UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	§	
	§	**Case No. 20-32564**
STAGE STORES, INC., et al.,[1]	§	
	§	**Chapter 11**
Debtors.	§	

UNITED STATES TRUSTEE'S WITNESS AND EXHIBIT LIST

Main Case No: 20-32564	Name of Debtor: Stage Stores, Inc., et al.
Witnesses: 1.) Any witness listed or called by any other party 2.) Rebuttal witnesses as necessary	**Judge**: Christopher M. Lopez **Courtroom Deputy**: Zilde Martinez **Hearing Date**: January 25, 2024 **Hearing Time**: 10:00 a.m. **Party's Name**: Kevin Epstein, United States Trustee for Region 7 **Attorney's Name**: Vianey Garza **Attorney's Phone**: (713) 718-4663
Nature of Proceeding: Hearing on *Jackson Walker LLP's Emergency Motion for Entry of an Order Requiring Any Party-in-Interest Who Asserts Standing or Indispensable Party Status to File a Notice Stating a Basis for Indispensable Party Status or Standing in Connection with Jackson Walker LLP Fee Matters* [ECF Nos. 1222]	

EXHIBITS

Ex. #	Description	Offered	Objection	Admitted/ Not Admitted	Disposition
1	Preliminary Response of Jackson Walker LLP to Recent Filings by the Office of the United Staes Trustee, *In re Westmoreland Coal Company, et al.*, Case No. 18-35672, [ECF No. 3362]				

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Stage Stores, Inc. (6900) and Specialty Retailers, Inc. (1900). The Debtors' service address is: 2425 West Loop South, Houston, Texas 77027.

Ex. #	Description	Offered	Objection	Admitted/ Not Admitted	Disposition
2	Jackson Walker LLP's Brief Regarding Indispensable Parties and Parties with Standing Related to the Jackson Walker Fee Disputes, *In re Nieman Marcus Group Ltd LLC, et al.*, Case No. 20-32519 [ECF No. 3208]				
	Any document, pleading, exhibits, transcripts, orders, or other documents filed in the above captioned bankruptcy cases				
	Any exhibit necessary for impeachment and/or rebuttal purposes				
	Any exhibit identified or offered by any other party				

Date: January 23, 2024

Respectfully Submitted,

KEVIN M. EPSTEIN
UNITED STATES TRUSTEE
REGION 7, SOUTHERN AND WESTERN
DISTRICTS OF TEXAS

By: */s/ Millie Aponte Sall*

Millie Aponte Sall
Assistant U.S. Trustee
Tex. Bar No. 01278050/Fed. ID No. 11271
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EXHIBIT 1

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	)	Chapter 11
WESTMORELAND COAL COMPANY, *et al.*,[1]	)	Case No. 18-35672 (CML)
	)	(Jointly Administered)
Reorganized Debtors.	)	

PRELIMINARY RESPONSE OF JACKSON WALKER LLP TO RECENT FILINGS BY THE OFFICE OF THE UNITED STATES TRUSTEE
[RELATES TO DKT. NOS. 3360 & 3361]

1. With respect to the relationship between former Jackson Walker LLP ("Jackson Walker" or "Firm") partner Elizabeth Freeman ("Ms. Freeman") and former Bankruptcy Judge David R. Jones ("Judge Jones") there have been recent filings made in certain bankruptcy cases involving Jackson Walker by the Office of the United States Trustee (the "U.S. Trustee") (collectively, the "Filings").[2] Jackson Walker has a long and productive working relationship with the U.S. Trustee for whom it has great respect. The Filings, however, make allegations based, in part, on largely unsubstantiated media stories and from preliminary *allegations* made by the Fifth Circuit in a complaint against Judge Jones filed on October 23, 2023. The Filings are premised upon incorrect and incomplete facts, and necessarily rely upon some degree of speculation about Jackson Walker's knowledge and conduct. The Firm seeks to supplement the record with this statement regarding those issues.

2. In summary, Jackson Walker's management first learned in March of 2021 that a *pro se* litigant had *alleged* a romantic relationship between Ms. Freeman and Judge Jones. The Firm immediately asked Ms. Freeman to confirm or deny the allegation. She denied the charge of a *current* romantic relationship but admitted to a past relationship which had ended. Nevertheless, the Firm retained and consulted with a prominent ethics expert regarding the matter and set up certain safeguards regarding Ms. Freeman's future involvement in Judge Jones' cases. As part of the ethics expert's review, the Firm's General Counsel prepared a statement of relevant facts and presented a draft to Ms. Freeman who, after reviewing it, stated in writing that she had no issues with its accuracy. The factual summary that was confirmed by Ms. Freeman stated, among other things as described below, that there was no ongoing intimate relationship with Judge Jones. As a result, Jackson Walker did ***not*** know of any ongoing intimate relationship between Ms. Freeman

[1] Due to the large number of debtors in these chapter 11 cases, for which joint administration has been granted, a complete list of the debtors and the last four digits of their tax identification, registration, or like numbers is not provided herein. A complete list of such information may be obtained on the website of the Debtors' claims and noticing agent in these chapter 11 cases at www.donlinrecano.com/westmoreland. Westmoreland Coal Company's service address for the purposes of these chapter 11 cases is 9540 South Maroon Circle, Suite 300, Englewood, Colorado 80112.

[2] Jackson Walker intends to separately respond to the various Filings at the appropriate time, but submits this Preliminary Response now.

and Judge Jones until 2022 when it learned, quite by accident, that Ms. Freeman's denial was possibly false or at least no longer true. When confronted again she initially denied the relationship but later on admitted to a current romantic relationship. Jackson Walker then commenced discussions with Ms. Freeman and her counsel that ultimately resulted in her separation from the Firm.

3. This filing details the timeline of events, Jackson Walker's knowledge—or lack thereof—of Ms. Freeman's relationship with Judge Jones, and Jackson Walker's actions to address these issues.[3]

FACTS AND TIMELINE OF EVENTS

Application and Employment of Ms. Freeman at Jackson Walker

4. In early 2018, Ms. Freeman, a law clerk for Judge Jones at the time, sought a potential partnership position at Jackson Walker. As customary, Ms. Freeman was provided with a "Lateral Partner Questionnaire" which she was asked to complete and return in writing. One section asked her to disclose any possible conflicts of interest. In her questionnaire, Ms. Freeman did not disclose any conflicts other than she could not work on matters "currently pending" during her clerkship before Judge Jones.

5. Pursuant to Judge Jones's practice, Ms. Freeman, after she left the Court, could not appear in person before Judge Jones in his court or sign pleadings for cases in his court for six years mirroring in time her clerkship tenure. Importantly, Judge Jones' practice did not prohibit her from working on cases assigned to his Court, and permitted her work to be included in fee applications that came before him.

6. At no time during the interview process did Ms. Freeman mention or indicate that she had in the past—or was currently having—an intimate relationship with Judge Jones. Nor did Ms. Freeman state that she was living with him at the time.

