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

IN RE:	§	**CASE NO. 20-32564**
	§	
STAGE STORES, INC., *et al.*,[1]	§	**CHAPTER 11**
	§	
REORGANIZED DEBTORS.	§	**Jointly Administered**
	§	

UNITED STATES TRUSTEE'S REPLY TO JACKSON WALKER LLP'S RESPONSE IN OPPOSITION TO AMENDED AND SUPPLEMENTAL MOTION FOR (1) RELIEF FROM JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 60(B)(6) AND FEDERAL RULE OF BANKRUPTCY PROCEDURE 9024 APPROVING THE RETENTION AND COMPENSATION APPLICATIONS OF JACKSON WALKER LLP, (2) SANCTIONS, AND (3) RELATED RELIEF

[Relates to ECF No. 1258]

[1] The Reorganized 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.

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TO THE HONORABLE CHRISTOPHER M. LOPEZ
UNITED STATES BANKRUPTCY JUDGE:

Kevin M. Epstein, the United States Trustee for Regions 6 and 7 ("U.S. Trustee"), files this reply to Jackson Walker LLP's ("Jackson Walker") *Response in Opposition to the United States Trustee's Amended and Supplemental Motion for (1) Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(6) and Federal Rule of Bankruptcy Procedure 9024 Approving the Retention and Compensation Applications of Jackson Walker LLP, (2) Sanctions, and (3) Related Relief*, ECF No. 1258 ("JW Opp.").[2]

I. PRELIMINARY STATEMENT

1. Jackson Walker made a conscious decision to hide the fact that its partner had a financial and romantic relationship with the presiding judge who approved her firm's retention and compensation applications and before whom her firm appeared both in cases where he presided and that he mediated. In so doing, the firm violated multiple duties under the Bankruptcy Code, the Bankruptcy Rules, and the Texas Disciplinary Rules of Conduct ("Disciplinary Rules"), and as officers of the court.

2. Even taking Jackson Walker's untested allegations as true, Jackson Walker's ostrich defense fails because its partner's knowledge is imputed to it. And even were that not the case,

[2] The *United States Trustee's Amended and Supplemental Motion for (1) Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(6) and Federal Rule of Bankruptcy Procedure 9024 Approving the Retention and Compensation Applications of Jackson Walker LLP, (2) Sanctions, and (3) Related Relief* filed in cases where Judge Jones presided shall be referred to herein as the "60(b) Mot." Additionally, those motions that were filed in cases where Judge Jones served as mediator will be referred to herein as "60(b) Mot. – Med." The 60(b) Mot. and 60(b) Mot. – Med. shall be referred to collectively as the "60(b) Motions" herein.

Jackson Walker also filed a *Preliminary Response of Jackson Walker LLP to Recent Filings by the Office of the United States Trustee*, which shall be referred to herein as the "Prelim. Resp."

Jackson Walker has admitted that by March 2021 it knew that its partner had a past romantic relationship with Judge Jones, and that by March 2022, it knew that relationship was ongoing.

3. Jackson Walker claims that it took "reasonable" steps to address the impropriety of its partner's romantic and financial entanglement with the Judge. But those alleged steps did not accomplish the most important thing Jackson Walker was required to do: disclose. Instead, those steps merely show that Jackson Walker knew it had an ethical problem yet made the conscious decision to keep its partner's relationship with the Judge a secret.

4. In its efforts to excuse these violations, Jackson Walker makes arguments that it had no obligation to disclose and, even if it did, it should not be punished for violating its disclosure obligations. But it is well established in the Fifth Circuit, and nationwide, that bankruptcy professionals have an obligation to disclose any potential conflict of interest. *See* 60(b) Mot., Part IV.B; 60(b) Mot. – Med., Arg. Part I.A–B; *infra* Part II.B–C. As the Seventh Circuit held just last year, "[t]he Bankruptcy Code's disclosure requirements are 'central to the integrity of the bankruptcy process.'" *Dordevic v. Layng (In re Dordevic),* 62 F.4th 340, 342–43 (7th Cir. 2023). The default sanction for the violation of disclosure obligations is the denial of all fees, including disgorgement of fees already paid. *See* 60(b) Mot., Part IV.G; 60(b) Mot. – Med., Arg. Part II; *infra* Part II.F.

5. The Court should reject Jackson Walker's dismissive "no harm, no foul" approach to its misconduct. The harm, in these cases and to the reputation of this Court and the integrity of the bankruptcy system more broadly, is immeasurable. But harm is not a prerequisite to sanctioning attorney misconduct.

6. Rather, full disclosure is the prerequisite to be retained or paid by the estate. Even if Jackson Walker could somehow prove that no proceedings were influenced by the undisclosed

relationship, and Jackson Walker provided reasonable and necessary services that benefitted the estate, none of that is relevant to whether Jackson Walker acted wrongfully. Nor would it show that the denial of fees—the remedy for nondisclosure routinely upheld by United States Courts of Appeals—should not be applied with equal force here. A contrary holding would undercut the very underpinnings that mandate ethical disclosures in the first place.

7. Jackson Walker lays blame for its current circumstances at the feet of everyone but Jackson Walker. The U.S. Trustee's Rule 60(b) Motion does not "inequitably and improperly target[]" Jackson Walker. JW Opp. at ¶ 1. Nor does the "U.S. Trustee . . . concede[] that the inappropriate conduct at issue . . . was that of former Judge Jones." JW Opp. at ¶ 3.

8. To be sure, Judge Jones's conduct was highly improper. But Jackson Walker's argument that it is not liable for Judge Jones's misconduct is a strawman. It is Jackson Walker's misconduct in repeatedly failing to disclose the relationship between its partner and Judge Jones that merits the denial of all fees and sanctions. Even after it admittedly knew that its partner had a past romantic relationship with the Judge, and even after it admittedly knew that the relationship was ongoing, it thought carefully about what to do and concluded that its interests were best served by keeping quiet.

