number of Group Partnership Units surrendered" (*i.e.*, an exchange of units for shares was always on a one-for-one

[18] KKR & Co. Inc., Form 10-K, at 31 (Feb. 19, 2021).

basis).[19] Because a tax-free exchange creates no tax assets for the Company, the Exchange Agreement required the Founders and other unitholders to structure and "report any Exchange ... as a taxable sale" and agreed that "no party shall take a contrary position on any income tax return, amendment thereof or communication with a taxing authority."[20] The diagram below illustrates how KKR's TRA worked for taxable exchanges:



[19] *See* Third Amended and Restated Exchange Agreement, at 4 (Jan. 1, 2020).

[20] *See id*. at § 3.10.

56. One of the primary responsibilities of KKR's Conflicts Committee was "enforcing [KKR's] rights under … the exchange agreement [and] the tax receivable agreement."[21]

57. A foundational concept of the Up-C structure is that one KKR partnership unit is, in substance, the economic equivalent of one KKR common share. That is, a unit and a share each hold the same level of economic risk.[22] If unitholders received more shares than units in the exchange (*i.e.*, an exchange rate greater than 1.0), the exchange would be dilutive to KKR stockholders contrary to statements made in KKR's financial statements that were signed by the Founders.[23]

---

[21] KKR, Inc., Form 10-K, at 255 (Feb. 19, 2021).

[22] *See* Letter from Joshua Ford Bonnie, Simpson Thacher & Bartlett LLP, John C. Kennedy, Paul, Weiss, Rifkind, Wharton & Garrison LLP, & Gregory P. Rodgers, Latham & Watkins LLP, to David Fredrickson, Chief Couns., Div. of Corp. Fin., SEC at 3 (Oct. 28, 2016) ("OP Units are exchanged for Corporation Shares at a ratio of one-for-one (or another fixed ratio that maintains economic parity between the Corporation Shares and the OP Units) because the resulting Corporation Share represents an identical percentage right to the pool of assets held by the OP as does one OP Unit."), https://www.sec.gov/divisions/corpfin/cf-noaction/20l6/up-c-110116144-incoming.pdf.

[23] The Company's financial statements reflect that the one-for-one exchanges of the KKR Group Partnership units for shares in KKR would not alter the relative economic ownership positions of the public stockholders and the private unitholders because "the exchange of these units would not dilute KKR's respective ownership interests in the KKR Group Partnership." *See* KKR & Co. Inc., Form 10-K, at 217 (Feb. 19, 2021). *See also id.* at 274 ("To the extent that KKR Group Partnership

KKR's financial reports explain that the one-for-one exchanges of the KKR Group Partnership units for shares in KKR would not alter the relative economic ownership positions of the public stockholders and the pre-IPO owners because "the exchange of these units would not dilute KKR's respective ownership interests in the KKR Group Partnership."[24] KKR's financial statements also assumed that exchanges would not dilute the public stockholder's economic interests in the Company.[25]

Units held by KKR Holdings or its transferees are exchanged for shares of our common stock, our interests in the KKR Group Partnership will be correspondingly increased."). The financial statements also assumed that exchanges would not dilute the public stockholder's economic interests in the Company. *See id.* at 4 ("references in this report to our fully exchanged and diluted common stock outstanding, or to our common stock outstanding on a fully exchanged and diluted basis, reflect (i) actual shares of common stock outstanding, (ii) shares of common stock into which KKR Group Partnership Units held by KKR Holdings are exchangeable pursuant to the terms of the exchange agreement described in this report, (iii) shares of common stock into which all outstanding shares of Series C Mandatory Convertible Preferred Stock are convertible and (iv) shares of common stock issuable pursuant to any equity awards actually granted from the Amended and Restated KKR & Co. Inc. 2010 Equity Incentive Plan ....").

[24] *See* KKR & Co. Inc., Form 10-K, at 217 (Feb. 19, 2021). *See also id.* at 274 ("To the extent that KKR Group Partnership Units held by KKR Holdings or its transferees are exchanged for shares of our common stock, our interests in the KKR Group Partnership will be correspondingly increased.").

[25] *See id*., at 4 ("references in this report to our fully exchanged and diluted common stock outstanding, or to our common stock outstanding on a fully exchanged and diluted basis, reflect (i) actual shares of common stock outstanding, (ii) shares of common stock into which KKR Group Partnership Units held by KKR Holdings are exchangeable pursuant to the terms of the exchange agreement described in this

The Founders Propose a "Reorganization" with a TRA Termination Payment

58. By June 2021, the Founders were keenly aware that two KKR rivals—Apollo and Carlyle—had engaged in restructurings to convert to more traditional corporate structures. The Founders were also keenly aware that as part of those restructurings, Apollo's and Carlyle's founders received multi-hundred-million-dollar payments in connection with tax-free exchanges of private partnership units into public equity.

59. Kravis and Roberts seized on the idea of extracting a similar payoff from KKR in connection with the tax-free exchange of their units. Kravis and Roberts did so in conjunction with their stepping down as co-CEOs and the promotions of Bae and Nuttall as co-CEOs.

60. On June 30, 2021, KKR partner and general counsel David Sorkin took the Founders' proposal to the KKR Board's Conflicts Committee—comprised of Scully (the chair), Dillon, Russo, and Schoewe. Sorkin was a private unitholder and interested in the proposal. Sorkin provided "a summary term sheet ... dated June 22, 2021," proposing that KKR approve "a tax-free business combination (the

---

report, (iii) shares of common stock into which all outstanding shares of Series C Mandatory Convertible Preferred Stock are convertible and (iv) shares of common stock issuable pursuant to any equity awards actually granted from the Amended and Restated KKR & Co. Inc. 2010 Equity Incentive Plan ....").

'Reorganization') whereby limited partners in [KKR Holdings L.P ("Holdings I")] exchange into PubCo stock and receive a cash payment ('TRA Payment') in connection with a termination of [KKR's] tax receivable agreement ('TRA')."

61. Sorkin said the Reorganization would collapse KKR's current Up-C structure and that the termination of the TRA was made "against the backdrop of the contemplated CEO changes discussed in executive session at the most recent Board meeting"—*i.e.*, the Founders intended to relinquish their executive roles to Bae and Nuttall. Sorkin explained "management's view that a benefit of the transaction would be to eliminate KKR's contractual obligations under the TRA at a discount." Sorkin relayed management's estimate that KKR would need to make a payment to KKR partners for early termination of the TRA of "[redacted] and that management would be providing a proposal in respect of a negotiated payment amount."

62. The Founders did not condition their proposal on the approval by an independent committee or a vote of unaffiliated stockholders.

63. Sorkin highlighted that management had estimated a payment pursuant to the termination provision of the TRA of "[redacted]" That figure was derived by using a [redacted] per unit price for approximately 271 million KKR Holdings units at a [redacted] discount rate. The term sheet the Founders provided stated that the "TRA

provides that the present value of the early termination payment be calculated using the lesser of [redacted] or [redacted]."

64. Sorkin's reliance on the TRA termination provision was misdirection. No fiduciary acting in good faith would have triggered the early termination payment, which functioned as an anti-takeover device, not a measure of fair value. KKR's own Form 10-K provided two different discount rates to value the TRA of 7% or 15%, not the [redacted] Sorkin urged.

65. Sorkin stayed at the meeting while the Conflicts Committee determined to hire Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden") as its legal counsel. It is unclear how Skadden was selected. No other law firms were interviewed. There is no record of the Conflicts Committee requesting a conflicts disclosure from Skadden. One of the three KKR legal directors who attended KKR Board meetings concerning the Challenged Payoffs had joined KKR approximately one year earlier from Skadden. The core Skadden legal team advising the Conflicts Committee was from Skadden's New York transactional practice with a specialized focus on financial institutions, which was the same specialized group that the KKR legal director had worked in for more than ten years and had only recently left to join KKR. Neither Skadden nor KKR management appears to have disclosed that to the Conflicts Committee.

66. Shortly thereafter, the Founders prepared a draft proposal, dated July 1, 2021, proposing a "TRA Termination Payment" of [redacted] (consisting of 8.5 million KKR shares with the balance in cash). It remains unclear why the Founders wanted 8.5 million shares specifically, where that number came from, or why the Founders were so fixated on it. As explained below, the Founders' desire for the 8.5 million share payoff remained a constant throughout the process, which leads to the reasonable inference that the Founders' request for an additional cash payment was made with the intention of giving it up while creating the appearance that the committee had negotiated the requested amount down.

67. On July 13, 2021, the Founders proposed that KKR pay them and other private unitholders [redacted], consisting of 8.5 million shares and the balance in cash. The Founders continued to base the [redacted] payment on a hypothetical, discounted "TRA Termination Payment":

TRA Termination Payment	The new holding company (or its subsidiary) to pay [redacted] in total to terminate the tax receivable agreement (includes all 269 million Holdings units)[2]
Consideration Mix	TRA Termination Payment to be made part in cash and part in shares of common stock of the new holding company ("KKR common stock") Common stock portion to be comprised of 8.5 million newly issued shares of KKR common stock, valued over a to-be-determined trading period prior to announcement and to be paid at Closing (expected in early 2022). Shares to be immediately fully vested, but subject to a three-year post-closing lock-up The remainder of the TRA Termination Payment to be paid in cash in four equal installments at Closing and on each of the three succeeding one-year anniversaries of Closing[3]

68. The presentation highlighted that "[t]he Carlyle and Apollo 'Full C-Corp' conversions and associated TRA termination payments are two recent

market comps for TRA termination payments." Most of the presentation is devoted to the supposed benefit of paying to eliminate the TRA and the precedents of Carlyle and Apollo. The presentation also stated that the Golden Share would be eliminated following the death or permanent disability of both Kravis and Roberts.

The Founders Propose that the Founders, Bae, and Nuttall Receive Over Three Million Forfeited Units

69. At the same time the Founders were proposing that they receive a TRA Termination Payment, the Founders angled to use the Reorganization as an excuse to grab 3.36 million unallocated units that were being held in KKR Holdings, which remained unallocated primarily because they had been forfeited by KKR personnel who left before the units vested.

70. The Founders' June 22 term sheet raised "Additional Questions to be Answered." One question was the treatment of the "3.36m Holdings I units [that] are available for issuance (primarily due to past forfeitures)."

71. The Founders' July 1 draft proposal indicated that a proposal was forthcoming "regarding treatment of 3.36 million units that are currently unissued"—*i.e.*, the 3.36 million forfeited units.

72. The July 13 presentation proposed that as part of the Reorganization, KKR give the Founders, Bae, and Nuttall the 3.36 million unallocated KKR Holdings units (of which 2.3 million units would go to Bae and Nuttall, and 1.06

million units that Kravis and Roberts could award as they pleased, including to themselves).[26] The Founders, Bae, and Nuttall had no entitlement to these units.

73. These KKR Holdings units existed because in connection with the IPO, KKR created new KKR Holdings units to fund equity compensation for KKR's employees (the "KKR Holdings Compensation Units").[27] Each KKR Holdings Compensation Unit represented one KKR Group Partnership unit and could be exchanged one-for-one for a share of the publicly-traded KKR entity.[28] KKR

---

[26] The Founders also proposed that the Company accelerate the vesting of 3.91 million KKR Holdings Compensation Units that were granted in 2017 and were not scheduled to vest until late 2022 (of which 2.91 million units would be accelerated for Bae and Nuttall, and one million units would be accelerated for Kravis and Roberts). Allowing these units to vest early not only gave the Founders and Bae and Nuttall access to these units early, it also ensured that they would receive a portion of the proposed TRA Payoff for those units. The proposal and accompanying presentation included no explanation of why the Reorganization should accelerate the vesting period.