7. Ms. Freeman was ultimately hired by Jackson Walker on May 14, 2018, as an income partner in the bankruptcy group.[4] She was later promoted to equity partner effective January 1, 2021.

First Allegation of an Intimate Relationship

8. On January 21, 2020, McDermott International filed for chapter 11 bankruptcy protection in the United States Bankruptcy Court for the Southern District of Texas (Bankr. SDTX Case No. 20-30336). Jackson Walker was retained to serve as co-counsel for McDermott. Judge

[3] To this date, Jackson Walker *still* does not know the state or history of the relationship between Judge Jones and Ms. Freeman over time since Judge Jones gave another version of their relationship to *The Wall Street Journal* when he purportedly admitted that he and Ms. Freeman have been living together for years. *See* The Wall Street Journal, "*Bankruptcy Judge Jones Named in a Lawsuit Over Romantic Relationship With Local Lawyer*," dated Oct. 7, 2023.

[4] Jackson Walker, like many other firms, has two tiers of partnership: an income partner where such partners' compensation consists of a salary and potential bonus, but they do not share in the profits of the firm; and an equity partner who does receive a share of the firm's profits.

Jones was assigned the bankruptcy case. Judge Jones ultimately confirmed McDermott's plan of reorganization on March 12, 2020.

9. Following confirmation of the plan of reorganization by Judge Jones, on July 17, 2020, pro se litigant, Mr. Michael Van Deelen ("Van Deelen") filed a lawsuit in Texas state court against various officers of McDermott. That state court lawsuit was removed to federal court as part of the McDermott bankruptcy case and became an adversary proceeding. *See* Adv. Proc. No. 20-03309. Unhappy with Judge Jones' rulings in the McDermott bankruptcy case, Mr. Van Deelen filed a motion to recuse Judge Jones on July 31, 2020. The focus of that recusal motion was Mr. Van Deelen's criticisms of Judge Jones's rulings; there were no allegations of any relationship between Judge Jones and Ms. Freeman in that initial recusal motion.

10. Thereafter, on Saturday, March 6, 2021, Mr. Van Deelen sent an email to a Jackson Walker partner raising for the first time a question as to whether Ms. Freeman and Judge Jones were in a romantic relationship. Jackson Walker immediately delivered that email to the Southern District of Texas Bankruptcy Court on Monday morning, March 8, 2021. *See* Adv. Pro. No. 20-03309 at Dkt. Nos. 36, 37 & 78. The document was filed under seal given concerns of Mr. Van Deelen's credibility that were raised previously in the bankruptcy case,[5] and given the highly personal nature of the allegation.

11. Mr. Van Deelen thereafter supplemented his motion to recuse, this time attaching the alleged anonymous letter that he previously referenced in his March 6, 2021 email to Jackson Walker. Judge Isgur was ultimately assigned to consider the recusal motion, which recusal motion was ultimately denied after an evidentiary hearing. *See* Adv. Pro. No. 20-03309 at Dkt. No. 42.

12. According to Chief Judge Priscilla Richman:

> "Judge Jones referred the motion to recuse to another bankruptcy judge but did not disclose to that judge the facts regarding his relationship with Ms. Freeman. On information and belief, the judge who ruled on the motion to recuse was unaware that Judge Jones was romantically involved with Ms. Freeman or that they were cohabiting. The motion to recuse was denied and appealed to a federal district court judge, and on information and belief, Judge Jones did not apprise that district court judge of the relationship with Ms. Freeman, and that judge was also unaware of the facts regarding the relationship. The appeal was denied."

See Complaint Identified by the Chief Judge of the Fifth Circuit Court of Appeals Against United States Bankruptcy Judge David R. Jones, Southern District of Texas, Under the Judicial Improvements Act of 2002, Complaint No. 05-24-9002 at pp. 2-3 (5th Cir. Oct. 13, 2023).

[5] *See e.g.*, McDermott International Case No. 20-30336 at Dkt. No. 694 (*Emergency Motion for Michael Van Deelen to Appear and Show Cause Why He Should Not be Held in Contempt of Court and Prohibited from Further Contact with the Debtors, Their Officers, or Their Counsel*).

Steps Taken by Jackson Walker

13. After receipt of the March 6, 2021 email alleging a romantic relationship between Ms. Freeman and Judge Jones, Jackson Walker discussed the allegations therein with Ms. Freeman. Ms. Freeman acknowledged that there had been a romantic relationship between her and Judge Jones, but that such relationship was well in the past, was not ongoing, and was not likely to rekindle. In light of this information, Jackson Walker instructed Ms. Freeman that she could not and should not work on any matters that were assigned to Judge Jones, and Jackson Walker advised that it would deduct from Ms. Freeman's compensation as an equity partner any profits associated with work that was performed by Jackson Walker in cases pending before Judge Jones.

14. Jackson Walker also took the additional step of consulting with outside ethics counsel to ensure that it understood its legal and ethical obligations. Specifically, and beginning on March 8, 2021, Jackson Walker contacted Peter Jarvis, Esq. of the respected law firm of Holland & Knight. Mr. Jarvis is a nationally recognized expert on lawyer professional responsibility and ethics, and was a co-author of *The Law of Lawyering*, a leading treatise on the subject.

15. The General Counsel for the Firm presented Ms. Freeman with a draft letter that Jackson Walker intended to provide to Mr. Jarvis as part of his analysis. That draft letter, a copy of which is attached hereto as **Exhibit 1**, contained several important components. First, the draft letter was presented to Ms. Freeman with a specific request to review it for factual accuracy.[6] To this point, the draft letter stated, as factual assumptions based on Jackson Walker's knowledge at the time, (a) that Ms. Freeman and Judge Jones were close personal friends; (b) that Jackson Walker's understanding was that Judge Jones precluded Ms. Freeman from appearing personally in his court for six years (*i.e.*, the length of Ms. Freeman's judicial clerkship); (c) the draft letter outlined the claims and allegations asserted by Mr. Van Deelen; and (d) that Jackson Walker then understood that, while there had been a romantic relationship between Ms. Freeman and Judge Jones prior to March 2020, that such relationship had ended and that there was no ongoing romantic relationship, nor any romantic relationship expected going forward. The draft letter also stated—and asked Ms. Freeman to confirm—that Judge Jones and Ms. Freeman did not live together. The draft letter also informed Ms. Freeman of Jackson Walker's view that an ongoing intimate relationship with Judge Jones (as opposed to an intimate relationship that had terminated in the past) would be incompatible with Jackson Walker continuing to participate in cases before Judge Jones. Ms. Freeman reviewed the draft letter and confirmed in writing that "I reviewed the letter and have no questions or issues." *See* Exhibit 1. Jackson Walker's outside ethics counsel concluded that the measures taken by Jackson Walker, based on the facts stated in the letter, which were confirmed by Ms. Freeman, were sufficient to meet Jackson Walker's obligations.