9. Jackson Walker also attempts to blame Ms. Freeman and Judge Jones because they proposed disclosures that Jackson Walker determined were "insufficient, inadequate, and misleading." JW Opp. at ¶ 57. Jackson Walker's determination, in the face of the inadequacy of these proposed disclosures, that the best course of action was to make no disclosure at all is indefensible. Jackson Walker knowingly allowed the world to believe what it recognized was a lie—that Judge Jones and Ms. Freeman's relationship was no different than the relationship the Judge had with other lawyers.

10. Jackson Walker asserts that, even if it engaged in sanctionable conduct, it cannot be held to account for its actions. It argues that the U.S. Trustee lacks standing to ask this Court to address Jackson Walker's wrongdoing and enter appropriate relief. Jackson Walker cites not a single decision involving a U.S. Trustee that holds this. And Jackson Walker's standing argument is atextual. The plain language of section 307 of title 11 empowers United States Trustees to "raise" "any issue," and section 586 specifically authorizes the U.S. Trustee to police professional retention and compensation.

11. In any event, this Court has an independent power and duty to address this type of wrongdoing, deny fees, and impose sanctions. *See infra* Part II.F.

12. Jackson Walker also alleges that it is insulated from liability by releases and exculpations in a plan that it drafted. However, those releases and exculpations are both inapplicable and unenforceable.

13. Jackson Walker cannot escape public scrutiny of, and accountability for, its misconduct that has undermined public and stakeholder confidence in the integrity of the bankruptcy system generally and this Court specifically. Instead, the court should vacate the retention and employment orders in these cases and require disgorgement of all fees Jackson Walker received. Although Jackson Walker states that denying the U.S. Trustee's 60(b) Motion would not condone Jackson Walker's conduct, it would do exactly that and send the message that professionals can violate their ethical, disclosure, and fiduciary duties without consequence and keep their ill-gotten gains. The opposite has been the law across circuits and across decades.

II. LAW AND ARGUMENT

A. Judge Jones's Relationship with a Jackson Walker Partner Disqualified Both Judge Jones and Jackson Walker.

1. Judge Jones's Relationship with Ms. Freeman Created at Least an Appearance of Partiality Requiring Recusal Under Section 455.

14. In its 60(b) Motion, the U.S. Trustee established that Judge Jones should have been disqualified under 28 U.S.C. § 455(a)–(b). *See* 60(b) Mot., Part IV.A.1–2; 60(b) Mot. –Med., Part I.A.1.

15. Jackson Walker does not contest that Judge Jones's relationship with Ms. Freeman created an appearance of impropriety under section 455(a). Indeed, Jackson Walker, by its counsel, Ms. Brevorka, has made this admission in a separate pending civil proceeding:

> THE COURT: But, counsel, this all goes back to the very beginning in that Judge Jones shouldn't have been presiding over these matters. Period.
> MS. BREVORKA: Correct.
> THE COURT: So it creates the appearance of impropriety at a minimum.
> MS. BREVORKA: Correct.

Exhibit 1, *Van Deelen v. Jones*, No. 4:23-CV-3729, Hr'g Tr. at 80:4–10 (S.D. Tex. June 6, 2024). Rather, Jackson Walker contends that the U.S. Trustee lacks "specific facts" to evaluate Judge Jones' decision to not recuse and that the U.S. Trustee would have to explain the nature of the relationship at "*each* relevant time in *each* challenged case." JW Opp. at ¶ 149, n.178. Jackson Walker fails to explain what additional facts are needed. For every case at issue, Judge Jones had at least a past romantic relationship with Ms. Freeman, he co-owned a house with her where they lived together, and she was the executor of, and beneficiary under, his will. Judge Jones's partiality, at the least, "might reasonably be questioned" based on these admitted facts that existed throughout Ms. Freeman's tenure at Jackson Walker. And that is sufficient to mandate recusal. 28 U.S.C. § 455(a) (dictating that a judge "*shall* disqualify himself in any proceeding in which his impartiality

might reasonably be questioned") (emphasis added). To the extent more detail is needed, discovery is likely to more fully establish the contours of the relationship between Ms. Freeman and Judge Jones and show that section 455(a) disqualified Judge Jones from presiding at all relevant times.

16. Jackson Walker also argues that section 455(b)(5) does not apply to Judge Jones because Ms. Freeman was not married to him. *See* JW Opp. at ¶¶ 163–65. But as established in the U.S. Trustee's 60(b) Motion and recognized by the Chief Judge of the Fifth Circuit in her complaint against Judge Jones, "[r]ecusal considerations applicable to a judge's spouse should also be considered with respect to a person other than a spouse with whom the judge maintains both a household and an intimate relationship." Ethics Complaint at 3-4 (quoting Commentary to Canon 3C of the Code of Conduct for United States Judges).

17. Jackson Walker ignores the Fifth Circuit's Ethics Complaint and argues that the Commentary to the Code of Judicial Ethics should likewise be ignored. But, as demonstrated by the Ethics Complaint's reliance on it, while the commentary may not be binding on this Court, it is instructive. Section 455 was enacted with the purpose of "reconcil[ing] the 1972 Code of Judicial Conduct with the federal statutes. Its purpose was to eliminate 'dual standards, statutory and ethical, couched in uncertain language (that) had the effect of forcing a judge to decide either the legal or the ethical issue at his peril.'" *See SCA Servs., Inc. v. Morgan*, 557 F.2d 110, 113 (7th Cir. 1977) (quoting H.R. Rep. No. 93-1453, 93d Cong., 1st Sess. 2 (1973). When considering whether Judge Jones was disqualified, this Court can "properly consider as an aid to the exercise of his informed discretion any and all codes of judicial conduct, including Canon 3 of the American Bar and any advisory directives of the Judicial Conference of the United States." *Va. Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co. (In re Va. Elec. & Power Co.)*, 539 F.2d 357, 369 (4th Cir. 1976).