[27] *See* KKR & Co. Inc., Form 10-K, at 49 (Feb. 27, 2015) ("[W]e made large grants of KKR Holdings units that vest in installments over a five year period commencing October 1, 2009 and that completely vested on October 1, 2014, subject to certain transfer restrictions."); *id*. at 3 ("In this report, references to 'KKR,' 'we,' 'us,' 'our' and 'our partnership' refer to KKR & Co. L.P. and its consolidated subsidiaries.").

[28] *See* KKR & Co. Inc., Form S-1, at 89 (Sept. 16, 2010) ("In connection with and subsequent to the Transactions, our principals and other employees received equity and equity based awards in KKR Holdings. The awards were granted in connection with the Transactions and were issued ... to promote broad ownership of our firm among our personnel and further align their interests with those of our investors."); *see also* KKR & Co. Inc., Form 10-K, at 250 (Feb. 27, 2015) ("These units are

granted most of the KKR Holdings Compensation Units to KKR employees shortly before the IPO, subject to forfeiture if the employees left KKR within specified time periods ranging from three to five years.[29] The remaining KKR Holdings Compensation Units were reserved to fund future KKR equity compensation. At the time of the IPO, approximately 37.8 million of these units remained available for KKR to use to pay future equity compensation to its employees.[30] KKR Holdings Compensation Units that did not vest before an employee left their position at KKR would be forfeited and returned to the pool of units to be redistributed as necessary "to incentivize, motivate and retain qualified professionals that will help us continue to grow our business over the long-term."[31]

74. Although the KKR Holdings Compensation Units were not held directly by KKR, because KKR had granted those units to KKR Holdings to pay

---

generally subject to minimum retained ownership requirements and in certain cases, transfer restrictions, and allow for their exchange into common units of KKR & Co. L.P. on a one-for-one basis.").

[29] *See* KKR & Co. Inc., Form 10-K, at 292 (Feb. 27, 2015). In general, unvested KKR Holdings units initially vest in equal installments over a multi-year period (which can range from three to five years) from the grant date, subject to the recipient's continued employment with us.

[30] *See* KKR & Co. Inc., Form S-1, at F-117 (Sept. 16, 2010).

[31] *See* KKR & Co. Inc., Form S-1, at 89 (Sept. 16, 2010).

KKR employees, the Board was required to provide "approval" of any grant of KKR Holdings Compensation Units.[32] From the IPO onward, KKR's board approved all grants of KKR Holdings Compensation Units to KKR's senior employees.

75. In its annual and quarterly financial statements, KKR reported grants of KKR Holdings Compensation Units as KKR equity compensation.[33] Each Form 10-K discloses (i) the number of KKR Holdings Compensation Units granted, vested, and forfeited, (ii) a vesting schedule for the KKR Holdings Compensation Units, and (iii) an "Equity Based Compensation" table that includes the value of the KKR Holdings Compensation Units.[34]

---

[32] Public filings use both the words "approval" and "consent" to describe the Board's role in granting KKR Holdings Compensation Units. *See, e.g.*, KKR & Co. Inc., Form 10-K, at 260 (Feb. 24, 2017) ("The size of the grants were determined at the discretion of the general partner of KKR Holdings L.P., subject to the approval of our board of directors ...."); *id.* ("Following the receipt of the consent of our Managing Partner's board of directors, the general partner of KKR Holdings made the following grants").

[33] *See, e.g.*, KKR & Co. Inc., Form 10-K, at 228 (Feb. 24, 2014) (noting that grants of KKR Holdings Compensation Units "give rise to equity-based payment charges in the consolidated statements of operations based on the grant-date fair value of the award."); *id.* at 230 ("As of December 31, 2016, there was approximately $271.0 million of estimated unrecognized expense related to unvested KKR Holdings awards. That cost is expected to be recognized as follows ....").

[34] *See, e.g.*, KKR & Co. Inc., Form 10-K, at 234, 236-38 (Feb. 23, 2018).

76. The number of KKR Holdings Compensation Units was fixed at the IPO. As the number of available KKR Holdings Compensation Units decreased as they vested following the IPO, the Company began to fund a larger portion of its equity compensation in KKR "restricted equity units" through the Company's "Equity Incentive Plan."[35] The Company disclosed that "we have granted and will grant some or all of the types of equity awards historically granted by KKR Holdings from our Equity Incentive Plan."[36] Similarly, KKR disclosed that as the number of available KKR Holdings Compensation Units decreased, "[i]n lieu of granting equity in KKR Holdings, we have granted and expect to grant equity awards from our Equity Incentive Plan."[37]

77. Because of the long vesting conditions of the KKR Holdings Compensation Units, the number of forfeited units was substantial, and higher than KKR initially projected.[38] Over the years, as these units were forfeited, a significant

---

[35] *See, e.g.*, KKR & Co. Inc., Form 10-K, at 263-64 (Feb. 23, 2018).

[36] *See, e.g.*, KKR & Co. Inc., Form 10-K, at 50 (Feb. 24, 2014).

[37] *See, e.g.*, KKR & Co. Inc., Form 10-K, at 49 (Feb. 27, 2015).

[38] *See, e.g.*, KKR & Co. Inc., Form 10-K, at 172 (Mar. 7, 2011) ("Additionally, the calculation of compensation expense on unvested units assumes a forfeiture rate of up to 4% annually based upon expected turnover"); KKR & Co. Inc., Form 10-K, at 229 (Feb. 24, 2014) ("The calculation of equity-based payment expense and general administrative and other expense on unvested Principal Awards assumes forfeiture

number of units were returned to the pool of KKR Holdings Compensation Units available for subsequent KKR employee compensation, subject to the Board's approval.

78. The Company continued to use these forfeited KKR Holdings Compensation Units to fund equity compensation for its employees long after the IPO. For example, in 2016 the Board granted two million previously forfeited KKR Holdings Compensation Units to KKR's Chief Administrative Officer, Chief Financial Officer, and General Counsel.[39] Similarly, in 2017 the Company disclosed that the Board allocated 4.85 million previously forfeited KKR Holdings Compensation Units, along with four million KKR restricted equity units under the Equity Incentive Plan, to each of Bae and Nuttall, in conjunction with their appointments as KKR's Co-Presidents and Co-Chief Operating Officers. These combined grants to Bae and Nuttall were equivalent to 17.7 million KKR public shares, then worth $242 million.[40] The 8.85 million units granted to each of Bae and

---

rates of up to 6% annually based upon expected turnover"); KKR & Co. Inc., Form 10-K, at 249 (Feb. 27, 2015) ("The calculation assumes a forfeiture rate of up to 8% annually ….").

[39] *See* KKR & Co. Inc., Form 10-K, at 260 (Feb. 24, 2017).

[40] *See* KKR & Co. Inc., Form 10-K, at 268 (Feb. 23, 2018).

Nuttall would vest over a five year period, from 2018 through 2022.[41] The Company disclosed that the Board granted the KKR Holdings Compensation Units and KKR LP Compensation Units to Bae and Nuttall "to provide incremental long-term economic incentives to our Co-Presidents/Co-Chief Operating Officers in connection with their appointment as such in July 2017."[42] These equity grants were in addition to continued cash allocations of carried interest and cash bonuses that totaled over $460 million to Bae and Nuttall during the five-year vesting period. [43]

79. Also in 2017, the Conflicts Committee granted 2.5 million previously forfeited KKR Holdings Compensation Units to each of Kravis and Roberts. These units were worth nearly $90 million and would vest in equal installments from 2018

---

[41] *Id*. ("The KKR Holdings units granted to our Co-Presidents/Co-Chief Operating Officers in November 2017 are subject to five year service-based vesting requirements and will vest on October 1 of each year as follows: 10% in 2018, 15% in 2019, 20% in 2020, 25% in 2021 and 30% in 2022, in each case, subject to continued service through each vesting date ....").

[42] *Id*. at 264.

[43] Bae received cash carried interest and cash bonuses of $30.1 million in 2018, $34.6 million in 2019, $35.7 million in 2020, $82.9 million in 2021, and $79.6 million in 2022. Nuttall received cash carried interest and cash bonuses of $30.5 million in 2018, $34.8 million in 2019, $35.9 million in 2020, $80.3 million in 2021, and $77.8 million in 2022.

to 2022.[44] These equity grants were in addition to continued allocations of carried interest, which totaled over $550 million to the Founders during the five-year vesting period.[45]

80. By the time the Founders proposed the Reorganization in 2021, 3.36 million forfeited KKR Holdings Compensation Units remained unallocated and available for the Board to use for employee equity compensation. Because all KKR Holdings units would be exchanged for KKR public shares as part of the Reorganization, the 3.36 million forfeited units would revert to the Company in the Reorganization if they remained unallocated.

81. The Founders seized on the opportunity to use the Reorganization as a pretext to grab the forfeited units. In their July 13 proposal, KKR management proposed that, as part of the Reorganization, the Board approve granting all of the remaining 3.36 million KKR forfeited units to Kravis, Roberts, Bae, and Nuttall, with 1.15 million units each going to Bae and Nuttall (of which 70% would be

---

[44] *See* KKR & Co. Inc., Form 10-K, at 268 (Feb. 23, 2018) ("The KKR Holdings units granted to our Co-Chief Executive Officers in November 2017 are subject to five year service-based vesting requirements and will vest in equal annual installments beginning on October 1, 2018 and ending October 1, 2022 ....").

[45] Kravis and Roberts each received cash carried interest of $55.6 million in 2018, $39.2 million in 2019, $41.3 million in 2020, $66.3 million in 2021, and $77.2 million in 2022.

immediately vested and 30% would vest in one year), with the balance immediately vested and "awarded at the discretion of Mr. Kravis and Mr. Roberts." The proposal also stated that Kravis, Roberts, Bae, and Nuttall would receive a pro rata portion of the TRA Payoff for those units. The Founders' proposal and accompanying KKR management presentation contain no explanation why the Board should have approved granting all 3.36 million forfeited units to the Founders, Bae, and Nuttall as part of the Reorganization. As noted below, no legitimate explanation for why the Reorganization should include giving all 3.36 million forfeited units away to the Founders, Bae, and Nuttall was ever provided.

Evercore Debunks the "TRA Termination Payment" Rationale and Suggests an Alternative Rationale for Paying the Founders

82. On July 19, 2021, the Conflicts Committee met with representatives of Evercore. It is unclear how Evercore was selected. The minutes do not say. No other advisors were interviewed.

83. Evercore never provided a conflicts disclosure, and the Conflicts Committee did not ask for one.

84. Evercore had advised Carlyle's founders concerning the payoffs they received in connection with the tax-free exchange of their units. Evercore's team advising the KKR Conflicts Committee included Steven Todrys, Sorkin's former law partner at Simpson Thacher & Bartlett LLP ("STB"). Shortly after Sorkin left

STB for KKR, Todrys represented KKR in its IPO. Evercore also represented KKR multiple times in 2021. Evercore represented KKR in the sale of the vitamin and supplement brands of KKR portfolio company The Bountiful Company, which was announced on April 30, 2021. Evercore also represented KKR in the sale of the former sports and active nutrition division of The Bountiful Company, which was announced on October 4, 2021. KKR management did not disclose Evercore's concurrent representation of KKR.

85. By July 2021, the deal participants learned that Plaintiff's counsel had served Section 220 demands on Carlyle and Apollo challenging the TRA-related payoffs to the founders of those firms. STB was involved in advising each of Carlyle, Apollo, and KKR. STB and other advisors to KKR, including Evercore, understood the prospect of litigation and the infirmity of the rationale for the Apollo and Carlyle TRA payoffs.