16. Notwithstanding the above confirmation from Ms. Freeman and actions taken by Jackson Walker, months later in 2022, a credible third party volunteered new information to a

[6] The cover email to Ms. Freeman states, in relevant part: "I will appreciate your review. I want to be sure that the statements of fact are accurate and that the terms described in the letter that will apply to you are consistent with what you have understood and can go along with. Once we have your concurrence, I will sen[d] the letter to Peter [Jarvis] in draft form, to be sure it provides the information he needs, after which I will send in final form and look for his opinion."

Jackson Walker partner which led Jackson Walker to again question Ms. Freeman about these allegations. Ms. Freeman again denied any current intimate relationship with Judge Jones. When Jackson Walker continued to question Ms. Freeman, she ultimately admitted that the relationship had resumed. Shortly after these follow up conversations with Ms. Freeman, Ms. Freeman retained her own legal counsel.

17. Upon learning from Ms. Freeman that her relationship with Judge Jones had resumed, Jackson Walker again reached out to its outside ethics counsel, Mr. Jarvis. Mr. Jarvis discussed the situation with Ms. Freeman's attorney. Jackson Walker concluded that the only solution was for Ms. Freeman to leave.

18. Ms. Freeman ultimately agreed separation was appropriate and Ms. Freeman left Jackson Walker to start her own firm.

CONCLUSION

19. The above represents the facts and timeline of events as known to Jackson Walker as of the date of this filing.

20. While Jackson Walker has found itself dealing with a very difficult and challenging set of circumstances, the Firm takes very seriously its responsibility to operate in accordance with professional ethics and integrity, as the Firm has done for more than 130 years. Jackson Walker is not perfect—no firm is. But in the case of the relationship that has come to light between Ms. Freeman and Judge Jones, Jackson Walker believes the Firm acted responsibly.

Dated: November 13, 2023
Houston, Texas

Respectfully submitted,

NORTON ROSE FULBRIGHT US LLP

/s/ *William R. Greendyke*
Jason L. Boland (SBT 24040542)
William R. Greendyke (SBT 08390450)
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Counsel for Jackson Walker LLP

CERTIFICATE OF SERVICE

I certify that on November 13, 2023, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

By: /s/ William R. Greendyke

From: Freeman, Liz
Sent: Friday, August 27, 2021 1:15 PM
To: Cowlishaw, Pat
Subject: RE: Request for Opinion [IMAN-JWDOCS.FID560826]

Sensitivity: Private

Follow Up Flag: Follow up
Flag Status: Completed

Pat,

I reviewed the letter and have no questions or issues. I deeply appreciate the time and effort everyone has put into this very difficult situation. I lament that it was necessary. Thank you for everything.

- Liz

From: Cowlishaw, Pat <pcowlishaw@jw.com>
Sent: Thursday, August 26, 2021 12:57 PM
To: Freeman, Liz <efreeman@jw.com>
Subject: Request for Opinion [IMAN-JWDOCS.FID560826]
Importance: High
Sensitivity: Private

Liz,

Enclosed is a draft letter to Peter Jarvis, who is engaged by Jackson Walker to advise us from time to time regarding professional ethics matters. (Peter is a partner at Holland & Knight, where he leads a practice group in the area of legal professional ethics and risk management. He is co-author of *The Law of Lawyering*, a leading treatise on the subject).

The draft has been reviewed by Wade, Matt C, and Bruce, and it incorporates their comments. I will appreciate your review. I want to be sure that the statements of fact are accurate and that the terms described in the letter that will apply to you are consistent with what you have understood and can go along with.

Once we have your concurrence, I will sent the letter to Peter in draft form, to be sure it provides the information he needs, after which I will send in final form and look for his opinion.

Please let me know if you have questions. I can say for Wade and me that we know that this has been an extraordinarily difficult matter to ask you to address, that we deeply appreciate your candor, cooperation and your commitment to the firm, and that we look forward very soon to closing the book on this. I would add Matt and Bruce, but you know that they feel that way already. Many thanks.

Pat

Jackson Walker LLP

Patrick R Cowlishaw
(Direct Dial)
(Direct Fax)

DRAFT

August __, 2021

Privileged and Confidential – Attorney-Client Communication

Mr. Peter Jarvis
Holland & Knight LLP
601 Southwest 2nd Avenue #1800
Portland, Oregon 97204

Re: Judicial Disqualificaiton Matter

Dear Peter:

This letter concerns the relationship between one of our law firm's partners and a federal bankruptcy judge, which you and I have discussed on several occasions going back to March of this year. I describe below the pertinent circumstances and the measures that the firm and our partner have taken in response. On behalf of Jackson Walker, I ask for your advice regarding the propriety and sufficiency of these measures, both in terms of our professional ethical posture and minimizing the risk that the firm's participation in future contested matters before the judge, through our partner or others, might result in disqualification of the judge or of us.

Background

Elizabeth Freeman joined Jackson Walker as a partner in our bankruptcy practice group on May 14, 2018. As with virtually all lateral partner hires, she joined the firm as an "income partner" (salaried). Elizabeth had been a licensed Texas lawyer for 20 years at that time. For the six years preceding her joining Jackson Walker, Elizabeth had worked as a law clerk to Chief Bankruptcy Judge David R. Jones of the Bankuptcy Court of the United States for the Southern District of Texas, Houston Division. Prior to her clerkship, Elizabeth had been a partner in the bankruptcy practice of Porter Hedges in Houston. Prior to his taking the bench October 1, 2011, Judge Jones and Elizabeth were law partners at Porter Hedges. Consistent with this background, Elizabeth and Judge Jones were and remain close personal friends. Both individuals are, and at all relevant times have been, divorced.

Elizabeth enjooyed quick and substantial success at Jackson Walker. From the time of her arrival through today, Houston has became a favored venue for complex debtor cases, in the

energy industry and more broadly. Complex cases filed in the Southern District are assigned either to Judge Marvin Isgur or Judge Jones. Jackson Walker's debtor practice grew very substantially during this time, including cases in which we took an expansive local counsel role, with Kirkland Ellis acting as lead counsel, and cases in which we were lead debtor's counsel. Much of this work was in cases before either Judge Isgur or Judge Jones. This success was a team effort, involving other bankruptcy partners as well, but Elizabeth's leadership and contribution were recognized as integral. Throughout, Elizabeth adhered to guidelines set by Judge Jones in respect of her status as his former law clerk. Under those guidelines, she could and did work on cases in his court, and the firm's fees for her work could be included in fee applications that came before him for review, but she could not (and did not) appear in his court or sign pleadings to be filed in his court. Elizabeth's understanding has been that Judge Jones expects those guidelines to apply to her for at least as long as the six years she served as his clerk, i.e., at least through May 2024.

In view of her success and contributions, Elizabeth was elected an equity partner in the firm, effective January 1, 2021.