18. Ms. Freeman has been in a relationship with Judge Jones that is akin to a spousal relationship, which is closer and more intimate than relationships that are defined as a relationship within the third degree (such as great-grandparents, nephews, and nieces), which also require recusal. Ms. Freeman and Judge Jones were in a romantic relationship, they shared a home, and Ms. Freeman was the executor of Judge Jones' will, as well as a beneficiary. *See* Exhibit 2, Elizabeth Freeman's Responses to United States Trustee's First Set of Interrogatories*, In re IEH Auto Parts Holding, Inc.*, No. 23-90054, Resp. 3. While they were not legally married, the nature of their relationship brings them within the ambit of section 455(b), mandating recusal.

2. Judge Jones Did Not Have the Authority to Approve Jackson Walker's Employment and Compensation Requests under Rules 5002 and 5004.

19. Rules 5002 and 5004 were promulgated to promote fairness in our judicial system. As established in the U.S. Trustee's 60(b) Motion, Rules 5002 and 5004 preclude Judge Jones from approving Jackson Walker's employment and compensation. *See* 60(b) Mot., Part IV.A.3-4.

20. Jackson Walker contends that Rule 5002(a) should not apply because Ms. Freeman is not a "relative" of Judge Jones. *See* JW Opp. at ¶¶ 167-169. But as established in the U.S. Trustee's 60(b) Motion, and as discussed above, because Ms. Freeman was equivalent to Judge Jone's spouse, she likewise is a relative by affinity. *See* 60(b) Mot., Part. IV. A.3; 60(b) Mot. – Med., Arg. Part I.B.1.

21. Any reading of Bankruptcy Rule 5002 that did not include cohabitating romantic partners because they lack a marriage certificate should be rejected as "demonstrably at odds with the intention of its drafters." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242, (1989) (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). To fail to include such relationships would allow for a large swath of modern romantic relationships to go undisclosed under Rule 5002(a)(2), which cuts against the principles of promoting the integrity of the judiciary

contemplated by the Bankruptcy Code and Rules. *See generally* Exhibit 3, Benjamin Gurentz, *Cohabiting Partners Older, More Racially Diverse, More Educated, Higher Earners*, Census.gov (Sept. 23, 2019), https://www.census.gov/library/stories/2019/09/unmarried-partners-more-diverse-than-20-years-ago.html ("The number of unmarried partners living together in the United States nearly tripled in two decades from 6 million to 17 million").

22. Even if Ms. Freeman were not considered a relative, Jackson Walker, through Ms. Freeman, was so connected to Judge Jones "as to render it improper" for Judge Jones to have approved Jackson Walker's retention and compensation applications. *See* Fed R. Bankr. P. 5002(b). *See Judges' Social or Close Personal Relationships with Lawyers or Parties as Grounds for Disqualification or Disclosure*, ABA Comm. on Ethics & Pro. Resp., Formal Op. 488 (Sept. 5, 2019) (including, among relationships that should be disclosed, a judge and lawyer who are "divorced but remain amicable").

23. Jackson Walker tries to distinguish Ms. Freeman's connection to Judge Jones as separate from its own. *See* JW Opp. at ¶ 170. That is, Jackson Walker attempts to cleave the conduct of its individual partners from the conduct of "the firm." Taken to its logical conclusion, this argument would mean that the firm could be retained in a case even if all its individual partners were "so connected [to the judge] as to render it improper." Fed. R. Bankr. P. 5002(b), 5004(b). That conclusion not only is nonsensical, it also contradicts established law and practice. As shown in the U.S. Trustee's 60(b) Motion, a partner's conflict of interest should be imputed to Jackson Walker.[3] *See* 60(b) Mot. ¶ 111-13; 60(b) Mot. – Med. ¶125-26; *see also* Disciplinary Rule 1.06(f).

[3] Jackson Walker's reliance on *Cygnus* is misplaced as that case did not interpret Bankruptcy Rules 5002 or 5004. Nor did *Cygnus* address facts like those here, where the firm's partner was in an intimate relationship with the judge without even an ethical wall between the partner and others in the firm working on the engagements.

Even Jackson Walker understood this because it acknowledged that its attorneys' connections are the firm's connections when it sought retention. *See, e.g.*, *In re Basic Energy Services, Inc.*, No. 21-90002, ECF No. 809, Jackson Walker Retention Appl. (disclosing that "to the best of the Debtors' knowledge, *these attorneys* have no interest adverse to the Debtors, or to the Debtors' bankruptcy estates, and *are disinterested*.") (emphasis added).

24. In any event, Jackson Walker ignores its own connection to Judge Jones by virtue of Ms. Freeman's relationship with him: Jackson Walker had a material financial interest in having a friendly judge in a relationship with its partner who might lend a less critical eye to its employment and compensation requests. This "render[ed] it improper" for Judge Jones to have approved Jackson Walker's retention and compensation applications. *See* Fed R. Bankr. P. 5002(b), 5004(b).

3. Jackson Walker's Partner's Relationship with Judge Jones Meant that Jackson Walker Was Not Disinterested.

25. As established in the U.S. Trustee's 60(b) Motion, Ms. Freeman's relationship with Judge Jones—whether the romantic relationship was over or still ongoing—rendered Jackson Walker not disinterested. 60(b) Mot., Part IV.E; 60(b) Mot., Arg. Part I.B.1.

26. Jackson Walker erroneously argues that the U.S. Trustee's motion is built on a "reimagined framework" for the retention and compensation of professionals at odds with the Bankruptcy Code. JW Opp. at ¶ 100. Section 327 expressly prohibits the estate from retaining professionals unless they "do not hold or represent an interest adverse to the estate, and . . . are disinterested persons." 11 U.S.C. § 327. And section 328(c) provides that the court may deny compensation to a professional "if, at any time during such professional person's employment under section 327 or 1103 of this title, such professional person is not a disinterested person, or

represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed." *Id*. § 328(c).