86. At the July 19 meeting, Evercore explained that "on the whole" the Founders' use of [redacted] as "precedent transactions" "were of limited utility given the different circumstances in those cases, key terms of those precedents, analysis of the TRA termination payments in those situations, and other items." Evercore's July 19 presentation book acknowledged that the elimination of the TRA was not a sound basis for a massive payoff to the Founders.

87. Evercore's July 19 presentation explained that the Founders did not possess the right to trigger the early termination provision in the TRA and force the early termination payment. Evercore further explained that there was a low likelihood of a future change of control that would trigger the early termination provision of the TRA. Evercore also explained that elimination of the TRA meant that KKR would lose its 15% of the future tax savings from the creation of tax assets by future taxable exchanges under the TRA. Evercore wrote: "Public shareholders lose the benefit of the 15% of the tax savings in which they would otherwise share. Assuming a [redacted] TRA valuation, that translates to [redacted] of shareholder value lost."

88. Evercore questioned the governance benefits associated with the Founders' proposal:

- While there is a path to one-share / one-vote, the sunset provisions require both founders to die or be permanently disabled; this could take **12 - 20 years**
- Additional governance provisions after the sunset are not favorable to shareholders (i.e., a staggered board of directors)
- Precedent TRA termination payments [redacted] accompanied by an immediate conversion to one-share / one-vote

89. Evercore further observed that the proposed transaction might not increase the likelihood of index inclusion or increase the public float, and that both

claimed benefits "would benefit all shareholders, including unit holders." Evercore cautioned that any payment to eliminate the TRA "may be viewed by some shareholders as a reduction in equity value." Evercore also observed that both [redacted] had negative price reactions following the announcements of their conversions into corporations. In response to the question "[w]hat do investors think about TRAs?," Evercore reported on commentary by Glenn Schorr, Evercore's senior research analyst:

- "Eyes glaze over, people don't understand it."
- "Does not think TRA buyout would be well-received"
- "A TRA buyout would 'reinforce the perception that alts are run for the employees.'"

90. Knowing that a massive payment to the Founders and other unitholders could never be justified as a payment for their TRA rights, Evercore came up with a new justification for the same payoff. Evercore's July 19 presentation book contained a slide entitled "Selected Change-in-Control Dual Class Recapitalizations." The slide identified 21 recapitalizations dating back to 1993, and Evercore noted that "a premium was paid to high-vote shareholders in nearly every transaction." Evercore further noted that while "each precedent has unique circumstances that complicate a direct comparison to other recapitalizations,

premiums to low-vote equity averaged [redacted].” (Emphasis in original.) The slide further noted that fairness opinions were provided in 14 of the 21 transactions.

91. The minutes of the July 19 meeting refer to a discussion about the significance of the above slide:

> Mr. Hiltz then reviewed the proposed change to governance to sunset the voting control of the Series I share in the future. He described the nature and timing of the sunset provision, noting how it was analogous to, but different in important ways from, dual class recapitalizations in which voting control is given up on a current basis. Mr. Hiltz reviewed an analysis of precedent transactions in which companies with dual class structures recapitalized to one share one vote structures. Mr. Hiltz responded to questions regarding this analysis.

92. Respecting the KKR Holdings Compensation Units, Evercore’s analysis of the Reorganization was silent about the reasoning behind, justifications for, or financial impact of granting the remaining 3.36 million forfeited KKR Holdings units to the Founders, Bae, and Nuttall as part of the Reorganization. Evercore simply relayed the Founders’ request with no supporting explanation or analysis. By excluding the 3.36 million forfeited units from its financial analysis, Evercore significantly understated the costs of the Reorganization to KKR and the benefits of the Reorganization to the Founders, Bae, and Nuttall. The Conflicts Committee never requested that Evercore quantify the cost of giving away the forfeited units as part of its valuation analysis of the Reorganization.

93. On July 20, 2021, the Conflicts Committee reconvened via videoconference with Skadden and without Evercore. They discussed "Evercore's perspectives on management's rationales for the transaction and the financial data and analyses provided by Evercore." The minutes then refer to the following question, which was left unanswered: "Committee members also inquired as to the possibility of seeking from Evercore a fairness opinion in connection with the proposed transaction."

94. The Conflicts Committee's engagement letter with Evercore, dated August 8, 2021, is ambiguous about the provision of a fairness opinion. It states: "Evercore will provide financial advisory services as customarily may be provided by Evercore in connection with engagements of this type, including information, opinions and reports relevant to consideration of the Transaction." There is no payment provision expressly predicated on the request or delivery of a fairness opinion.

The Committee Is Formally Charged with the Authority to Evaluate the Proposal

95. On July 20, Kravis, Bae, Lewin, and Sorkin presented to the Board about the Reorganization, including the "tax receivable agreement and related proposed termination payment." Bae and Sorkin again told the Board that KKR's current situation was comparable to the recent changes at Carlyle and Apollo.

96. The Board orally approved a resolution stating that the Conflicts Committee could "review and evaluate the Reorganization and, if determined appropriate by the Conflicts Committee, negotiate the terms of the Reorganization, in each case on behalf of the holders of the Company's common stock ... for the purpose of recommending to the Board, if determined appropriate, approval of the Reorganization." The Conflicts Committee was also tasked with evaluating and recommending "any other proposal presented by an executive officer with respect to his employment ... ancillary to or to be considered concurrently with the Reorganization."

The Founders Modify the Proposal

97. In a presentation, dated July 25, 2021, the Founders and management again proposed a tax-free exchange of units for shares and a "TRA Termination Payment" of [redacted] that would include 8.5 million newly issued KKR shares:

TRA Termination Payment	The new holding company (or its subsidiary) to pay $[redacted] in total to terminate the tax receivable agreement (includes all 269 million Holdings units)[2]
Consideration Mix	TRA Termination Payment to be made part in cash and part in shares of common stock of the new holding company ("KKR common stock") Common stock portion to be comprised of 8.5 million newly issued shares of KKR common stock, valued over a to-be-determined trading period prior to announcement and to be paid at Closing (expected in early 2022). Shares to be immediately fully vested, but subject to a three-year post-closing lock-up The remainder of the TRA Termination Payment to be paid in cash in four equal installments at Closing and on each of the three succeeding one-year anniversaries of Closing[3]

98. A novelty of the July 25 proposal is that it outlined "certain post-employment arrangements from Messrs. Kravis and Roberts and equity incentive awards for Messrs. Bae and Nuttall." The Founders proposed that they *continue to*

have control over the "carry pool," the portion of KKR's realized carried interest used to compensate management, which the Conflicts Committee had just agreed to increase dramatically from approximately 40-65% to 80% a few months earlier in February 2021. The Founders also proposed that Bae and Nuttall each be awarded ten million KKR units as part of a new equity compensation package.

Evercore Attributes Massive Value to the Proposed Sunset Provision

99. On August 4, 2021, the Conflicts Committee met with Evercore presenting. Evercore's August 4 presentation materials calculated an "Illustrative Value Impact" for various features of the Founders' proposal.

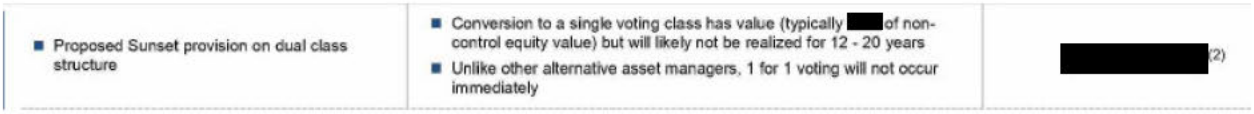
100. Evercore attributed significant ***negative*** value to the elimination of the TRA:

Potential Sources of Value	Considerations for Committee	Illustrative Value Impact
▪ TRA liability is terminated	▪ No liability exists until there is an exchange that creates an offsetting tax asset ▪ Shareholders will lose their 15% benefit of the step-up	[redacted](1)

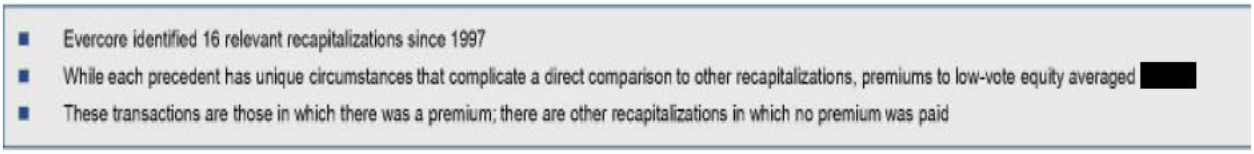
Evercore derived its valuation range of negative [redacted] to negative [redacted] by estimating the net present value of lost tax savings from the TRA.

Evercore used two different scenarios about the future exchange of units and two different proposed discount rates.[46]

101. Evercore attributed irrationally high positive value—[redacted] to [redacted]—to the conversion of KKR to a one-share, one-vote corporate structure upon the death or permanent disability of both Founders:



Evercore's positive valuation of the governance impact was derived from "the components of select dual class recapitalizations." Evercore described those selected dual class recapitalizations as follows:



102. Evercore's financial analysis of the significant positive value of the proposed sunset of the dual class structure was facially flawed.

103. Evercore only included recapitalizations in which "there was a premium." Doing so inflated the average premium dramatically. There were dozens

[46] Evercore never analyzed whether ***any*** taxable exchanges would actually take place absent a reorganization. As noted above, the Founders had not engaged in any taxable exchanges since the IPO.

of other recapitalizations involving high-vote stock in which no premiums were paid. In one study, Houlihan Lokey identified 39 reclassification transactions involving high-vote stock, the majority of which resulted in no premium paid to high-vote stock.[47] Including all of those 39 transactions would have driven the mean premium paid to high-vote stock down to 0.9%.

104. Only three selected dual class recapitalizations had occurred in the prior decade, and the most recent one on Evercore's list, from 2017, had an implied premium of just 0.2%.

105. Evercore highlighted that each precedent involved "unique circumstances," yet made no effort to analyze KKR's own unique circumstances. Kravis and Roberts were both nearing 80-years old. They were in the midst of turning over managerial control to Bae and Nuttall. There is no indication in the Section 220 documents or the public record that Kravis and Roberts had any intention of passing voting control to their future heirs, even if they could do so. Nor is there any indication in the Section 220 documents indicating that anyone, including Bae and Nuttall, was considering purchasing control from Kravis and Roberts. Kravis and Roberts's original proposal, which Evercore had presented to

[47] Houlihan Lokey, *Dual-Class Stock Structures*, at 34-35 (2023), https://cdn.hl.com/pdf/2023/dual-class-stock-structures.pdf.

the Conflicts Committee on July 19, included them giving up control at death or disability without any accompanying payment or value attributed to it.

106. Evercore attributed relatively little value to the agreement of the Founders not to transfer control prior to the sunset of the dual class structure. Evercore observed that there was a low likelihood of a change of control. Nevertheless, Evercore derived an average premium for a potential change of control from nine cherry-picked precedent acquisitions of dual class companies dating back to 1997 in which a premium was paid to the high-vote holders. As with the recapitalization transactions, Evercore excluded dozens of acquisitions in which no premiums were paid.[48] Several of the precedents involved the same controlling stockholder, John Malone. Several of the precedents were subject to subsequent litigation. For example, in the post-buyout settlement involving Delphi, the controller had to pay back almost all, if not all, of the premium. The litigation involving Starz settled for $92.5 million. The litigation involving Affiliated Computer Systems settled for $69 million. The litigation involving Tele-Communications, Inc. settled for $52 million.

[48] *See, e.g.*, *id*. at 39-41.