Van Steelen/McDermott Claim

Among our debtor cases in progress early this year was a Chapter 11 reorganization proceeding for McDermott International, where we acted as local counsel with Kirkland as lead, and Judge Jones presiding. *In re McDermott International, Inc.,* Case No. 20-30336. In that proceeding Michael Van Deelen, a McDermott shareholder, pursued a *pro se* adversary action against certain Kirkland officers, complaining of actions they had taken in the bankruptcy. *Michael Van Deelen v. David Dickson,* et al., Adversary No. 20-3309. Van Deelen had moved to recuse Judge Jones, citing adverse rulings as evidence of bias. That motion was set for hearing March 10, 2020.

On Saturday, March 6, 2021, Van Deelen sent an e-mail to Matt Cavenaugh, a JW bankruptcy partner who was leading our work in the McDermott case. Van Deelen claimed to have received a "most disturbing communication," which indicated that Elizabeth Freeman had had a romantic relationship with Judge Jones. Van Deelen questioned whether Judge Jones was favoring Jackson Walker and its clients because of his relationship with our partner. Van Deelen provided a copy of what he said was the referenced communication, in the form of an anonymous, unsigned letter, accompanied by an envelope with no return address.

Matt promptly contacted me as the firm's general counsel. We conferred with our managing partner and another long-time firm leader, one of our senior trial partners, that weekend. The latter reached out to Elizabeth, who confirmed that there had been a romantic relationship. No further details were sought at that time. At the firm's request, Elizabeth stopped work on all matters in Judge Jones' court, pending the firm's assessment of the matter.

One of our lawyers delivered a courtesy copy of the Van Deelen communication to Judge Jones' chambers. We also disclosed these matters to our Kirkland co-counsel, who disclosed

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them to the client. At Judge Jones' request, Judge Isgur presided at the hearing on the motion. Kirkland appeared on behalf of McDermott and argued at the virtual hearing March 10. Judge Isgur denied the motion, based on Van Deelen's failure to present any competent evidence in support of his allegations, and he ordered that the anonymous letter Van Deelen had profferred be sealed. Van Deelen subsequently sought mandamus relief, which was denied.

Jackson Walker Review

With the Van Steelen matter resolved, the firm undertook a more complete assessment. From a legal standpoint, we reviewed judicial disqualification precedent inside and outside the Fifth Circuit based on relationships between counsel and judges, as well as opinions and commentary on relevant ethics requirements applicable to lawyers and the distinct requirements applicable to judges. I also conferred with you, beginning on March 8, and continuing from time to time as we learned more facts and were able to confer within firm management. Factually, our managing partner has met with Elizabeth on several occasions, both to better understand the relationship, in particular on a current and going-forward basis, and to keep her apprised of firm management's thinking.

Elizabeth has confirmed that there is no current romantic relationship between herself and Judge Jones and that none is expected going forward. According to Elizabeth, there has been no romantic relationship since prior to the time in March 2020 when COVID caused so many of us to shift to remote work and virtual-only meetings. Judge Jones and Elizabeth each own their own homes; they do not and have not lived together.

The firm, for its part, had concluded and has advised Elizabeth that any romantic, intimate, or sexual relationship between a firm lawyer and a federal judge would create too much risk of disqualification to be compatible with any lawyer in the firm continuing to appear before that judge. There is direct authority that a lawyer appearing before a judge with whom he or she is in a romantic relationship is cause for immediate disqualfication of the judge. *In re Schwarz,* 255 P.3 299 (N.M. 2011). *See* ABA Opinion No. 488 at 6 (2018). While we found no authority regarding judicial disqualification based on the appearance of a lawyer whose law partner has a romantic relationship with the judge, but does not herself appear, the Fifth Circuit has taken a strict approach to disqualifying judges based on other kinds of prohibited relationships between a judge and an equity partner of the lawyer who is appearing before the judge. *In re Billedeaux,* 972 F.2d 104 (5th Cir. 1992); *Potashnik v. Port City Const. Co.,* 609 F.2d 1101 (5th Cir. 1980).

We understand that a close personal relationship remains. We expect that Elizabeth and Judge Jones may see one another socially as friends with some frequency. They enjoy shared interests. Elizabeth assures us that at all times since she left her clerkship and joined Jackson Walker, she and Judge Jones have avoided any discussion of active cases and will continue to do so. With these facts as context, we understand the ethics authorities to agree that a friendship between lawyer and judge is not disqualfying. ABA Opinion No. 488 at 5. As stated by the Seventh Circuit: "In today's legal culture friendships among judges and lawyers are common. They are more than common; they are desirable. . . . Many courts therefore have held that a

judge need not disqualify himself just because a friend – even a close friend – appears as a lawyer." *United States v. Murphy,* 768 F.2d 1518, 1537 (7th Cir. 1985).

The cases we have reviewed treat friendship relationships as a matter of degree. In an extreme circumstance, such as a judge and trial lawyer who frequently vacation together, including shortly after a trial in which the lawyer had appeared before the judge, a close friendship might provide grounds for disqualification. As long as such extremes are avoided, however, we do not understand a continuing close friendship between Elizabeth and Judge Jones to create a basis for disqualifying Judge Jones when Jackson Walker represents clients in his court, through other lawyers or Elizabeth herself.

Recommended Actions

After careful consideration of all of these matters, the firm's Management Committee concluded that it would be prudent to maintain separation between Elizabeth and our firm's representation of clients in matters before Judge Jones for some reasonable time following the conclusion of any romantic relationship, and to adjust her compensation during that time so that she does not receive any portion of the profits that may be earned by the firm attributable to cases before him. The objective of these actions is to place any alleged appearance of impropriety well into the past.

More specifically, the Management Committee has determined to take the following steps:

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1) Continue to require Elizabeth to refrain from working on matters in Judge Jones' court through March 2022, at which point it will have been at least two years since the relationship returned to one of close friendship alone. Since the firm first became aware of this issue last March, Elizabeth has done more than avoid appearing in Judge Jones' court; she has, at our request refrained from all work on any matters before Judge Jones. With the firm's concurrence, she has continued to work on complex bankrupcty matters that are planned to be filed in Houston, prior to the filing of a bankruptcy petition. That is, Elizabeth has worked during the planning stages on cases that may wind up being assigned to Judge Jones after they are filed, but she has refrained from further work once a case is filed if it is assigned to Judge Jones. At present, with only six months remaining until March 2022, we also consider that it will be appropriate for Elizabeth to work on certain matters after the effective date of a confirmed plan in cases assigned to Judge Jones. Her work will be limited to post-effective date matters that will not come before Judge Jones for decision. This includes such matters as advising on plan mechanics and interpretation, or on post-efffective date asset sales outside of the bankruptcy court that were authorized under a plan. None of these activities would come before Judge Jones for decision, nor would they result in fees to be recovered from the estate or presented to the court for approval.