27. Thus, estate-retained professionals must be free of adverse interests and must be disinterested to be eligible for retention and compensation, and the burden is on the applicant to establish each. 11 U.S.C. §§ 327, 328. *See, e.g., Waldron v. Adams & Reese, L.L.P. (In re Am. Int'l Refinery, Inc.)*, 676 F.3d 455, 461 (5th Cir. 2012); *I.G. Petroleum, L.L.C. v. Fenasci (In re West Delta Oil Co.)*, 432 F.3d 347, 355 (5th Cir. 2005); *Pierson & Gaylen v. Creel & Atwood (In re Consol. Bancshares, Inc.)*, 785 F.2d 1249, 1256 & n. 6 (5th Cir. 1986); *In re B.E.S. Concrete Prods., Inc.,* 93 B.R. 228, 237 (Bankr. E.D. Cal. 1988); *In re Huddleston*, 120 B.R. 399, 400–01 (Bankr. E.D. Tex. 1990).

28. The Fifth Circuit has "observed that these standards [for retention] are 'strict' and that attorneys engaged in the conduct of a bankruptcy case 'should be free of the slightest personal interest which might be reflected in their decisions concerning matters of the debtor's estate or which might impair the high degree of impartiality and detached judgment expected of them during the course of administration.'" *West Delta Oil*, 432 F.3d at 355 (quoting *Consol. Bancshares*, 785 F.2d 1249).

29. Jackson Walker had an obvious interest in having a favorable judge approve its fee applications, but Jackson Walker's interest in higher fees is contrary to the estate's interest in lower fees. While ordinarily the requirement that the bankruptcy court approve professionals' compensation serves to protect the estate from that inherent conflict, Jackson Walker's interest in having a favorable judge reviewing its fee applications made it adverse to the estate's interest. And disclosure was contrary to Jackson Walker's interests because it could not only lead to a less favorable judge, but could lead parties to challenge Jackson Walker's fees, as has happened. As

the Tenth Circuit explained in *Stewart*: "If, for example, [the attorney] had thought that disclosure would lead to substantial challenges to the payments (as indeed occurred), [the attorney] would have had a motive not to disclose." *SE Property Holdings, LLC v. Stewart (In re Stewart)*, 970 F.3d 1255, 1268 (10th Cir. 2020). Jackson Walker also had an interest in not disclosing the relationship because disclosure could jeopardize its ability to attract clients if it was precluded from appearing before half of the bankruptcy judges in the Southern District of Texas assigned to hear complex cases—particularly given that it was generally being hired as local, not lead, counsel. *See* Exhibit 1, *Van Deelen v. Jones*, No. 4:23-CV-372, Hr'g Tr. at 100:14, 101:24-25 (S.D. Tex. June 6, 2024) (explaining that Kirkland & Ellis worked with Jackson Walker as local counsel due to Jackson Walker's "longer and historic ties" as the "largest firm in Texas with a much longer history there [than Kirkland]"). These are actual conflicts of interest with the estate, not merely hypothetical, theoretical, or speculative conflicts as asserted by Jackson Walker.[4] JW Opp. at ¶¶ 113.

30. Jackson Walker posits that it had no adverse interest because, if it had disclosed the relationship, Judge Jones could have recused and Jackson Walker would then not be disqualified and would not have an adverse interest to it "***clients***." JW Opp. at ¶ 111 (emphasis in original). But the adverse interest inquiry focuses not on Jackson Walker's clients, but the *estate.* 11 U.S.C. § 327. More fundamentally, Jackson Walker's counterfactual ignores the elephant in the room: no one knew to seek Judge Jones's recusal or Jackson Walker's disqualification, or to challenge its fees, because Jackson Walker did not disclose the relationship.

[4] Jackson Walker's reliance on *In re Marvel Ent. Grp., Inc.*, 140 F.3d 463, 477 (3d Cir. 1998), is thus inapposite. JW Opp. ¶¶ 112–13.

B. Jackson Walker's Arguments that It Had No Obligation to Disclose the Relationship Despite Its Obvious Relevance to Jackson Walker's Retention and Compensation Applications Fail.

1. Jackson Walker Had a Duty to Disclose Its Partner's Romantic and Financial Relationship with the Presiding Judge Who Would, *Inter Alia*, Approve Its Compensation.

31. Even if Jackson Walker did not have an actual conflict of interest, it still had an obligation to disclose the relationship (whether it was past or ongoing) to enable the parties and the Court to judge this issue for themselves. "[T]he Code and associated Rules impose a rigorous structure of oversight on a debtor, its professionals, and the estate. At the heart of that structure is a baseline presumption – and an expectation – of disclosure and candor." *In re 38-36 Greenville Ave. LLC*, No. 21-2164, 2022 WL 1153123, at *5 (3d Cir. Apr. 19, 2022).

32. Jackson Walker does not dispute, as established in the U.S. Trustee's 60(b) Motion, that bankruptcy professionals' disclosure obligations are broader than section 327's prohibitions because it is for the court, not the professionals, to decide if a disqualifying conflict exists. *See* 60(b) Mot., Part IV.B; 60(b) Mot. – Med., Arg. Part II.B.1.

33. Rather, Jackson Walker narrowly focuses on Rule 2014. Because of Rule 2014's singular purpose —to ensure estate-paid professionals satisfy the retention standards of section 327 (or section 1103), it cannot limit or alter the statutory retention requirements. Bankruptcy Rule 2014 is merely one tool to "facilitate[] the implementation of § 327 and § 101(14) of the Bankruptcy Code." *In re Alpha Nat. Res., Inc.,* 556 B.R. 249, 258 (Bankr. E.D. Va. 2016). To use a Rule intended to force counsel to disclose potential conflicts of interest as justification for hiding them would turn the law on its head.

34. Indeed, as established in the U.S. Trustee's Motion, *see* 60(b) Mot., Part IVB; 60(b) Mot. – Med., Arg. Part II.B.4., Rule 2014 is not the limit, nor the only source, of the disclosure obligations of professionals who will seek to be paid at the estate's expense. A debtor's counsel's

duty to disclose "arises not solely by reason of the bankruptcy rules, but also is founded upon the fiduciary obligation owed by counsel for the debtor to the bankruptcy court." *Futuronics Corp. v. Arutt, Nachamie, & Benjamin (In re Futuronics Corp.)*, 655 F.2d 463, 470 (2d Cir. 1981) (quotation marks omitted); *see also In re EWC, Inc*., 138 B.R. 276, 279 (Bankr. W.D. Okla. 1992); *Rome v. Braunstein*, 19 F.3d 54, 62 (1st Cir. 1994). This obligation includes the duty "to disclose any actual or potential conflicts of interest with the estate." *Jensen v. U.S. Trustee (In re Smitty's Truck Stop, Inc.)*, 210 B.R. 844, 850 (B.A.P. 10th Cir. 1997); *accord In re Food Mgmt. Grp., LLC*, 380 B.R. 677, 711 (Bankr. S.D.N.Y. 2008).