107. The Conflicts Committee decided on August 4 to invite a revised proposal from management due to the significantly lower overall value attributed to the current proposal by Evercore and the Conflicts Committee. The Conflicts Committee also again discussed with Skadden "the possibility of seeking a fairness opinion."

108. On August 5, 2021, the Conflicts Committee met. Evercore reported on a meeting between Evercore and management. Evercore reported that they advised management that (i) elimination of the TRA had a cost to the Company, and (ii) the positive value attributed to the sunset of the Company's dual class structure was insufficient to justify management's proposed payment. Discussion followed "regarding the potential rationale for the transactions."

The Founders Embrace the Changed Justification for a Massive Payoff, but Leave the Form of the Proposal as a TRA Termination Payment

109. On August 10, 2021, the Founders and management provided a revised proposal. This revised proposal lowered the total compensation demand from $[redacted] to [redacted], of which $568 million was attributed to the issuance of 8.5 million shares to the private unitholders at the time of closing. The revised proposal also included a new sunset provision of no longer than seven years after the closing date.

110. The revised proposal accepted Evercore's attribution of significant negative value to the elimination of the TRA. Following Evercore's assumptions, the revised proposal attributed massive additional value to the revised sunset on the dual-class structure.

111. The Founders overtly rebranded the payoff, by simply crossing out the phrase "TRA Termination":

~~TRA Termination~~ Payment	The new holding company (or its subsidiary) to pay [redacted] per outstanding Holdings unit (the "Per Unit Payment") at Closing (approximately [redacted] based on existing Holdings units) [redacted] ~~in total to terminate the tax receivable agreement (includes all [redacted] Holdings units).~~[2] Any Holdings units exchanged prior to the Closing would retain their current TRA entitlement without change, so that the number of Holdings units receiving the Per Unit Payment will decrease as a result of any such exchanges
Consideration Mix	~~TRA Termination~~ Payment to be made part in cash and part in shares of common stock of the new holding company ("KKR common stock") Common stock portion to be comprised of 8.5 million newly issued shares of KKR common stock, valued over a to-be-determined trading period prior to announcement and to be paid at Closing (expected in early 2022). Shares to be immediately fully vested, but subject to a three-year post-closing lock-up The remainder of the ~~TRA Termination~~ Payment to be paid in cash ~~in four equal installments~~ at Closing ~~and on each of the three succeeding one-year anniversaries of Closing,~~[3] which would be approx. [redacted] assuming all Holdings units remain outstanding at Closing

The presentation materials continued to invoked Carlyle and Apollo as "two recent comps for TRA termination payments."

112. The structure of the "Payment" as a "TRA Termination Payment" remained the same despite the deletion of the reference to the TRA. The "Payment" still went to ***all*** private unitholders, not just the Founders, in proportion to the number of KKR Holdings units each private unitholder would exchange tax-free. The proposal stated that "[a]ny Holdings units exchanged prior to the Closing would retain their current TRA entitlement without change," and the KKR Holdings units

exchanged in the Restructuring would receive a "Per Unit Payment." In other words, the "Payment" remained a TRA Termination payment because before and after the August 10, 2021 meeting: (i) any private unitholder who engaged in a taxable exchange before the Restructuring would receive TRA payments under the terms of the existing TRA, in proportion to the number of units they exchanged, and (ii) any private unitholder who exchanged tax-free in the Restructuring, and who therefore would not be entitled to TRA payments because tax-free exchanges create no tax assets, would receive a *pro rata* portion of the "Payment" in proportion to the number of Holdings units they exchanged. The shifting justification did not change the fact that the Founders would receive just over half of the rebranded "Payment" with the rest going to other KKR Holdings unitholders.

113. Evercore presented to the Conflicts Committee on August 17, 2021. Evercore's presentation materials attributed massive value to the proposed sunset provision in management's revised proposal. Using three precedent dual class recapitalizations within the prior ten years for which a premium was paid to high-vote shares, Evercore derived a [redacted] recap premium, which Evercore translated into a valuation range of [redacted] to [redacted].

114. None of the recapitalization transactions contemplated a transition to a one-share, one-vote structure seven years in the future. Drawing a contrast with

[redacted], Evercore nonetheless noted: "Unlike other alternative asset managers, 1 for 1 voting will not occur immediately."

115. Evercore also failed to analyze the effective control the Founders and senior management would continue to wield after the proposed sunset. The Founders and senior management would hold a voting block of approximately 25%, and the Founders would continue in their roles as co-Chairmen, while Bae and Nuttall's would remain as co-CEOs. Only three of the 16 precedent recapitalization transactions Evercore cherry-picked involved high-vote stockholders who would wield more than 20% of the post-transaction vote.

116. Though Evercore presented on the "Value Impact" of the Founders' revised proposal, Evercore's calculations did not account for the proposed grant of the remaining 3.36 million forfeited KKR Holdings units to the Founders, Bae, and Nuttall as part of the Restructuring.

Semler Brossy Warns the Conflicts Committee about Giving the 3.36 Million Forfeited Units to Kravis, Roberts, Bae, and Nuttall

117. On August 27, 2021, Conflicts Committee Chair Scully signed an engagement letter with Semler Brossy Consulting Group, LLC ("Semler Brossy"), a compensation consultant, to evaluate the "certain equity awards proposed by management to be made to Bae and Nuttall." The Conflicts Committee never met

to discuss hiring Semler Brossy. No other compensation consultants were interviewed or considered.

118. On September 8, 2021, Semler Brossy presented to the Conflicts Committee. Skadden "noted that management was also proposing to the Board certain equity grants to be made to Messrs. Bae and Nuttall in connection with their proposed elevation to co-Chief Executive Officer, which grants would be outside of the Committee's charge and instead considered by the Board in due course." Semler Brossy nevertheless presented on these equity grants and the post-employment requests of the Founders.

119. Semler Brossy's "Draft" presented its "Initial Perspective on Compensation-Related Proposals" for the Conflicts Committee. Semler Brossy cautioned that "many elements of the proposals have limited precedent—in form and/or amount—and may very reasonably be expected to attract significant scrutiny and negative attention by external audiences." Semler Brossy noted that "disclosable FY21 compensation for each of Messrs. Bae and Nuttall could exceed [redacted] on a grant date fair value (GDFV) basis—inclusive of annual compensation (salary and realization of carried interest), the previously granted incentive equity award to Mr. Bae, and the contemplated incentive equity awards

and issuance of [the forfeited] Holding Units."[49] Semler Brossy stated that "[w]hile market precedent exists for a public-company executive to receive compensation at this level, it is exceedingly rare."

120. Separate and apart from the "incentive equity awards" being proposed to Bae and Nuttall, Semler Brossy estimated the fair market value of granting the remaining 3.36 forfeited KKR Holdings units as [redacted] to each of Bae and Nuttall and [redacted] each to Kravis and Roberts, for a total of over [redacted]. Semler Brossy's presentation relayed that the purported justification for granting 2.3 million forfeited units to Bae and Nuttall was that those units "were earmarked for issuance in 2017 at [Bae and Nuttall's] promotion to Co-Presidents/Co-COOs" but "an insufficient number of Holdings Units remained unallocated at the time." Semler Brossy did not identify who told it that any of the forfeited units had been "earmarked" for Bae and Nuttall and did not cite to any documentary evidence reflecting that the units were "earmarked" for them.

121. The justification provided to Semler Brossy made no sense. As discussed above, the Board-approved equity grants to Bae and Nuttall in 2017 included both KKR Holdings Compensation Units and four million KKR restricted

[49] Semler Brossy added that the Founders' various post-employment perquisites were "atypical" and "have garnered external criticism in other situations."

equity units to each of Bae and Nuttall under the Equity Incentive Plan. Unlike the KKR Holdings Compensation Units, the number of restricted equity units available under the Equity Incentive Plan was at the Board's discretion, meaning that if Bae and Nuttall were actually entitled to 2.3 million more units in 2017, then the Board could have granted them 2.3 million more restricted equity units in 2017 under the Equity Incentive Plan. Moreover, had the Board already approved the grant of units in 2017, there would have been no need for the Board to approve the grant of the forfeited units again.

122. As for the other 1.06 million forfeited units that the Founders proposed that they receive in the Reorganization, no one from Semler Brossy, Evercore, or KKR management ever provided any justification for granting these units to the Founders. Semler Brossy's presentation, and all other 220 documents, are silent as to why the Board should grant these units to the Founders as part of the Reorganization. The Conflicts Committee and Board never asked for an explanation. Skadden provided no advice on the topic. Nor did Evercore.

123. In the Section 220 process, Plaintiff repeatedly requested documents showing that an additional 2.3 million forfeited units were "earmarked" for Bae and Nuttall in 2017. The Company was unable to locate any such documentation. The claim that these units were earmarked in 2017 directly contradicts the Company's

repeated public disclosures from 2018 to 2021, which describe the amounts of, and reasoning behind, all equity compensation, carried interest, and bonuses paid to Bae and Nuttall. These public disclosures include no mention of an additional 2.3 million KKR Holdings Compensation Units, worth $150 million, that KKR had earmarked for Bae and Nuttall in 2017. If KKR had earmarked additional units for Bae and Nuttall in 2017, then multiple years of the Company's public filings falsely understate their compensation.

124. The Conflicts Committee had every reason to question that the Board in 2017 had approved an additional undisclosed grant of 2.3 million KKR Holdings Compensation Units to Bae and Nuttall. Had the Board already agreed to grant additional KKR Holdings Compensation Units to Bae and Nuttall in 2017, the Board would know that, and there would have been no need for it to approve these grants again in 2021 as part of the Reorganization. And if Bae and Nuttall were already entitled to these units in 2017, they would have already received them, as forfeitures occurred in 2018, 2019, and 2020, instead of waiting years to receive them as part of the 2021 Reorganization. The only reasonable inference is that KKR did not have a secret, undisclosed $150 million compensation plan for Bae and Nuttall, on top of the hundreds of millions of dollars of disclosed compensation they had received since 2017.

125. Semler Brossy's warnings to the Conflicts Committee about the award of the forfeited units also belie the notion that the Board had already "earmarked" 2.3 million units for Bae and Nuttall back in 2017:

- Institutional investors and their proxy advisors discourage the issuance of fully vested awards without substantial risk of forfeiture over multi-year (3-years or greater) service periods.
- That such awards are also substantive in magnitude could draw additional scrutiny from shareholders; in our experience, it is the expectation of institutional investors and their proxy advisors that awards of this magnitude are subject to both (i) performance-based vesting, and (ii) longer-tail (5-years or greater) and/or back-loaded or cliff vesting.

126. Semler Brossy's "draft" presentation to the Conflicts Committee included additional "Semler Brossy Commentary." Based on KKR's representation that 2.3 million KKR Holdings Compensation Units were promised to Bae and Nuttall in 2017, Semler Brossy cautioned the Conflicts Committee that KKR should "take particular care to establish the rationale" for giving Bae and Nuttall the forfeited units: "We consider the proposed terms to be reasonably appropriate within the context of the facts and circumstances; that said, the Company should take particular care to establish the rationale for the unique forfeiture provisions in the public disclosures as the proposed actions will likely result in external criticism."