2) Adjust Elizabeth's 2021 distribution of net income to remove any portion of firm net profits derived from cases before Judge Jones. As an equity partner at JW, Elizabeth has been

assigned a percentage share of firm profits for 2021. Her share is __%, which would result in net income of $ _____ at budgeted firm net income of $ _____. During the year, equity partners receive a monthly draw at 60% of their share of budgeted net income. Additional distributions may be authorized around estimated tax dates, but at year end all equity partners will have received substantially less than their shares of budgeted net income. Net income is budgeted very conservatively, actual net income regularly exceeds budgeted net income by a substantial margin, and is expected to do so in 2021 based on performance to date. Once net income for the year has been determined, the balance is distributed to each equity partner in mid-January. In Elizabeth's case, her final distribution will be calculated by multiplying her assigned percentage share times firm net income, but excluding the portion of firm net income derived from fees received for firm work on cases before Judge Jones. For example, if fees from those cases accounts for 2% of total firm revenues in 2021, then Elizabeth's net income for 2021 would be calculated by multiplying her percentage share times 98% of firm net income, rather than 100%.

Conclusion

We will appreciate your careful review of this matter. Please let us know whether you have questions or require additional information. Please let us know whether, in your judgment, the measures we have described are appropriate and sufficient to address these circumstances, from the standpoint of avoiding disqualification of Judge Jones or Jackson Walker when we appear in cases before him and in terms of our own ongoing compliance with applicable ethical requirements. We look forward to hearing from you.

Sincerely,

DRAFT

Patrick R Cowlishaw

EXHIBIT 2

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	)	Chapter 11
NEIMAN MARCUS GROUP LTD LLC, *et al.*,[1]	)	Case No. 20-32519 (MI)
Reorganized Debtors.	)	(Jointly Administered)

JACKSON WALKER LLP'S BRIEF REGARDING INDISPENSABLE PARTIES AND PARTIES WITH STANDING RELATED TO THE JACKSON WALKER FEE DISPUTES
[Relates to Dkt. No. 3202]

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

Pursuant to this Court's *Order Requiring Any Party-in-Interest Who Asserts Standing or Indispensable Party Status to File a Notice Stating a Basis for Indispensable Party Status or Standing in Connection with Jackson Walker LLP Fee Matters* [Dkt. No. 3202] (the "Order Requiring Notice"), Jackson Walker LLP ("JW") files this Brief, and in support thereof, states as follows:

PRELIMINARY STATEMENT

1. Kevin M. Epstein, the United States Trustee for Region 7 (the "U.S. Trustee"), has filed a motion[2] seeking to vacate the *Order Granting Jackson Walker LLP's First and Final Fee*

[1] The Reorganized Debtors in these chapter 11 cases, along with the last four digits of each Reorganized Debtor's federal tax identification number, are: NMG Holding Company, Inc. (5916); Bergdorf Goodman LLC (5530); Bergdorf Graphics, Inc. (9271); Mariposa Intermediate Holdings LLC (5829); NEMA Beverage Corporation (3412); NEMA Beverage Holding Corporation (9264); NEMA Beverage Parent Corporation (9262); NM Bermuda, LLC (2943); NM Financial Services, Inc. (2446); NM Nevada Trust (3700); NMG California Salon LLC (9242); NMG Florida Salon LLC (9269); NMG Global Mobility, Inc. (0664); NMG Notes PropCo LLC (1102); NMG Salon Holdings LLC (5236); NMG Salons LLC (1570); NMG Term Loan PropCo LLC (0786); NMG Texas Salon LLC (0318); NMGP, LLC (1558); and The Neiman Marcus Group LLC (9509). The Reorganized Debtors' service address is: One Marcus Square, 1618 Main Street, Dallas, Texas 75201.

[2] *See United States Trustee's Motion for Relief from Judgment or Order Pursuant to Federal Rule of Civil Procedure 60(b)(6) and Federal Rule of Bankruptcy Procedure 9024 Approving any Jackson Walker Applications for Compensation and Reimbursement of Expenses* [Dkt. No. 3178].

Application for Allowance and Payment of Fees and Expenses as Co-Counsel to the Debtors for the Period from May 7, 2020 through September 3, 2020 [Dkt. No. 2147] (the "Challenged Order") entered by this Court approving JW's requests for compensation for services rendered and reimbursement for expenses incurred as co-counsel to the Debtors in these chapter 11 cases. JW submits that neither the Reorganized Debtors nor the U.S. Trustee are "necessary" or "indispensable" parties under Federal Rule of Civil Procedure 19.[3]

2. The Court's Order Requiring Notice invited other parties claiming to be an indispensable party or otherwise claiming to have standing to challenge the Challenged Order to file a notice (a "Notice") no later than January 10, 2024 asserting the basis for such indispensable party status or standing. Consideration of whether any party who files such a Notice has standing, post-confirmation, to seek vacatur of the Challenged Order requires an analysis of the *Debtors' Third Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code* [Dkt. No. 1793] (with all supplements and exhibits thereto, the "Plan") and the *Order Confirming the Third Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code* [Dkt. No. 1795] (the "Confirmation Order"). Any party seeking to vacate the Challenged Order bears the burden of proof to establish a basis for its constitutional, prudential, **and** section 1109 standing, in light of the confirmed Plan and related Confirmation Order.

3. This Brief sets forth JW's legal position that (i) there are no necessary or indispensable parties to this proceeding; and (ii) parties seeking vacatur of the Challenged Order or similar relief must establish certain elements of standing as a threshold matter before proceeding

[3] While Federal Rule 19 automatically applies to adversary proceedings pursuant to Bankruptcy Rule 7019, it is not automatically applicable to contested matters under Bankruptcy Rule 9014(c). However, under Bankruptcy Rule 9014(c), "the court may at any stage in a particular matter direct that one or more of the other rules in part VII shall apply," and may do so by giving "parties notice of any order issued under this paragraph to afford them a reasonably opportunity to comply with the procedures prescribed by the order." JW assumes for the purposes of this Brief that the Order Requiring Notice constitutes such an order under Bankruptcy Rule 9014(c).

on their claims. JW is not, through this Brief, engaging in an in-depth analysis on any particular party's asserted basis for standing, but reserves the right to do so following any Notices that may be filed pursuant to the Order Requiring Notice.

INDISPENSABLE PARTIES

A. Federal Rule 19 Governs Joinder of Necessary or Indispensable Parties.

4. Federal Rule 19(a), which governs joinder of required (*i.e.*, "necessary") parties, provides, in pertinent part:[4]

> (a) Persons Required to Be Joined if Feasible.
>
> > (1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
> >
> > > (A) in that person's absence, the court cannot accord complete relief among existing parties; or
> > >
> > > (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
> > >
> > > > (i) as a practical matter impair or impede the person's ability to protect the interest; or
> > > >
> > > > (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

5. The Federal Rule 19 analysis is a two-step process: first, under Rule 19(a), is the party "necessary," *i.e.*, the party should be joined; and second, under Rule 19(b), if the party is "necessary" but cannot be joined to the proceeding, is the necessary party "indispensable," *i.e.*, the claim raised cannot be adjudicated without the party.[5]

[4] FED. R. CIV. P. 19(a); *see also HS Res., Inc. v. Wingate*, 327 F.3d 432, 438 (5th Cir. 2003).