35. Jackson Walker does not address this law other than to dismiss the notion that it has a fiduciary duty to the Court as *dicta*. JW Opp. at 44 n.99. That characterization is wrong. In *Futuronics*, for example, the Second Circuit found that counsel had violated Rule 215—the rule promulgated incident to the Code's enactment more than 45 years ago requiring the disclosure of connections—but *also* found that two law firms "flagrantly breached their fiduciary obligations to the bankruptcy court" based on their failure to disclose, when one firm sought interim compensation, that the requesting firm had transferred one-third of the advances already received to the other firm. *Futuronics Corp.*, 655 F.2d at 471. Moreover, even if Jackson Walker is dismissive of its obligations to the Court, it cannot deny that it owes a fiduciary duty to the estate and its creditors, *see* 60(b) Mot., Part IV.D, who are also entitled to fulsome disclosures by the professionals who will be paid ahead of them.

36. Jackson Walker further argues that, despite the "sweeping language" in these opinions, "no court has looked beyond the Bankruptcy Code's or Rule's text to impose additional obligations on professionals under the relevant provisions." JW Opp. at 44 n.99. But the court need not look beyond the Bankruptcy Code—the disclosure obligation is firmly grounded in the

disinterested requirements of sections 327(a) and 328(c), as well as the bankruptcy courts' authority to implement those provisions in section 105(a) and in attorneys' duties as officers of the court.

37. As explained by the First Circuit, "sections 327(a) and 328(c) cannot achieve their purpose unless court-appointed counsel police themselves in the first instance." *Rome*, 19 F.3d at 59. *See also Consol. Bancshares*, 785 F.2d at 1255 ("Vigilance is required by and among court-appointed counsel in particular to enforce the standards of the Code."). "[B]ecause the bankruptcy court does not possess the resources to independently investigate an applicant's conflicts of interest, full and candid disclosure is required to enable the court to determine whether the applicant meets the 'disinterested' standards of § 327(a)." *In re Benjamin's-Arnolds, Inc.*, No. 4-90-6127, 1997 WL 86463, at *9 (Bankr. D. Minn. Feb. 28, 1997).

38. To the extent Jackson Walker suggests that courts do not enforce disclosure obligations beyond the literal terms of Rule 2014, that is not true. In the *Leslie Fay* case, for example, the court found that counsel was obligated to disclose its policy of never suing accounting firms—which is not a "connection" listed in Rule 2014. *In re Leslie Fay Cos., Inc*., 175 B.R. 525, 535 (Bankr. S.D.N.Y. 1994).

39. Indeed, courts have never limited professionals' disclosure obligations to the literal terms of Rule 2014—and Jackson Walker cites no case holding that the disclosure obligation is so limited. The Rule, for example, does not expressly require continuing disclosure, but the obligation to update disclosures with new information is well established. As the Fifth Circuit explained, "[a]lthough [Rule 2014(a)] does not explicitly require ongoing disclosure, case law has uniformly held that under Rule 2014(a), (1) full disclosure is a continuing responsibility, and (2) an

attorney is under a duty to promptly notify the court if *any* potential for conflict arises." *West Delta Oil*, 432 F.3d at 355 (internal quotation marks omitted; emphasis added).

40. Jackson Walker's position, that it had no obligation to disclose Ms. Freeman's relationship with Judge Jones at any time, even when it admittedly knew about the relationship, JW Opp. at ¶ 108-109, is astonishing. Jackson Walker cites no case blessing such nondisclosure. It is directly contrary to the view of the Advisory Committee to the Bankruptcy Rules, which has expressly stated that "appropriate disclosure must be made to the bankruptcy court" of any connections to a judge "before accepting appointment or employment." Fed. R. Bankr. P. 5002, advisory comm. n. to 1985 Amendment (emphasis added). And it is directly contrary to Fifth Circuit's holdings and other precedent establishing bankruptcy professionals' duties to the court, including the duty to update the court if *any* potential conflict arises. *See, e.g., West Delta Oil*, 432 F.3d at 355.

2. Jackson Walker Does Not Dispute It Had an Obligation to Disclose the Relationship in Cases Where Judge Jones Was a Mediator.

41. Jackson Walker does not dispute that, as established in the U.S. Trustee's 60(b) Motion, it had an obligation to disclose Ms. Freeman's relationship to Judge Jones in cases that he mediated under Local Rule 16.4.I(2). 60(b) Mot. – Med., Arg. Part I.A.2. The Local Rule expressly requires potential mediator conflicts to be raised with the Court. S.D. Tex. L.R. 16.4.I(2). And as established in the U.S. Trustee's Motion, under 28 U.S.C. § 455, which also applies to mediators under the Local Rules, Judge Jones had at least a potential conflict because of his relationship with Ms. Freeman. 60(b) Mot. – Med., Arg. Part I.A.

42. Although Jackson Walker denies that it knew the relationship was ongoing before 2022, as explained in the U.S. Trustee's Motion, 60(b) Mot., Part IV.B, and below, *infra* Part II.C.1, Ms. Freeman's knowledge is imputed to it. And that denial is relevant to only three of the mediated

cases. In four of the seven mediated cases (*HONX*, *Altera*, *GWG*, and *IEH*), the mediations occurred after Jackson Walker concededly had knowledge of Ms. Freeman's ongoing relationship with Judge Jones, and in two of them (*HONX* and *GWG*), no final fee order has yet been entered.

C. Even Without Discovery, the Facts to Date Show that Jackson Walker Violated Its Disclosure Obligations—and After March 2021, Its Nondisclosure Was Concededly Knowing and Intentional.