127. Semler Brossy prepared a written supplement, dated September 9, to its presentation to the Conflicts Committee, in which it reiterated its concerns. Semler Brossy cautioned:

> ***[I]t is important to acknowledge that many elements of the proposals have limited market precedent – in form and/or amount – and may very reasonably be expected to attract significant scrutiny and negative attention*** by external audiences (institutional investors, their proxy advisors, the business press, and the public-at-large). For example, disclosable FY21 compensation for each of Messrs. Bae and Nuttall could exceed [redacted] on a grant date fair value (GDFV basis – inclusive of annual compensation (salary and realization of carried interest), the previously granted incentive equity award to Mr. Bae in February 2021, and the contemplated incentive equity awards and issuance of Holding Units. While market precedent exists for a public-company executive to receive compensation at this level, it is exceedingly rare, and the Company is further differentiated by the fact, that such compensation would be delivered to two executives and accompanied by extraordinary compensation for the Co-Founders as well. Likewise, a number of the proposed Co-Founder Agreement provisions are quite rare, including: (i) the Co-Founders' continued oversight of the Carry Pool, (ii) the Co-Founders' ability to determine their own roles, and (iii) the continuation of certain benefits to death (and, in some cases, beyond).
>
> ***The potential for external criticism should, of course, be viewed within the context of the Co-Founders' current controlling interest and the lack of typical governance mechanisms for public shareholders to express their dissatisfaction*** (e.g., Say on Pay, Director elections).

The Conflicts Committee Disguises the TRA Payoff as a Payment for a Sunset

128. At the September 8 Conflicts Committee meeting, Evercore outlined a potential counterproposal: a sunset for the Golden Share at the third anniversary of

the closing in exchange for a payment of [redacted] in stock. Evercore attributed a value to the sunset of [redacted] to [redacted], based on the supposed precedent of four cherry-picked dual class recapitalizations since 2010. Evercore continued to value the impact to KKR of eliminating the TRA at negative [redacted] to negative [redacted], leaving the "Midpoint of Range" of value to KKR at [redacted].

129. On September 9, the Founders made a so-called "Final Proposal" in which they sought a total payment value of [redacted] (including 8.5 million shares, valued at $536 million, to *all* KKR Holdings unitholders in proportion to the number of KKR Holdings units they would exchange, tax-free, in the Reorganization) for a three-year sunset, among other terms. The Founders wanted to control KKR's "carry pool" allocations, be awarded a percentage of the carry pool consistent with past practice (even though they would no longer be co-CEOs) and retain the ability to invest in KKR funds on a no-fee, no-carry basis.

130. The Conflicts Committee met on September 10 and determined that Evercore provide to KKR management a "response proposal" that included all-stock consideration of [redacted] for a three-year sunset of the Golden Share.

131. The Board met on the morning of September 13, 2021, and discussed the status of the proposals by each side. Scully reported that management disagreed

with Evercore's exclusion of [redacted] as precedent transactions. The Conflicts Committee met on the afternoon of September 13 and discussed management's continued effort to persuade Evercore about the comparability of the [redacted] transactions. Evercore's presentation materials contain a page each on the [redacted] transactions. Evercore noted that both transactions collapsed the dual-class share structure immediately, [redacted] founders retained control post-transaction without any value attributed to governance changes, and Apollo was under significant pressure to resolve social and governance issues.

132. On September 17, 2021, the Conflicts Committee met. Scully reported on a call he had with the Founders: "Mr. Scully stated that he understood from Messrs. Kravis and Roberts that management was not pursuing the proposed reorganization and elimination of the [Golden Share], post-retirement benefits or additional charter amendments in light of the positions taken by the Committee." The Conflicts Committee decided not to take any action at that time.

133. Later that day, the full Board met. Kravis and Roberts attended. "It was noted that neither the proposed corporate restructuring of the Company nor the proposed Co-Founder Agreements were actively being pursued by the Founders or the Conflicts Committee at that time."

134. On Monday, September 20, the Conflicts Committee met. Scully reported on a phone call he had with Kravis "following discussions and communications among the Committee members over the weekend in which it was determined to try to re-open discussions regarding a potential reorganization transaction." Scully relayed that "Kravis stated that Mr. Nuttall would be the appropriate point person for management." Evercore's Hiltz stated that "a [redacted] payment would be a fair range to pay for control based on the precedent dual class recapitalization analysis" and that management's proposal was "in the zone of fairness." The Conflicts Committee expressed support for issuing 8.5 million shares in exchange for a three-year sunset of the Golden Share. "Scully noted that he was scheduled to have a follow-up call with Scott Nuttall later that day, which the Committee authorized, and that the Committee should reconvene following such call."

135. Later on the afternoon of September 20, the Conflicts Committee met again, and Scully reported on his conversation with Nuttall. Nuttall told Scully that the Founders wanted a sunset longer than three years.

136. On September 22, the Conflicts Committee met. Scully reported on further conversations he had had with Kravis and Nuttall. The Founders wanted a five-year sunset for the same payment of 8.5 million shares.

137. The Founders made a revised proposal on September 23. They proposed that: (i) KKR issue the same 8.5 million newly issued shares to all limited partners of KKR Holdings; (ii) KKR accelerate the vesting of unvested units for Kravis, Roberts, Bae, and Nuttall; (iii) KKR allow Bae and Nuttall to receive 2.3 million of the 3.36 million forfeited KKR Holdings units (1.15 million each), and allow Kravis and Roberts to award themselves the remaining 1.06 million units; and (iv) KKR allow Kravis and Roberts to control the carry pool for another five years (two more years than their previous proposal), including awarding themselves compensation from the carry pool in amounts "consistent with past practice."

138. The Board met on September 29 and discussed the revised proposal. Evercore discussed its financial analysis. It was reported that the management team understood the Conflicts Committee's position that "termination of the TRA would have a negative impact on the Company." Evercore supposedly stated that the value to the Company of the proposed transaction was "from other aspects thereof." Despite Evercore referencing the "other aspects" of the transaction and despite the Founders' proposal expressly referencing the Founders, Bae, and Nuttall receiving the forfeited KKR Holdings Compensation Units as part of the transaction, Evercore intentionally omitted the forfeited KKR Holdings Compensation Units from its analysis of the "Potential Transaction Value."

Evercore Refuses to Provide a Fairness Opinion

139. On October 3, the Conflicts Committee met. Evercore continued to intentionally omit the 3.36 million forfeited KKR Holdings Compensation Units, worth approximately $207 million at KKR's then-stock price, from its description of the Founder's September 23 proposal and its analysis of the "Potential Transaction Value." If Evercore had included the $207 million negative value from the transfer of the forfeited KKR Holdings Compensation Units, the "Midpoint of Range" of its "Value Impact" from the transaction would have dropped from $[redacted]—conveniently slightly above the [redacted] payment value based on KKR's then-stock price—to only [redacted].

140. Based on its analysis attributing massive, unjustified value to the future sunset of the Golden Share, without adjusting its analysis for the additional years of absolute control, and intentionally omitting the forfeited KKR Holdings Compensation Units, Evercore's Hiltz advised that Evercore "was of the view that the proposed transaction was in the best interests of the Company's unaffiliated stockholders." Hiltz further stated, however, that "Evercore could not provide a formal opinion one way or the other as to the fairness of the proposed transaction." According to Hiltz, "in precedent comparable transactions, Evercore has not provided a fairness opinion."

141. Evercore's refusal to provide a fairness opinion is striking. Evercore's assessment of the value received by KKR in exchange for issuing 8.5 million shares of stock was premised on Evercore's willingness to attribute huge value to a sunset of the Golden Share five years hence. Evercore's calculations on that subject were derived from a list of selected dual class recapitalization transactions, and fairness opinions were provided in the great majority of Evercore's selected transactions. Of course, the proposed Reorganization would not result in an immediate dual class recapitalization.

142. Evercore's refusal to provide a fairness opinion was a red flag waved in front of the Conflicts Committee. Evercore's many presentations respecting the supposed analogy to "Selected Dual Class Recapitalizations (Change in Voting Control)" were themselves red flags. They each contained the following caveats:

- Each precedent has unique circumstances that complicate a direct comparison to other recapitalizations; and
- These transactions are those in which there was a premium; there are other recapitalizations in which no premium was paid.

Fundamentally, Evercore lacked financial grounding for its expressed perspective that a five-year sunset on the dual-class structure had an "illustrative valuation range" of [redacted] to [redacted].

143. Evercore's October 2021 presentation materials identified "15 relevant recapitalizations since 1997."[50] For its valuation calculations, Evercore used an average implied aggregate premium as a percentage of total equity value of [redacted], which represented the average for all 15 transactions, as well as the identified average for the three transactions post-2010 involving U.S.-based companies.

144. Evercore's presentation to the Conflicts Committee showed that of the 15 transactions, fairness opinions were provided in 12 of them. No fairness opinion was provided in the two transactions with the highest recorded premia: [redacted] and [redacted]. There were only two identified premium transactions after 2005 in which a fairness opinion was issued: [redacted] and [redacted]. The average premium for those two transactions was less than [redacted]. Evercore never identified the number of dual class recapitalizations in which no premium was paid because it would have shown that no premium was paid in the majority of dual recapitalizations. In [redacted]

[50] Evercore dropped one of the 16 recapitalizations it had used in its initial analysis. Evercore initially included a recapitalization involving [redacted]. Evercore had included the [redacted] transaction initially because the "high vote shares traded at a discount to the low-vote shares." Eliminating the [redacted] had the effect of increasing the average premium for the remaining set of 15 cherry-picked transactions.

[redacted] and [redacted], the voting rights of the high-vote class were immediately reduced to [redacted] and [redacted] respectively.

145. A fairness opinion was provided in 11 of the 12 dual class recapitalizations for U.S.-based companies identified by Evercore.[51] The lone exception was a purported September 2017 recapitalization of [redacted], an [redacted]; the transaction was abandoned following stockholder litigation seeking to enjoin the recapitalization.[52]

146. Evercore's statement "that in precedent comparable transactions, Evercore has not provided a fairness opinion" was knowingly and objectively false—assuming that the identified dual class recapitalizations were, in fact, precedent comparable transactions. Evercore represented the special committees in three of the twelve identified recapitalization transactions for U.S.-based companies

[51] Evercore's list also included three recapitalizations involving non-U.S. companies, which Evercore excluded from its calculations of average and median premiums.

[52] A revised version of the [redacted] recapitalization was later completed with terms that reflected essentially no premium to the market price of the high-vote shares, which also were entitled to six times the dividend of the low vote shares. Evercore chose to omit providing a footnote with the details of the [redacted] recapitalization, even though it included explanatory footnotes for other transactions.

and provided a fairness opinion in each situation: [redacted];[53] [redacted];[54] and [redacted].[55]

147. Evercore has touted its experience with dual class recapitalizations and its willingness to provide fairness opinions. For example, in the [redacted] recapitalization, Evercore sent [redacted] board chairman and chief executive officer a letter which "outlined th[e] benefits" of a recapitalization and "summarized Evercore's experience in dual class voting stock restructuring transactions."[56] That led to [redacted] concluding that "Evercore had special knowledge of and experience in dual class voting stock recapitalization transactions" and Evercore being retained by the [redacted] special committee "to assist it in considering the fairness of the proposed recapitalization to the holders of Class B common stock, in part because of Evercore's meaningful experience in transactions similar to the proposed recapitalization transaction."[57]

---

53 [redacted].

54 [redacted].

55 [redacted].

56 [redacted].

57 *Id*. at 17-18.

148. Multiple senior Evercore representatives who attended the October 6 Conflicts Committee meeting had personal knowledge of the misleading nature of Evercore's statement that "in precedent comparable transactions, Evercore has not provided a fairness opinion." William Hiltz, who made the statement and is head of Evercore's Special Committee and Board Advisory practice, was personally involved in Evercore's representation of the special committee in the [redacted] transaction.[58] Saul Goodman, who attended the meeting and is head of Evercore's global alternative asset management practice, was also personally involved in the [redacted] transaction[59] and he signed Evercore's fairness opinion in the [redacted] transaction.[60] Goodman led the valuation and fairness opinion assignments respecting [redacted].