[5] *See HS Res., Inc.*, 327 F.3d at 439; *Shelton v. Exxon Corp.*, 843 F.2d 212, 218 (5th Cir. 1988).

B. There are No Necessary or Indispensable Parties to this Proceeding.

6. At the status conference held by this Court on December 12, 2023, the Court expressed concern about wanting to "have all the parties here" from the outset as an "up-front determination," rather than "wait[ing] 'til the end to figure [out who may be an indispensable party] because we could go through a lot of litigation or a lot of settlement discussions and not have the right parties here."[6] Pursuant to Rule 19, JW does not believe there are any necessary or indispensable parties missing from this proceeding. As discussed below, whether a party may be an ultimate beneficiary of funds disgorged, if any, is determinative of such party's standing, but does not have an impact on such party's status as a necessary or indispensable party.

7. As to the first step of the analysis under Rule 19(a) for an absent party, the Court must ask:

i. Is the Court unable to accord complete relief between JW and the challenging parties by vacating the Challenged Order in the party's absence?

ii. Does the absent party claim an interest relating to vacatur of the Challenged Order?

- If so, would disposing of the action in such party's absence either:
  - Leave JW subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations?
  - Impair or impede such party's ability to protect its interest as a practical matter?

Only if the ultimate answer is "yes" to these questions should the Court require such party's participation in this proceeding.[7]

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[6] *See* Dec. 12 Hr'g Tr. at 7:25-8:7; 10:15-23; 11:13-23.

[7] The factors under Rule 19(b) as to whether a party is "indispensable" only come into consideration if a required or necessary party cannot be joined to a proceeding because such joinder would destroy the court's jurisdiction. *See HS Res.*, 327 F.3d at 439. Because each party filing a notice in response to the Order Requiring Notice would necessarily not be "absent" from this proceeding, JW does not believe that Rule 19(b) is implicated.

8. There is no question that the Court could accord complete relief as between JW and any party who has standing to move to vacate the Challenged Order in the absence of any other party. If a party with standing moves to modify the Challenged Order, the relief, if any, will not be limited to the interest that party has in the amendment of the Challenged Order. In other words, this Court would order JW to pay a total amount, not an amount that is limited to the moving party's interest in the total payment. This is true even for the ultimate beneficiaries of the reduced fees, if any[8]—the reduction, or allowance of JW's fees is not impacted in any way by the participation, or lack thereof, of such beneficiaries in this proceeding. Indeed, a party may benefit even without participation in moving to vacate the Challenged Order under the terms of the applicable plan.

9. Further, the Court is able to accord complete relief between the existing parties here related to the Challenged Order based on the current motions already before the Court, without any participation of absent parties. The Court's ability to accord "complete relief" refers "only to the relief between persons already parties, and not as between a party and the absent person whose joinder is sought."[9] Therefore, under the first prong of Rule 19(a)(1)(A), there are no parties whose absence would prevent the Court from according complete relief related to the Challenged Order.

10. Turning to Rule 19(a)(1)(B), the Court has required any party who claims an interest "that Jackson Walker LLP should return to this bankruptcy estate all or part of the compensation that it was previous awarded in this case" to file a Notice no later than January 10,

[8] JW reserves its right to submit further argument to the Court regarding the flow of funds disgorged, if any, under the confirmed Plan and Confirmation Order.

[9] *CGI Logistics, LLC v. Martinez*, No. 5:23-CV-43, 2023 WL 6615364, at *4 (S.D. Tex. Sept. 22, 2023) (citation omitted).

2024. Under Rule 19(a)(1)(B), only parties claiming such an interest may be considered as required or necessary parties.[10] In any event, the Court will presumably allow for the participation of any party that files such a timely Notice on January 10 establishing such purported interest (and only after determining such party also has the requisite standing), and thus such party would not be "absent" from this proceeding or unable to be joined to the proceeding under Rule 19. Such party would therefore be able to assert its own interest in vacatur and/or disgorgement, and JW would not be subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations.[11] Accordingly, JW submits that there are also no necessary or required parties under Rule 19(a)(1)(B).

11. Because there are no necessary or required parties under Rule 19(a), the Court need not consider whether any party is indispensable under Rule 19(b).[12]

12. For the foregoing reasons, JW submits that there are no necessary or indispensable parties absent from this proceeding.

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[10] *See In re Ginn-La St. Lucie Ltd., LLLP*, 420 B.R. 598, 606 (Bankr. S.D. Fla. 2009) ("Because an absent party must claim an interest in the subject matter of the action between such party is determined to be necessary and indispensable, the Court concludes that the Non-Party Owners, having not claimed an interest in the subject matter of this action, are not required parties under Rule 19(a)(1)(B).") (citations omitted); *see also U.S. v. Keathley*, No. CIV.A. C-11-107, 2011 WL 2600552, at *3 (S.D. Tex. June 29, 2011).

[11] A bankruptcy court's order disallowing or reducing fees requested by a fee application, or an order denying or approving employment of a debtor's proposed professional, is binding on all parties in interest and may have res judicata effect. *See In re Intelogic Trace, Inc.*, 200 F.3d 382, 387-88 (5th Cir. 2000) (finding that an order approving a fee application had res judicata effect on a malpractice action); *In re Image Innovations Holdings, Inc.*, 391 B.R. 255, 260 (Bankr. S.D.N.Y. 2008) ("Three Circuit Courts and a District Court in this Circuit have held that orders deciding final fee applications preclude malpractice claims based on the same legal services."). Thus, it is unlikely in any event that JW will be subject to a risk of incurring double, multiple, or inconsistent obligations as any decision from this Court regarding fees awarded to JW in this case will be binding and preclusive in future proceedings.

[12] *See HS Res.*, 327 F.3d at 439.

PARTIES WITH STANDING

A. Each Party Seeking Vacatur of the Challenged Order Bears the Burden of Proof on Establishing its Constitutional, Prudential, and Section 1109 Standing.

13. Standing is a threshold issue that must be determined before a decision on the merits can be reached.[13] Standing includes both constitutional and prudential components. Further, under section 1109(b) of the Bankruptcy Code, only a "party in interest" has standing to raise, appear, and be heard on issues in a bankruptcy case.[14]

14. As this Court recognized in *Fieldwood*,[15]

> Constitutional standing requires that "an injury be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." Constitutional standing also requires that a plaintiff's injury must not be "conjectural or hypothetical." A particularized injury "must affect the plaintiff in a personal and individual way." A court has no subject matter jurisdiction when the party bringing claims lacks standing to assert those claims.