1. Even Assuming Discovery Yields No New Facts, Jackson Walker Cannot Claim Lack of Knowledge Before February 2022 Because Ms. Freeman's Knowledge Is Imputed to It.

43. Jackson Walker's self-serving assertions that not a single Jackson Walker attorney other than Ms. Freeman knew of her past relationship with Judge Jones before March 2021 and her continuing relationship with him before March 2022 remains wholly untested and highly implausible. However, even if true, Jackson Walker still knew of the relationship because Ms. Freeman knew. Jackson Walker's position that Ms. Freeman's knowledge cannot be imputed to the firm from the moment she joined the firm is at odds with the governing Texas statutes and common law. *See* JW Opp. at ¶ 119-129.

a. Ms. Freeman's Knowledge Is Imputed to Jackson Walker Under Texas Agency Law.

44. As both an equity and income partner at Jackson Walker, Ms. Freeman's knowledge was imputed to the firm because she was an agent of the firm. "Under Texas law, an agent is someone authorized by a person or entity to transact business or manage some affair for that person or entity." *Elbar Inv., Inc. v. Okedokun* (*In re Okedokun*), 593 B.R. 469, 533 (Bankr. S.D. Tex. 2018) (quoting *Tex. Soil Recycling, Inc. v. Intercargo Ins. Co.*, 273 F.3d 644, 650 (5th Cir. 2001)). "It is a basic tenet of the law of agency that the knowledge of an agent, or for that matter a partner or joint venturer is imputed to the principal." *In re Anderson*, 330 B.R. 180, 187 (Bankr. S.D. Tex. 2005) (quoting *Thomas v. N.A. Chase Manhattan Bank*, 1 F.3d 320, 325 (5th Cir. 1993)); *see also*

Okedokun, 593 B.R. at 535 ("[A] principal is deemed to know facts that are known to its agent.") (quoting *Sec. Inv. Prot. Corp. v. Cheshier & Fuller, L.L.P. (In re Sunpoint Secs., Inc.)*, 377 B.R. 513, 562 (Bankr. E.D. Tex. 2007)).[5]

45. The Texas Revised Partnership Act ("Partnership Act") recognizes that agency law is also applicable to limited liability partnerships. *See* Tex. Bus. Orgs. Code § 152.003 ("The principles of law and equity and the other partnership provisions supplement this chapter unless otherwise provided by this chapter or the other partnership provisions."). And the statute incorporates agency law, stating that a partner is presumed to be an agent of the partnership. Tex. Bus. Orgs. Code § 152.301 ("Each partner is an agent of the partnership for the purpose of its business.").

46. Throughout her time at Jackson Walker, the firm presented Ms. Freeman as a partner, meaning she was, at the very least, an experienced, senior attorney with supervisory authority. *See* JW Opp. at ¶ 30-31 (describing Ms. Freeman as an attorney that "excel[ed] in the bankruptcy field and a "mentor" who commonly provided "guidance" to "younger and mid-level attorneys"). She appeared as a partner of the firm in public and before the Court, and she transacted business on behalf of the firm, as its authorized agent, including filing fee applications. *See, e.g., In re Exco Servs., Inc.*, No. 18-30167, ECF No. 41, Jackson Walker, Final Fee Appl. (Bankr. S.D. Tex. Aug. 27, 2019); s*ee also*, *e.g., In re Exco Res., Inc.*, No. 18-30155, ECF No. 1069, Jackson Walker Second Interim Fee Appl., Ex. B, (Bankr. S.D. Tex. Sept. 18, 2018) (listing Ms. Freeman as a partner under the "Summary of Timekeepers Included in This Fee Application" table). As a

[5] Like the "adverse interest" exception in the Partnership Act, "[i]f the agent is acting adversely to the corporation, the corporation may not be bound by the agent's activity or knowledge." *Okedokun*, 593 B.R. at 535. However, this exception does not apply here since Ms. Freeman's actions were in furtherance of Jackson Walker's interests, allowing them to be retained in cases and benefit financially from those representations.

result, it did not matter whether Ms. Freeman was an equity partner or an income partner; she was an agent of the firm, whose knowledge was imputed to the firm, in either case.

b. Ms. Freeman's Actual Knowledge, While She Was an Equity Partner, Is Imputed Under the Texas Revised Partnership Act.

47. The Partnership Act, which governs Jackson Walker's partnership, imputes a partner's knowledge to the partnership. "Receipt of notice by a general partner of a fact relating to the partnership is effective immediately as notice to the partnership unless fraud against the partnership is committed by or with the consent of the partner receiving the notice." Tex. Bus. Orgs. Code § 151.003(d). While there is an "adverse interest exception" to imputation, "'the agent must have totally abandoned his principal's interests and be acting entirely for his own or another's purposes'" for the exception to apply. *Okedokun*, 593 B.R. at 535 (quoting *Sunpoint Sec.*, 377 B.R. at 564), aff'd and remanded sub nom. *Elbar Invs., Inc. v. Prins (In re Okedokun)*, 968 F.3d 378 (5th Cir. 2020).

48. Here, Ms. Freeman, as an equity partner since January 1, 2021, JW Opp. at ¶32, had actual knowledge of her relationship with former Judge Jones, and her actions were not a "total abandonment" of Jackson Walker's interests. Ms. Freeman's alleged failure to disclose her relationship to anyone at Jackson Walker financially benefitted both her and Jackson Walker across dozens of cases and, in this one, allowed both to profit from the retention orders and fee orders awarding compensation.

49. Jackson Walker contends that imputation would "undermine the benefits of limited liability and much of the Texas Revised Partnership Act." *See* JW Opp. at ¶119 n.134. This wrongly interprets whose liability is limited under the principles of limited liability partnerships. A limited liability partnership limits the liabilities of *individual partners* from the actions of the partnership. *See* Tex. Bus. Orgs. Code § 152.801. It does not protect the *partnership* from the

actions of its partners when conducting partnership business. Just the opposite: the Partnership Act makes the partnership liable for its partner's acts in the ordinary conduct of the business. *See* Tex. Bus. Orgs. Code § 152.303(a)(1) ("A partnership is liable for loss or injury to a person, including a partner, or for a penalty caused by or incurred as a result of a wrongful act or omission or other actionable conduct of a partner acting . . . in the ordinary course of business of the partnership . . . .").

c. Jackson Walker Cites No Relevant Case Law Supporting Its Position that the Knowledge of Its Partner Should Not Be Imputed to the Firm.