[58] Hiltz signed the subsequent [redacted] fairness opinion concerning the merger with differential consideration that Evercore's presentation to the Conflicts Committee notes was "identical to the Exchange Ratio originally planned in the recapitalization." Evercore's fairness opinion for the recapitalization does not appear to be publicly available, but is described in proxy statement for the related merger. *See id.*

[59] [redacted].

[60] [redacted].

Approval of the Reorganization

149. On October 6, 2021, the Conflicts Committee met and resolved to recommend that the Board approve the Reorganization.

150. Evercore provided the final version of its financial analysis of the Reorganization, which again excluded the 3.36 million forfeited KKR Holdings Compensation Units. The meeting's minutes reflect no discussion of the 3.36 million forfeited units. The Conflicts Committee adopted resolutions referring to "the termination of KKR's existing tax receivable agreement with KKR Holdings" and "the issuance to limited partners of KKR Holdings of 8.5 million shares." The resolutions were also silent about the 3.36 million forfeited KKR Holdings Compensation Units. The Conflicts Committee was also provided with a chart showing that the 8.5 million newly issued KKR shares would be allocated to *all* KKR Holdings unitholders in proportion to the number of KKR Holdings units they would exchange, tax-free, in the Reorganization, with 4.8 million of the 8.5 million shares going to the Founders and the other 3.7 million shares going to other limited partners of KKR Holdings.

151. Later that day, the full Board met in executive session (attended by Brown, Dillon, Grundfest, Gutierrez Hernandez, Hess, Holmes, Niel, Russo, Schoewe, and Scully) by video conference. Evercore presented and reviewed its

valuation analysis. Evercore told the Board (i) that the termination of the TRA had a negative value of approximately [redacted] to [redacted] impact on the Company but (ii) that was "compensated for by other benefits"—principally the five-year sunset to the Golden Share.

152. Evercore emphasized that the [redacted] transactions "were only of limited utility for Evercore's analysis given the very different circumstances facing those companies at the time of their respective restructurings." As noted above, there was no indication that those founders had been paid anything for control in those transactions. Of course, Kravis and Roberts had sought to be paid for their supposed TRA rights, not control. Paying for the sunset of the Golden Share was Evercore's invention.

153. Despite the attempt to rebrand the TRA Termination Payment as payment for the sunset on the Founders' "Golden Share," the deal remained a poorly disguised payment to all unitholders who engaged in the Reorganization's tax-free exchange. Notably, the final Reorganization structure presented to the Board for approval expressly stated that "Step 2" was: "The TRA entitlement is exchanged for [8.5 million] Class A Recapitalization Units in Group Partnership." Likewise, the October 6, 2021, KKR management presentation to the Board stated, "[a]ny

Holdings units exchanged prior to the Closing would retain their current TRA entitlement without change but not be entitled to share in the Payment."

154. The appendix to the minutes of the October 6 meeting also included a proposed "Reorganization Agreement," which divided the 8.5 million newly issued KKR shares among the KKR Holdings unitholders according to their relative ownership. Under this final documentation, the payment of 8.5 million was allocated *pro rata* among the unitholders of KKR Holdings, which was a party to the TRA and only partially owned by the Founders, not KKR Management, the entity through which the Founders hold the Golden Share. The Reorganization Agreement also stated that "the Tax Receivable Agreement ... will be terminated with respect to exchanges subsequent to the [Reorganization]." Though the resolutions adopted by the Conflicts Committee were silent about the 3.36 million forfeited KKR Holdings Compensation Units, the appendix to the minutes included a proposed "Reorganization Agreement," which dictated how the "[forfeited] Holdings Units as of the date hereof shall be allocated," with 2.3 million going to Bae and Nuttall. As for the remaining units, the Reorganization Agreement stated that the:

> balance of the unallocated Holdings Units as of the date hereof (together with any additional Holdings Units forfeited ... prior to the Closing time ... may be awarded by the Co-Founders in their sole discretion prior to the Closing Time, with the amounts, applicable terms

> and recipients of any such Holdings Units determined by the Co-Founders (which terms may provide for no vesting or transfer restrictions and which recipients may and are expected to include each such Co-Founder) ….

155. No one explained why the Founders, Bae, and Nuttall should receive the Forfeited Unit Payoff. Evercore's "valuation analysis with respect to each aspect of Project Aubergine" did not include any valuation analysis of the Founders' proposal that the Board approve granting all 3.36 million forfeited KKR Holdings Compensation Units to themselves, Bae, and Nuttall as part of the Reorganization. The minutes do not reflect any mention of the forfeited units. Nevertheless, at the end of this meeting, the Board was presented with the following resolutions, which they voted to adopt:

> The Board hereby determines that it is advisable and in the best interests of the Company and its stockholders for Holdings to allocate 1,150,000 Holdings Units to each of Messrs. Bae and Nuttall ….
>
> The Board hereby determines that it is advisable and in the best interests of the Company and its stockholders for the Co-Founders, on behalf of Holdings, to allocate any and all currently remaining unallocated Holdings Units at their discretion to themselves or others ….

156. The Board then voted to approve the Reorganization Agreement, even though they never received any justification or explanation from Semler Brossy, Evercore, KKR management, or anyone else regarding why they should approve granting the Founders, Bae, and Nuttall all 3.36 million forfeited KKR Holdings Compensation Units as part of the Reorganization. It is unclear how the Board could

have arrived at the conclusion that it was "advisable and in the best interests of the Company and its stockholders" to grant all 3.36 million of the forfeited units to the Founders, Bae, and Nuttall as part of the Reorganization.

157. There was no reason the Reorganization should have served as the impetus for the Founders, Bae, and Nuttall to separately receive another 3.36 million KKR Holdings units, for no stated purpose, simply because those units happened to be unallocated due to prior forfeitures. Kravis, Roberts, Bae, and Nuttall had received publicly disclosed and Board-approved equity compensation awards worth over $1.3 billion when those awards vested from 2018 through 2022.[61] In addition to this publicly disclosed equity compensation, Kravis, Roberts, Bae, and Nuttall received a total of over $1 billion dollars of publicly disclosed carried interest and bonuses during the five-year vesting period of their existing equity grants. At the time of the Reorganization in 2021, Kravis and Roberts were retiring from their co-CEO positions and creating a new equity pay package for Bae and Nuttall, which

[61] From 2018 through 2022, Kravis and Roberts each acquired over 3.0 million vested shares worth almost $133 million. Bae acquired over 11.7 million vested shares worth over $515 million. Nuttall acquired almost 12 million shares worth over $522 million.

would grant Bae and Nuttall each 7.5 million KKR shares collectively worth up to $1 billion.[62]

158. The Board and Conflicts Committee had other ways to use the 3.36 million forfeited KKR Holdings Compensation Units that would benefit KKR. For example, internal documents state that if these units remained unallocated, they would have been "delivered to the new public company." Alternatively, the Company could have used the 3.36 million forfeited KKR Holdings Compensation Units to fund approximately 40% of the 8.5 million KKR Holdings units that comprised the proposed TRA Payoff. The Founders instead proposed that the Board approve granting all 3.36 million forfeited KKR Holdings Compensation Units to the Founders, Bae, and Nuttall, in addition to the 8.5 million new KKR Holdings units that they proposed be created to fund the TRA Payoff. All these KKR Holdings units would convert to shares upon the Reorganization, meaning the Reorganization would effectively cost KKR and its public stockholders 11.86 million KKR public shares worth $777 million under the Founders' proposal.

[62] Antoine Gara, *KKR Co-Chiefs Could Net $1bn Each as Part of Stock Incentive Scheme*, Financial Times (Dec. 10, 2021).

159. Brown, Dillon, Grundfest, Gutierrez Hernandez, Hess, Holmes, Niel, Russo, Schoewe, and Scully voted in favor of the Reorganization and the Challenged Payoffs.

KKR Announces the Reorganization

160. On October 8, 2021, the Reorganization Agreement was executed. On October 11, 2021, KKR publicly announced that it would eliminate its Up-C structure by exchanging, tax-free, all units of KKR Holdings for common shares on a one-for-one basis. The announcement stated that "8,500,000 new Class A Units ... shall be issued to KKR Holdings L.P." but never stated the shares were a payment for Kravis and Roberts relinquishing control in the future. To the contrary, the disclosure stated that "the tax receivable agreement will terminate upon the closing of the mergers," and that the payoff would be divided among the Founders and other unitholders in accordance with their pro rata ownership of KKR Holdings.[63]

161. The Board ignored Semler Brossy's admonition to "take particular care to establish the rationale" for granting the forfeited KKR Holdings Compensation Units to Kravis, Roberts, Bae, and Nuttall. Instead, the public disclosures provide no rationale at all. The public disclosures simply state the number of units granted

[63] *See* KKR & Co. Inc., Form 10-K, at 190 (Feb. 28, 2022).

to each of Kravis, Roberts, Bae, and Nuttall, describe the grants as being part of the Reorganization, and explain that Kravis and Roberts decided how much to give to Bae and Nuttall and how much to keep for themselves:[64]

> The number of KKR units allocated to Messrs. Bae and Nuttall was determined by Messrs. Kravis and Roberts, and the allocations were made as part of the Reorganization Mergers, which were approved by our board of directors following the recommendation of our conflicts committee.
>
> * * *
>
> In addition, Messrs. Kravis and Roberts were authorized to allocate the balance of any outstanding and unallocated KKR Holdings Units, in their sole discretion, to themselves or others, on such terms as they determined ….

162. The October 2021 announcement did not state how much each of the unitholders would receive. Based on a series of Forms 4 filed in October 2021 and May 2022, the Founders and other KKR executive officers received all of the forfeited KKR Holdings Compensation Units and a substantial majority of the 8.5 million newly-issued KKR shares:

[64] *See* KKR & Co. Inc., Form 10-K, at 382 (Feb. 27, 2023).

Payoff Recipient	Forfeited Unit Payoff (Converted to KKR Shares)	TRA Payoff in KKR Shares	Total Value of Payoffs (@$65.51/share)
Kravis	535,185	2,414,142	$193,210,412
Roberts	535,184	2,659,772	209,301,568
Bae	1,150,000	465,629	105,839,856
Nuttall	1,150,000	575,356	113,028,072
Sorkin	-	103,464	6,777,927
Lewin	-	35,874	2,350,106
Other Unitholders	-	2,245,763	147,119,934
Total	**3,370,369**	**8,500,000**	**$777,627,873**

163. KKR's public disclosures provided scant detail on the purpose of the creation and distribution of these new common shares and provided no information about how the payment was negotiated or approved by the Board. The lack of disclosure is concerning, given the materiality of the Challenged Payoffs to KKR.[65] The disclosures do not state that the Founders (or other unitholders) were being paid for relinquishing future control. The Reorganization Agreement states that the 8.5 million tax-free shares constituted "further consideration for the Holdings Units."[66]

---

[65] *See* KKR & Co. Inc., Form 8-K, at Item 7.01 (Oct. 12, 2021) ("KKR estimates that the impact on after-tax distributable earnings per adjusted share would have been a decrease of approximately 1% ... had the 8.5 million Reorganization Shares been outstanding ...."); *id.* ("KKR estimates that the impact of these items on book value per adjusted share would have been a decrease of approximately 4%").

[66] *See* Reorganization Agreement, at 4 (Oct. 8, 2021).

The Reorganization Agreement shows that the 8.5 million share payoff is allocated pro rata among all KKR Holdings unitholders in proportion to their KKR Holdings units exchanged in the tax-free exchange.[67]

164. The Reorganization was consummated on May 31, 2022.

165. Since the Reorganization, Kravis and Roberts have continued to control the Company. The Founders appointed themselves Co-Executive Chairman (ostensibly for life) and have since benefited by the increased carry pool allocations, which have risen, as a percentage of KKR's overall realized carried interest, to 80%, significantly in excess of previously fixed percentages for all funds (previously 40%, 43%, 65%).