Each of the three elements must exist for a party to establish constitutional standing.[16] An assertion of an "injury to the public's confidence in the integrity of the [c]ourt's process" is insufficient to establish a particularized injury.[17]

15. Establishing constitutional standing is not enough on its own; a party must also have prudential standing.[18] Prudential standing "encompasses the general prohibition on a

[13] *See Audler v. CBC Innovis Inc.*, 519 F.3d 239, 247-48 (5th Cir. 2008) ("Because standing is a jurisdictional requirement, we must address it before considering the merits of an appellant's claim."); *see also Williams v. Parker*, 843 F.3d 617, 620 (5th Cir. 2016).

[14] *See* 11 U.S.C. § 1109(b).

[15] *In re Fieldwood Energy LLC*, No. 20-33948, 2021 WL 4839321, at *6 (Bankr. S.D. Tex. Oct. 15, 2021) (Isgur, J.) (internal citations omitted).

[16] *Williams*, 843 F.3d at 621.

[17] *In re Old ANR, LLC*, No. 19-00302-KRH, 2019 WL 2179717, at *6 (Bankr. E.D. Va. May 17, 2019).

[18] *Cibolo Waste, Inc.*, 718 F.3d at 474.

litigant's raising another person's legal rights."[19] In other words, "a plaintiff generally must assert his own legal right and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."[20]

16. Lastly, in bankruptcy cases, pursuant to section 1109(b) of the Bankruptcy Code, a party has standing only if it is a "party in interest."[21] While "party in interest" is not defined in the Bankruptcy Code, courts have held that it generally means "anyone who has a legally protected interest that could be affected by the bankruptcy case."[22] Section 1109 standing is similar to prudential standing in that it "requires more than identity; it also requires interest . . . that is particular and direct to that creditor."[23] Further, "courts may prohibit a prospective 'party in interest' from participating in a chapter 11 case for a lack of standing 'if he or she has *no* cognizable interest (whether directly or indirectly) in the outcome of the proceeding.'"[24]

17. This Court has previously recognized the standing requirements in the context of fee objections, finding that "[i]n the bankruptcy context, a party does not have standing to object to an application for compensation unless that party has a financial stake in the approval of the application."[25] This Court further explained that "[a] party lacks a financial stake when, regardless

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[19] *Id.*; *see also St. Paul Fire & Marine Ins. Co. v. Labuzan*, 579 F.3d 533, 539 (5th Cir. 2009).

[20] *Superior MRI Servs., Inc. v. All. Healthcare Servs.*, Inc., 778 F.3d 502, 504 (5th Cir. 2015) (quoting *United States v. Johnson*, 632 F.3d 912, 919-20 (5th Cir. 2011)).

[21] *See* 11 U.S.C. § 1109.

[22] *Matter of Xenon Anesthesia of Tex., P.L.L.C.*, 698 F. App'x 793, 794 (5th Cir. 2017); *see In re Megrelis*, No. 13-35704-H3-7, 2014 WL 4558927, at *2 (Bankr. S.D. Tex. Sept. 12, 2014).

[23] *In re Friede Goldman Halter Inc.*, 600 B.R. 526, 531-32 (Bankr. S.D. Miss. 2019) (citing *In re E.S. Bankest, L.C.*, 321 B.R. at 595 (noting that "[t]he Bankruptcy Code is replete with examples where a creditor may not have standing to object," including to portions of a chapter 11 plan that do not affect the creditor's direct interests)).

[24] *In re Old ANR, LLC*, 2019 WL 2179717, at *4 (citation omitted).

[25] *See In re Moye*, No. 07-37364, 2012 WL 3217595, at *2 (Bankr. S.D. Tex. Aug. 7, 2012).

of the outcome of the application for compensation, that party will not receive a distribution from the estate."[26]

B. The Plan and Confirmation Order Govern Each Party's Asserted Basis or Standing.

18. A party's standing can change throughout the course of a bankruptcy case and must be evaluated at every stage.[27] Particularly in the case of a confirmed plan, a party's standing post-confirmation may be drastically different than it was pre-confirmation.[28] Thus, when considering a party's standing post-confirmation, courts must "consider the disclosure statement as well as the terms of a plan of reorganization," and the order confirming such plan.[29]

19. Similarly, a party's standing as a "party in interest" changes post-confirmation.[30] For example, pre-confirmation, a reduction in professional fees under 11 U.S.C. § 330 would increase (or at least, prevent a decrease in) estate assets, which, prior to a plan being confirmed, could be available for distribution to creditors in a case; therefore, creditors hold "a legally protected interest that could be affected by the bankruptcy case." Post-confirmation, however, the plan dictates not only where professional fees are returned, if disgorged or disallowed, but also sets recoveries to different classes of creditors. In a situation where a plan entitles disgorged or disallowed professional fees to flow to a particular class of creditors, such class of creditors—or perhaps their representative in the event of a liquidating trustee or plan agent—would likely

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[26] *Id.* (citing *In re Runnels Broadcasting Sys., LLC*, 2009 WL 4611447, at *3 (Bankr. D.N.M. Dec. 1, 2009)).

[27] *See In re Foster*, 516 B.R. 537, 544 (B.A.P. 8th Cir. 2014), aff'd, 602 Fed. Appx. 356 (8th Cir. 2015) ("Standing is a component of subject matter jurisdiction that may be challenged at any time during the proceeding.").

[28] *See Dynasty Oil & Gas, L.L.C. v. Citizens Bank (In re United Operating, L.L.C.)*, 540 F.3d 351, 355 (5th Cir. 2008) ("[A]fter confirmation of a plan, the ability of the debtor to enforce a claim once held by the estate is limited to that which has been retained in the [bankruptcy] plan. . . . If a debtor has not made an effective reservation, the debtor has no standing to pursue a claim that the estate owned before it was dissolved.").

[29] *In re Tex. Wyoming Drilling, Inc.*, 647 F.3d 547, 551 (5th Cir. 2011) (quoting *Floyd v. CIBC World Mkts., Inc.*, 426 B.R. 522, 537-38 (S.D. Tex. 2009)) (internal quotation marks omitted).

[30] *See Friede Goldman Halter Inc.*, 600 B.R. at 532 (finding that a creditor during the pendency of a bankruptcy case lacked standing to move to reopen the case where it did not seek additional distributions on its claim and could not assert any stake in reopening the case premised on the relief to which it would be entitled as a creditor).

continue to have legally protected interests post-confirmation. Thus, to determine where disgorged funds, if any, may ultimately flow, the Court must undertake an in-depth analysis of the Plan and Confirmation Order, and only such parties as may have a "legally protected interest" that could be affected by disgorgement of funds may assert claims against those funds or against the Challenged Order.