50. Under Jackson Walker's interpretation, it is difficult to know when, if ever, a law firm would have actual knowledge of anything. A law firm can only know what its partners and agents know; it does not have its own independent mind. In determining whether knowledge should be imputed, the court should look to governing state law. See, e.g., Schmidt v. Nordlicht (In re Black Elk Energy Offshore Operations, LLC), 649 B.R. 249 (Bankr. S.D. Tex. 2023) (applying state law to hold that the knowledge of an agent should be imputed to defendants).

51. The one case that Jackson Walker relies on for not imputing knowledge does not even discuss it. *See* JW Opp. at ¶ 120. In *Cygnus Oil & Gas Corp.*, the court rejects per se firm-wide disqualification, but states that it is "proper and required" for a court to consider whether an individual attorney's disinterestedness "would impair [other firm member's] ability to act on behalf of the debtor and the estate in an impartial manner." No. 07-32417, 2007 WL 1580111, at *3 (Bankr. S.D. Tex. May 29, 2007). There was no discussion of imputing a partner's knowledge to the firm. In fact, the firm "fully disclosed McBride's interest in Cygnus in its affidavit supporting the application to employ," and the firm also disclosed that the partner was "walled off" from the "reorganization team." *Id.* Thus, *Cygnus Oil & Gas Corp.* has no bearing on whether imputation of knowledge is appropriate under these circumstances.

52. Jackson Walker argues that the cases the U.S. Trustee cited are inapposite because the knowledge in those cases was confidential information acquired during a previous client representation. *See* JW Opp. at ¶¶ 121-26. But this narrow reading of what knowledge can be imputed, ignores the governing law, as well as principles underlying why knowledge is imputed within a law firm. The "integrity of the legal practice" is protected by both maintaining information imputed to the firm (like client confidences) and properly disclosing information affecting firm business (like disqualifying conflicts of interest). *See Nat'l Med. Enter., Inc. v. Godbey*, 924 S.W.2d 123, 131-32 (Tex. 1996). As a result, imputation of knowledge deters firms from allowing its partners and attorneys from acting in a way that would undermine the fairness of the system, while also making the firm responsible for the actions of its agents.

53. Jackson Walker also attempts to distinguish the *Bradley* case by differentiating actions of attorneys in their "private life" from actions performed in the "course of their employment." *See* JW Opp. at ¶ 128. This is a meaningless distinction because Ms. Freeman's private relationship was relevant to her work.[6] It is not uncommon for attorneys to disclose personal or financial relationships, independent of their position in the firm, when it is relevant to the case at hand. *See, e.g.*, *In re Neiman Marcus Grp. Ltd. LLC*, No. 20-32519, ECF No. 748, Kirkland & Ellis LLP Retention Appl., Ex. A ¶¶ 61–72 (Bankr. S.D. Tex. June 3, 2020) (disclosures including: (i) statement regarding de minimis attorney investments in parties in interest, (ii) a list of attorneys who formerly clerked for Southern District of Texas judges or worked for other parties in interest; and (iii) disclosure of an attorney whose spouse worked for a major bondholder in the

[6] Notably, the Disciplinary Rules also recognize that a "personal" relationship is imputed to other attorneys at a firm, preventing others at the firm from acting where the individual attorney had a conflict of interest. *See* Disciplinary Rule 1.06(f) ("If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.").

case). *See also In re Matco Elecs. Grp., Inc.*, 383 B.R. 848, 856 (Bankr. N.D.N.Y. 2008) (disallowing committee counsel's fees where the firm only vaguely disclosed that a partner was "related to" an officer of a general unsecured creditor when the attorney was actually the son-in-law of the CEO of an active member of the committee and the husband of the general counsel). Indeed, Jackson Walker's conduct shows that it understood that these personal relationships matter for disclosure purposes. *See infra* Part II.C.2-3 (discussing Jackson Walker's awareness of the issue). Thus, just as in *Bradley*, the court may impose sanctions against Jackson Walker for Ms. Freeman's conduct in the course of her employment.

54. Lastly, Jackson Walker criticizes the lack of cases cited that involve imputation of knowledge in the context of disclosures. But that just indicates the rarity of this situation. The events leading to this litigation are unprecedented, and it is not surprising that few, if any, analogous situations exist. However, that does not give Jackson Walker a free pass. The Court should apply governing statutes and common law and impute Ms. Freeman's knowledge and misconduct to her law firm.

2. Jackson Walker's Admitted Facts Show that by March 2021 It Knew that Ms. Freeman Had at Least a Past Relationship with Judge Jones, but It Made a Considered Decision Not to Disclose It.

55. In March 2021, Jackson Walker admittedly learned two critical pieces of information: (i) Ms. Freeman had (at least) a past romantic relationship with Judge Jones; and (ii) this revelation "contradicted" Ms. Freeman's disclosures to the firm when she was hired. As an initial matter, despite contending that the March 2021 disclosure "contradicted the disclosures [Ms. Freeman] made to Jackson Walker when she joined the firm," JW Opp. at ¶¶ 35, 183, Jackson Walker has not indicated that it did anything to verify Ms. Freeman's new denials of an ongoing relationship with Judge Jones.