DEMAND FUTILITY

166. New KKR's board of directors is currently comprised of thirteen directors, a majority of whom are interested in the Challenged Payoff, are not independent from those who are interested, or are substantially likely to be liable. As explained in *Hamilton Partners, L.P. v. Englard*, 11 A.3d 1180 (Del. Ch. 2010), "a plaintiff in a double derivative action brought on behalf of a wholly owned

[67] *See id.* at 2, 4-5.

subsidiary need only show demand futility or otherwise satisfy Rule 23.1 at the parent level." *Id.* at 1207 (citing *Lambrecht v. O'Neal*, 3 A.3d 277 (Del. 2010)).

167. Four of the current members were interested in the Challenged Payoffs and/or lack independence from one another (Kravis, Roberts, Bae, and Nuttall). Six other current directors (Scully, Dillon, Russo, Brown, Gutierrez Hernandez, and Niel), three of whom served on the Conflicts Committee (Scully, Dillon, and Russo), face a substantial likelihood of liability for approving the Challenged Payoffs.

Demand Is Excused as to Kravis, Roberts, Bae, and Nuttall Because They Are Interested and/or Lack Independence from Each Other and They Face a Substantial Likelihood of Liability

168. Kravis, Roberts, Bae, and Nuttall are interested because they stood on both sides of the transaction and/or lack independence from each other.

169. As part of the Reorganization, Kravis, Roberts, Bae, and Nuttall received Challenged Payoffs from KKR worth hundreds of millions of dollars. Kravis beneficially received 535,185 KKR partnership units and 2,414,142 KKR shares collectively worth approximately $193 million. Roberts beneficially received 535,184 KKR partnership units and 2,659,772 KKR shares collectively worth approximately $209 million. Bae beneficially received 1,150,000 KKR partnership units and 465,629 KKR shares collectively worth approximately $106 million. Nuttall beneficially received 1,150,000 KKR partnership units and 575,356 KKR

shares collectively worth approximately $113 million. By any measure, a payoff worth over one hundred million dollars would be material to any individual.

170. Kravis and Roberts are cousins and have been partners with each other for decades. Kravis and Roberts jointly controlled the Company before the Reorganization and continue to control it afterward. They can effectively fire Bae and Nuttall at any time. Bae and Nuttall owe their careers and massive compensation packages to Kravis and Roberts. Kravis and Roberts are responsible for Bae's and Nuttall's promotion to co-CEOs as part of the Reorganization and championed Bae and Nuttall's massive compensation packages at the same time. In 2021, Bae received $559,636,148 in compensation from KKR, and Nuttall received a total of $523,142,432 in compensation. Kravis and Roberts also continue to control Bae and Nuttall's cash bonuses and allocations from KKR's "carry pool," pursuant to which Bae and Nuttall have historically been paid the following:

Year	Bae	Nuttall
2018	$ 30.1 million	$ 30.5 million
2019	34.6 million	34.8 million
2020	35.7 million	35.9 million
2021	82.9 million	80.3 million
2022	79.6 million	77.8 million
2023	49.6 million	46.7 million
Totals	**$ 312.6 million**	**$ 305.9 million**

171. Kravis, Roberts, Bae, and Nuttall also face a substantial likelihood of liability. Kravis, Roberts, Bae, and Nuttall each stood on both sides of the Challenged Payoffs through which they each received non-ratable and unfair benefits. They did not condition the Challenged Payoffs on approval by a fully empowered committee and a vote of unaffiliated stockholders.

The Outside Director Defendants Face a Substantial Likelihood of Liability

172. Scully, Dillon, Russo, Brown, Gutierrez Hernandez, and Niel (the "Outside Director Defendants") face a substantial likelihood of liability for approving the Challenged Payoffs. The Outside Director Defendants acted in bad faith: (i) they knew that the TRA Payoff was a disguised payment for the Founders' and other unitholders' worthless TRA rights and not a payment for the sunset; (ii) they knew that Evercore's financial analysis was ungrounded and that Evercore was refusing to issue a fairness opinion; (iii) they facilitated a conflict-laden process by allowing the most conflicted outside director on the Conflicts Committee to run point and by utterly failing to make any attempt to understand and address the conflicts of the Conflicts Committee's advisors; and (iv) they gave Kravis, Roberts, Bae, and Nuttall the 3.36 million forfeited KKR Compensation Holdings Units without any justification, real advice, or analysis.

173. *First*, the Outside Director Defendants knew that the rationale for the TRA Payoff was not genuine. The Founders, Bae, Nuttall, Sorkin, and Lewin wanted at least 8.5 million shares for the termination of the TRA. When the Founders were told that a payoff on that basis was unwarranted, the justification for a payoff of the exact same number of shares shifted to a payment to the Founders for relinquishing hard control in five years. Yet, the intended purpose of the ultimate payment of 8.5 million shares remained for all unitholders' "TRA entitlement," as expressly stated in the final deal structure materials management provided at the October 6, 2021 meeting. The Outside Director Defendants also knew that the purported justification for the payment of 8.5 million shares based on the Founders relinquishing control was not genuine because nearly half of the TRA Payoff went to private unitholders other than the Founders.

174. *Second*, the Outside Director Defendants knew that Evercore's analysis was facially flawed, contrived and unreliable. Evercore intentionally omitted any discussion of the 3.36 million forfeited KKR Holdings Compensation Units from its description of the Founder's September 23 proposal and its analysis of the "Potential Transaction Value." The Outside Director Defendants knew the 3.36 million forfeited KKR Holdings Compensation Units were part of the transaction and worth in excess of $200 million.

175. Evercore's analysis was also facially flawed because it depended on attributing massive value to the contrived, artificial notion that the Founders were being paid for relinquishing control. Moreover, even setting aside the contrived premise, the "Estimated Illustrative" valuation for relinquishing control was itself facially flawed. Evercore repeatedly told Scully, Dillon, and Russo that it had cherry-picked the 15 precedent transactions it could find, dating back nearly twenty years, in which a premium was paid, and that Evercore was ignoring any precedent transaction in which no premium was paid. The members of the Conflicts Committee, who were each sophisticated business executives, knew the valuation analysis was facially problematic. As a matter of basic arithmetic, anyone who read the presentations knew that the average premium Evercore derived from its cherry-picked set of 15 transactions resulted in an inflated average premium.

176. All of the outside directors were on notice of the valuation issues in Evercore's final presentation on October 6, 2021, which repeated the statement from its earlier presentations that Evercore omitted no-premium recapitalizations. All of the outside directors knew that Evercore did not take into consideration KKR's unique circumstances, including that the Founders and other recipients of the Challenged Payoffs would continue to wield 25% voting power and managerial control, even after the sunset of the Golden Share. The outside directors knew that

the Founders, Bae, and Nuttall would own a 25% block without the Golden Share because the Outside Director Defendants were presented with a "Pro Forma Ownership Summary" at the October 6, 2021 meeting. That chart reflected Kravis, Roberts, Bae, and Nuttall would own approximately 25% of the common stock and have 25% voting power on that basis alone (and that another 10% of the stock would be held by other current or former KKR employees).

177. None of the Outside Director Defendants could reasonably rely on Evercore more generally. No other advisors were interviewed. No one asked for a conflicts disclosure, nor did Evercore provide one. Evercore had represented Carlyle's founders in their tax-free exchange and payoff, which created an issue conflict. Evercore was also concurrently representing KKR in portfolio company asset sales, which no one disclosed, including management. Evercore refused to provide a fairness opinion, though Evercore's precedent transactions analysis noted that in the vast majority of the transactions it cited fairness opinions were issued. And in addition to the facial flaws in Evercore's analysis concerning the value of control at KKR, Evercore never valued the tax benefits that the Founders, Bae, Nuttall, Sorkin, and Lewin received by virtue of receiving the Challenged Payoffs as part of a tax-free exchange of all of their units.

178. *Third*, the outside directors facilitated a conflict-laden process. The outside directors utterly failed to make any attempt to understand and address the conflicts of the Conflicts Committee's advisors, including Evercore and Skadden. The outside directors also allowed Scully—the most conflicted member of the Conflicts Committee—to serve as the chair of the Conflicts Committee, run the process and have critical, unsupervised discussions with Kravis and Nuttall. The outside directors knew that Scully and his wife had deep ties to the Founders, Bae, and Nuttall. Scully rose to the pinnacle of Wall Street as a senior relationship banker who was responsible for catering to and delivering the desires of his clients.[68] Scully's most important client was KKR and therefore his most important job was pleasing Kravis and Roberts. According to *The New York Times*, Scully spent years strategizing with Kravis over the "race" among private equity firms to go public.[69]

---

[68] David Wighton, *Morgan Stanley Promotes Scully*, Financial Times (Feb. 9, 2006) ("Morgan Stanley last night announced the appointment of Robert Scully, one of its most experienced investment bankers, as co-president …. Mr Scully, 56, is one of Morgan Stanley's senior relationship bankers, working with top clients such as Kohlberg Kravis Roberts.").

[69] Andrew Ross Sorkin and Julie Creswell, *What Does Henry Kravis Want?*, N.Y. Times (Sept. 6, 2008) ("Going public is not a recent fixation for Mr. Kravis—he began considering the idea more than five years ago …. Over the years, Mr. Kravis continued to bounce the idea around with Robert Scully, a vice chairman of Morgan Stanley …."; "And so began a parlor game: Which private equity firm would dip into the public trough first? Some bet on Mr. Kravis, others on Mr. Schwarzman and

Scully personally advised Kravis on KKR's IPO, and inferably worked closely with Nuttall, who led KKR's IPO efforts. Morgan Stanley, where Scully was Co-President and Chairman of global capital markets, was the lead left underwriter when KKR filed for its IPO.[70] Within approximately a year of Scully's retirement from Morgan Stanley in 2009, Scully joined the KKR board and continued his job executing on Kravis and Roberts' wishes, albeit in a different role.

179. Scully and his wife, Nancy Peretsman, have longstanding social ties to Kravis and his wife, Marie-Josee Kravis, as well as other senior KKR executives. Scully's wife, Nancy Peretsman, served for nearly twenty years on the board of Teach for America, during the latter part of which Scott Nuttall was the co-chair. Roberts's wife is also on the board. Ms. Kravis and Ms. Peretsman served together from 2002 to 2005 on the board of the Institute for Advanced Study. It is unlikely a coincidence that Kravis and Peretsman were two of the eleven members elected to the Business, Corporate, and Philanthropic Leadership Section of the American Academy of Arts and Sciences in 2017. Both Scully and Peretsman are major

---

others still on David Rubenstein, the co-founder of Carlyle, who was salivating over a possible I.P.O. The race was on.").

[70] Michael J. de la Merced, *KKR Files for $1.25 Billion I.P.O.*, N.Y. Times Dealbook (July 3, 2007); KKR & Co. L.P., Form S-1 (July 3, 2007).

supporters of the Lincoln Center, along with Bae and Kravis. Scully and Peretsman have also been notable supporters of Sponsors for Educational Opportunity, a non-profit organization that Kravis co-founded and at which he is co-executive chairman. In addition, Peretsman has been a managing director since 1995 at Allen & Company, which hosts the annual Sun Valley Conference—where the Kravises are frequent notable attendees.