20. The Court need look no further than the *SunEdison* case out of the U.S. Bankruptcy Court for the Southern District of New York for an analysis of when a creditor has standing post-confirmation to challenge employment or fee orders.[31] In recognizing the three required components of standing, the court in *SunEdison* concluded that a creditor lacked standing post-confirmation to pursue a Federal Rule 60 motion seeking vacatur of orders approving the retention of and payment of fees and expenses to McKinsey Recovery & Transformation Services U.S., LLC ("McKinsey"), one of the debtors' restructuring advisors, on the basis that McKinsey failed to disclose disqualifying connections under Bankruptcy Rule 2014. The court analyzed the confirmed plan and confirmation order, noting that, under the plan, unsecured creditors did not receive a distribution directly from the debtors but instead received pro rata interests in a GUC/litigation trust, which held assets transferred by the debtors, including the estates' causes of action against McKinsey.

21. The court also considered two settlements reached among the parties involved in the *SunEdison* bankruptcy case. First, the court noted a settlement between McKinsey and the United States Trustee regarding McKinsey's alleged non-disclosures, which resulted in payment by McKinsey to the reorganized debtor, which would be "distributed in accordance with the terms of the confirmed plan[ ] or further order in accordance with applicable law," and a release by the

[31] *See In re SunEdison, Inc.*, Case No. 16-10992 (SMB), 2019 WL 2572250 (Bankr. S.D.N.Y. June 21, 2019).

U.S. Trustee of McKinsey from further liability based on the failure to make complete disclosure or fully comply with Bankruptcy Rule 2014.[32] Second, the court described a settlement between McKinsey and the GUC/litigation trust, pursuant to which McKinsey agreed to make a payment to the GUC/litigation trust in exchange for the trust releasing its causes of action against McKinsey.

22. In analyzing the moving creditor's standing in light of the confirmed plan and the settlements, the court concluded that the creditor was "not a party in interest and lacks prudential standing to assert derivative claims arising from injuries to the debtor or its estate, including claims based on fraud on the court."[33] The court specifically found that, to the extent that there was a pre-petition payment by the debtors to McKinsey of fraudulent bills or a post-petition nondisclosure by McKinsey, such actions harmed the debtors and the estates, not the individual creditor. The creditor, therefore, could not "identif[y] a particularized injury that it suffered distinct from the injuries, if any, that all unsecured creditors suffered and [therefore,] it lack[ed] standing to assert a fraud on the court claim based on a secondary effect of an injury to the Debtors (pre-petition) or their estates (post-petition)."[34]

23. Lastly, the court noted that, even if the creditor could establish an injury, it could not establish redressability, as the creditor "cannot recover anything more [from McKinsey], even indirectly, through its interest in the [t]rust."[35] The court rejected the creditor's argument that the court could award sanctions against McKinsey and order that such sanctions be distributed broadly to all unsecured creditors on numerous grounds, including: (1) unsecured creditors were out of the money, with the second lien lenders being the fulcrum class and thus the injured parties; (2) the

[32] *Id.* at *4.

[33] *Id.* at *6.

[34] *Id.*

[35] *Id.*

potential for sanctions was only a "speculative possibilit[y]," which "is precisely the type of standing argument rejected by the Supreme Court;" (3) the "speculative distribution scheme" ignored the confirmation order and plan, which "distributed certain assets to the [GUC/litigation trust] and the second lien lenders and the balance of the estate's rights vested in the Reorganized Debtors;" and (4) the court's "inherent authority to remedy a fraud on the [c]ourt . . . does not mean that any creditor or every creditor has the right to litigate the same claim of fraud on the court even though it has not suffered a particularized injury."[36]

24. The U.S. Bankruptcy Court for the Eastern District of Virginia considered an identical challenge by the same creditor (Mar-Bow) to McKinsey's retention and fees in the chapter 11 cases of Alpha Natural Resources, Inc. and its affiliates debtors.[37] There, the court reached the same determination as the *SunEdison* court: that the creditor lacked standing to be heard on its Federal Rule 60 motion in light of the confirmed plan that fixed recoveries for the class to which the creditor belonged and "[i]n no event" entitled the creditor to receive "any excess cash that [could] ever enter[ ] the bankruptcy estates in the future.[38] The court's ruling followed a prior ruling by the district court in *Mar-Bow Value Partners, LLC v. McKinsey Recovery & Transformation Services US, LLC*, 578 B.R. 325, 354 (E.D. Va. 2017), *aff'd sub nom. In re Alpha Nat. Res., Inc.*, 736 Fed. Appx. 412 (4th Cir. 2018) ("Mar-Bow 1") that the creditor lacked standing to appeal on the basis of a failure to disclose under Bankruptcy Rule 2014 because the creditor "lost any pecuniary interest in the outcome of the Rule 2014 Appeal on July 12, 2016, when the

[36] *Id.* at *8.

[37] *See In re Old ANR, LLC*, No. 19-00302-KRH, 2019 WL 2179717, at *1 (Bankr. E.D. Va. May 17, 2019).

[38] *Id.* at *2.

Reorganized Plan was confirmed . . . [and] the expected recovery for Mar-Bow's class of claim became fixed."[39]

25. The U.S. Bankruptcy Court for the District of Delaware also determined the identical issue raised by Mar-Bow against McKinsey in the chapter 11 cases of the Standard Registry Company and its affiliates.[40] This court similarly found that the creditor lacked a "legal protected interest" in this matter because the creditor "as a general unsecured creditor, ha[d] no interest in potential proceeds from sanctions and disgorgement."[41]

26. Pursuant to *SunEdison*, *Old ANR*, and *SRC Liquidation*, all of which considered a creditor's standing post-confirmation to challenge retention or fee orders, this Court must analyze any "injuries" alleged by a party in connection with JW's fees or retention in light of the confirmed Plan and Confirmation Order and, before the Court may proceed on the merits, it must determine whether such party can establish all three forms of standing: constitutional, prudential, and party-in-interest.

RESERVATION OF RIGHTS

27. JW reserves its rights to contest any basis for indispensable party status or standing asserted by a party in this case in connection with the Court's Order Requiring Notice.

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[39] *Mar-Bow I*, 5578 B.R. at 355.

[40] *See In re SRC Liquidation LLC*, No. 15-10541 (BLS), 2019 WL 4386373, at *1 (Bankr. D. Del. Sept. 12, 2019).

[41] *Id.* at *4 ("Mar-Bow's alleged interest in the potential sanction proceeds is too hypothetical to satisfy the *Lujan* standing test. To receive anything, Mar-Bow would need to succeed in proving RTS committed fraud on the Court, that sanctions and disgorgement are the appropriate remedy, and then convince this Court to take the extraordinary step of disregarding the confirmed Plan and distributing those proceeds to unsecured creditors. Such an attenuated path to recovery on its claim does not establish an 'actual or imminent injury.'").

Dated: January 10, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2024, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

/s/ Jason L. Boland
Jason L. Boland