180. Unsurprisingly given his close ties to Kravis, Roberts and KKR management, Scully serves in every KKR board position that could serve as a check on Kravis's, Roberts's and KKR management's power. Kravis, Roberts, and Scully serve as the members of the Nominating and Governance Committee. Scully is chair of both the Conflicts Committee and the Audit Committee. All of the outside directors knew of and willfully ignored Scully's deep ties to Kravis and Roberts in allowing Scully to chair the Conflicts Committee and engage in critical, unsupervised conversations with Kravis and Nuttall during the process leading to the Challenged Payoffs.

181. *Fourth*, the Outside Director Defendants agreed to give Kravis, Roberts, Bae, and Nuttall the 3.36 million forfeited KKR Holdings Compensation Units as part of the Restructuring for no apparent reason other than that Kravis, Roberts, Bae, and Nuttall wanted them. The Outside Director Defendants were

never provided with any proof that anyone had "earmarked" (whatever that means) 1.15 million units to each of Bae and Nuttall in 2017. The Outside Director Defendants knew that they had never approved awarding those units to Bae and Nuttall, which is why the units remained "unallocated," and the Outside Director Defendants knew that no one else had, either, because the units were never reported as having been awarded as compensation to Bae and Nuttall. Moreover, no one provided any justification whatsoever that Kravis and Roberts were entitled to take the remaining 1.06 million KKR Holdings units for themselves.

182. It is not surprising that the Outside Director Defendants succumbed to the "controlled mindset," given the unusual level of control the Founders wield. All of the Outside Director Defendants were selected by the Founders with no vote of unaffiliated equity holders. KKR has not issued a proxy statement in years. The Founders dominate the nominating committee, and KKR did not produce any nominating committee minutes showing any kind of selection process whatsoever. The Founders act by fiat. The Golden Share provides the Founders with the power to hire and fire directors, at will, without a stockholder vote and without board approval. KKR directors do not sit for pre-set terms and can be removed by the Founders at any time for any reason, including for bringing a lawsuit against the Founders. The Outside Director Defendants' controlled mindset is reflected in the

fact that, despite being made aware of the unfairness of the Challenged Payoffs through Plaintiff's October 23, 2021 Section 220 demand and the subsequent complaint, the Outside Director Defendants have done nothing to remedy the harm to KKR and its public stockholders.

COUNT I

Breach of Fiduciary Duty
(Against the Director Defendants)

183. Plaintiff repeats and realleges all of the allegations above as though fully set forth herein.

184. Plaintiff brings Count I derivatively against Kravis, Roberts, Bae, Nuttall, Brown, Dillon, Holmes, Niel, Russo, and Scully (collectively, the "Director Defendants") for breach of fiduciary duty. By virtue of their positions as directors of KKR, the Director Defendants owe fiduciary duties of care, loyalty, and good faith to the Company and KKR stockholders. These duties required them to place the interests of KKR and its stockholders above their own interests and those of other directors, officers, and the Founders.

185. As described herein, the Director Defendants breached their fiduciary duties and have committed to continuing to breach their duties by knowingly and intentionally causing KKR to make substantial overpayments to the Founders and other unitholders on terms that the Director Defendants knew disproportionately

benefited the Founders and were not entirely fair to KKR. All of the Director Defendants are liable for causing the Challenged Payoff to be made or consciously failing to take action to prevent or remedy the harm, especially after they were made aware of the wrongdoing through Plaintiff's October 23, 2021 Section 220 demand. As noted above, the Reorganization did not close until May 2022.

186. As a result of the Director Defendants' actions, which were motivated by self-interested reasons, due to lack of independence, and/or done in bad faith, KKR was harmed in an amount to be proven at trial. Plaintiff seeks damages, including compensatory and/or rescissory damages. Plaintiff also seeks the cancellation of Defendants' shares, rescission, and/or restitution, as may be awarded by the Court in its broad remedial discretion.

COUNT II

Breach of Fiduciary Duty
(Against the Founders as Controlling Stockholders)

187. Plaintiff repeats and realleges all of the allegations above as though fully set forth herein.

188. Plaintiff brings Count II derivatively against the Founders for breach of fiduciary duty as controlling stockholders. By engaging in the acts, practices, and course of conduct described herein, the Founders failed to faithfully adhere to their fiduciary obligations to KKR and its stockholders.

189. The Founders acted together with the shared goal of pushing through the Reorganization and Challenged Payoffs on terms they knew were not entirely fair to KKR. They did so through their shared control of KKR Management, which controlled the Company and which the Founders, in turn, jointly controlled. Both of the Founders received pro rata shares of the Challenged Payoffs.

190. The Founders breached their fiduciary duties and will continue to breach their duties by knowingly and intentionally causing or allowing KKR to make overpayments to themselves for self-interested reasons and in bad faith.

191. As a result of the Founders' actions, KKR and its stockholders were harmed in an amount to be proven at trial. Plaintiff seeks damages, including compensatory and/or rescissory damages. Plaintiff also seeks the cancellation of Defendants' shares, rescission, and/or restitution, as may be awarded by the Court in its broad remedial discretion.

COUNT III

Breach of Fiduciary Duty
(Against the Officer Defendants)

192. Plaintiff repeats and realleges all of the allegations above as though fully set forth herein.

193. Plaintiff brings Count III derivatively for breach of fiduciary duty against Kravis, Roberts, Bae, Nuttall, Sorkin, and Lewin (collectively, the "Officer

Defendants"). By virtue of their positions as officers of KKR, the Officer Defendants owed fiduciary duties of care, loyalty, and good faith to the Company and KKR stockholders. These duties required them to place the interests of KKR and its stockholders above their own interests and those of other directors, officers, and the Founders.

194. By engaging in the acts, practices, and course of conduct described herein, the Officer Defendants failed to faithfully adhere to their fiduciary obligations to KKR and its stockholders and will continue to breach their duties for self-interested reasons, due to lack of independence, and/or in bad faith. The Officer Defendants proposed and stood on both sides of the Reorganization and Challenged Payoffs, which was not entirely fair to KKR, manipulated the purported rationale for the Reorganization and Challenged Payoffs, including in public disclosures, accepted the benefits of the Reorganization and Challenged Payoffs, despite knowing that it was unfair, and have taken no action since being apprised of the wrongdoing by Plaintiff. The Officer Defendants breached their fiduciary duties by facilitating substantial overpayments to the Founders and other unitholders on terms that the Officer Defendants knew disproportionately benefited the Founders and other untiholders and were not entirely fair to KKR. The Officer Defendants are

liable for causing the Reorganization and Challenged Payoffs to be made or consciously failing to take action to prevent or remedy the harm.

195. As a result of the Officer Defendants' actions, KKR was harmed in an amount to be proven at trial. Plaintiff seeks damages, including compensatory and/or rescissory damages. Plaintiff also seeks the cancellation of shares, rescission, and/or restitution, as may be awarded by the Court in its broad remedial discretion.

COUNT IV

Waste
(Against the Director Defendants)

196. Plaintiff repeats and realleges all of the allegations above as though fully set forth herein.

197. Plaintiff brings Count IV derivatively against the Director Defendants for waste.

198. The Director Defendants owed KKR the obligation not to waste corporate assets.

199. The Challenged Payoffs so disproportionately favored the Founders and the Officer Defendants that they could not have been based on a valid assessment of KKR's best interests. The Challenged Payoffs were so one-sided that no business person of ordinary, sound judgment could conclude that KKR received adequate consideration. The Director Defendants proposed and/or approved the Challenged

Payoffs in return for no consideration or consideration of little to no value to KKR. The rationale for the Reorganization and Challenged Payoffs shifted over time because no rationale made sense.

200. As a result of the Director Defendants' actions, KKR was harmed in an amount to be proven at trial.

COUNT V

Aiding and Abetting Breach of Fiduciary Duty (Against Evercore)

201. Plaintiff repeats and realleges all of the allegations above as though fully set forth herein.

202. Plaintiff brings Count V derivatively against Evercore for aiding and abetting the breaches of fiduciary duty alleged above.

203. Each of the Officer Defendants, Director Defendants, and Founders as controlling stockholders, owed fiduciary duties to KKR and its stockholders and breached those fiduciary duties. Evercore knowingly participated in these breaches of fiduciary duty by, among other things, failing to disclose its conflicts, creating a contrived, artificial rationale for the Challenged Payoffs and creating a contrived, artificial valuation analysis to help facilitate the Challenged Payoffs.

204. Evercore knew it was conflicted, knew the Conflicts Committee and outside directors were breaching their duties by utterly failing to make any attempt

to understand and address Evercore's conflicts and intentionally chose not to disclose its conflicts. Evercore had represented Carlyle's founders in connection with the TRA payoff to them, which motivated Evercore to justify and facilitate a similar payment to KKR's founders. Additionally, Evercore had represented KKR twice within the six months preceding announcement of the Reorganization, in connection with asset sales by KKR portfolio company The Bountiful Company. Inferably, Evercore understood that assisting the Founders and the Officer Defendants in obtaining the payoffs they sought would result in additional lucrative future engagements from KKR.

205. Evercore manufactured illogical rationales for the massive payoff that the Founders and Officer Defendants sought. Evercore knew that the precedents of the Carlyle and Apollo transactions did not justify a nine-figure TRA termination payment. So Evercore invented the justification of making the same payment as compensation for the purported loss of control in the Reorganization. Evercore supplied a financial analysis that was premised on the supposed similarity of dual-class recapitalizations which Evercore flagged as being unique and non-representative. Evercore understood but did not explain the unique circumstances confronting KKR and its Founders that cast grave doubt on any value being attributable to the delayed sunset of the Golden Share. Evercore intentionally

omitted the forfeited KKR Holdings Compensation units from its analysis. Evercore was unwilling to provide a fairness opinion.

206. KKR suffered harm, in an amount to be proven at trial, proximately caused by the breaches of fiduciary duty aided and abetted by Evercore.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court enter judgment in favor of Plaintiff and against Defendants:

A. Declaring that the Founders, Director Defendants, and Officer Defendants breached their fiduciary duties as directors, officers, and/or controlling stockholders in effecting and implementing the Reorganization and the Challenged Payoffs and that Evercore aided and abetted those breaches of fiduciary duty;

B. Awarding monetary damages, including compensatory and/or rescissory damages, together with pre- and post-judgment interest;

C. Awarding KKR restitution from the Officer Defendants and their affiliates, including ordering disgorgement of all profits, benefits, and other compensation obtained by them;

D. Rescinding the Challenged Payoffs;

E. Cancelling shares owned by the Officer Defendants or their affiliates in an amount equal to the value of the unfair benefits obtained by them in the Challenged Payoffs;

F. Directing KKR to take all necessary actions to reform and improve its corporate governance and internal procedures to comply with applicable laws and to protect KKR and its stockholders from a repeat of the damaging events described herein;

G. Awarding equitable relief to reform the governance and operation of KKR so that the risk of unfair related-party transactions are reduced;

H. Awarding the costs, expenses, and disbursements incurred in this Action, including experts' and attorneys' fees; and

I. Awarding such other relief as the Court deems just and proper.

FRIEDLANDER & GORRIS, P.A.

/s/ Jeffrey M. Gorris

Joel Friedlander (Bar No. 3163)
Jeffrey M. Gorris (Bar No. 5012)
Christopher M. Foulds (Bar No. 5169)
1201 N. Market Street, Suite 2200
Wilmington, DE 19801
(302) 573-3500

Attorneys for Plaintiff

OF COUNSEL:

ROBBINS GELLER RUDMAN
& DOWD LLP
Randall J. Baron
Benny C. Goodman III
Andrew W. Hutton
655 West Broadway, Suite 1900
San Diego, CA 92101
(619) 231-1058

SHOBE & SHOBE, LLP
Gladriel Shobe
Jarrod Shobe
P.O. Box 7132
Provo, UT 84602
(801) 900-5790

DATED: July 30, 2024