56. The steps it did take in response to the disclosure were woefully insufficient. Jackson Walker claims that after the March 2021 revelation it hired ethics counsel, JW Prelim Resp ¶ 14, but did not disclose the relationship when it sought retention in *Seadrill Limited*, or filed fee applications in two other cases, *J.C. Penney* and *Chesapeake Energy*, later that same month. *See* JW Opp., Ex. 2 at 15, 19, 35. Nor did it disclose the relationship in *Covia Holdings*, where it had a fee application pending. *Id*. at 21. And Jackson Walker continued to remain silent in five other cases where it filed retention or fee applications between March 2021 and March 2022. *See id*. at 31 (*Gulfport Energy*, June 2021 fee application); *id*. at 37 (*Katerra*, June 2021 retention application); *id*. at 33 (*Seadrill Partners*, July 2021 fee application) *id*. at 29 (*Bouchard Trans.,* Oct. 2021 fee application); *id*. at 39 (*Seadrill New Finance Ltd.*, Feb. 2022 retention application).

57. Jackson Walker also claims that it instructed Ms. Freeman not to work on matters assigned to Judge Jones and deducted from Ms. Freeman's "compensation any share of the firm's net income generated for bankruptcy work performed on behalf of clients in matters that were pending before former Judge Jones in light of this past relationship." JW Opp. at ¶ 37. Despite Jackson Walker's claimed prohibition on Ms. Freeman working on cases where Judge Jones presided, it appears that she did so. Jackson Walker attorneys billed for interactions with Ms. Freeman after March 2021, suggesting she was actively working on these cases. *See, e.g.*, *In re Mule Sky LLC*, No. 20-35561, ECF No. 10, Final Fee Appl., at 99 (Bankr. S.D. Tex. June 30, 2021) (in April 2021, Ms. Polnick billed for communications with Ms. Freeman on a motion to compel); *In re Katerra, Inc.*, No. 21-31861, ECF No. 1030, First Monthly Fee Statement, at 11, 25, 26 (Bankr. S.D. Tex. Sept. 14, 2021) (in June 2021, Ms. Wertz had multiple entries referencing interactions with Ms. Freeman). *See also* JW Opp. at ¶ 49 n.35 (claiming that Ms. Freeman did not bill any time in connection with only two of the 20 pre-March 2022, cases pending before

Judge Jones). And Jackson Walker notably makes no claim that it took any similar step regarding work on, or compensation from, cases mediated by Judge Jones.

58. Most importantly, these non-public actions did nothing to put other parties on notice of Jackson Walker's partner's romantic history with Judge Jones.

59. But the fact that Jackson Walker asserts it took these steps demonstrates Jackson Walker's awareness of the obvious: a past romantic relationship with a judge or mediator raises at least a potential conflict of interest. Jackson Walker's awareness of this potential conflict of interest is also demonstrated by its contention that Ms. Freeman's March 2021 admission "contradicted the disclosures [Ms. Freeman] made to Jackson Walker when she joined the firm" in response its Lateral Partner Questionnaire. JW Opp. at ¶¶ 35, 183. According to Jackson Walker's filing, its Lateral Partner Questionnaire does not ask specifically about personal relationships with judges, only whether the incoming partner has "any possible conflicts of interest." JW. Opp. at ¶ 26. If a past romantic relationship did not constitute a possible conflict of interest, there would be no contradiction. Despite its recognition that a past relationship between Ms. Freeman and Judge Jones created a potential conflict of interest, Jackson Walker made the knowing and intentional decision not to disclose it.

3. Jackson Walker's Admitted Facts Show that by February 2022 It Knew the Relationship Was Ongoing, but It Again Made a Considered Decision Not to Disclose It.

60. Accepting Jackson Walker's as-yet untested story as true, its conduct went from bad to worse in February 2022. Jackson Walker admits that, on February 1, 2022, the firm learned that Ms. Freeman had an ongoing, not just past, relationship with Judge Jones, was told that she was living with him, and was "given further information supporting the allegation." JW Opp. ¶ 46. Jackson Walker knew this created a disqualifying conflict. Jackson Walker itself has asserted that if Ms. Freman had "an ongoing intimate relationship with Judge Jones" it "would be

incompatible with [*Jackson Walker's*] continued participation in cases before Judge Jones." JW Opp. ¶ 38 (emphasis added).

61. Yet it took Jackson Walker *two months* to even approach Ms. Freeman about this revelation, which was confirmed as true on March 30, 2022.[7] During those two months, Jackson Walker applied to be retained as counsel in two more cases, *Seadrill New Finance* and in *4E Brands*—still with no disclosure. *See* JW Opp., Ex. 2, at 39–40 & Ex. 3, at 6–7.

62. Jackson Walker insists that it acted reasonably and appropriately. But Jackson Walker's conduct was hardly the "good faith" effort "to comply with its legal and ethical obligations" that Jackson Walker claims. JW Opp. at ¶ 77.

63. First, Jackson Walker claims it acted reasonably in "moving to exit Ms. Freeman from the firm." JW Opp. at ¶ 186. But Ms. Freeman remained at the firm for *ten months* after the February 1, 2022, disclosure. Notably, the eventual separation of Ms. Freeman in December 2022 is the *only* thing Jackson Walker did differently in March 2022 than it did in March 2021.

64. Jackson Walker also claims that it (again) forbade Ms. Freeman from working on cases where Judge Jones presided and excluded from Ms. Freeman's compensation revenues from cases where he presided. JW Opp. at ¶ 186. But that claim is belied by the record, which shows that Ms. Freeman did work on such cases, even though Jackson Walker was careful not to bill their client for her time. *See, e.g.*, *In re 4E Brands Northamerica LLC*, No. 22-50009, ECF No. 189, JW First Monthly Fee Statement, at 19 (Bankr. S.D. Tex. July 26, 2022) (in March 2022, Ms. Cameron billed time for drafting a memo summary to Ms. Freeman); *In re Sungard AS New Holdings*, No. 22-90018, ECF No. 570, JW First Interim Fee Appl., at 40 (Bankr. S.D. Tex. Aug.

[7] In this age of emails and cell phones, the lame excuse that there were vacations and spring breaks, JW Opp. at ¶ 47, is no explanation at all for such a delay.

17, 2022) (in May 2022, Ms. Argeroplos and Ms. Wertz billed for conversations with Ms. Freeman regarding U.S. Trustee reporting requirements); *In re LaForta – Gestão e Investimentos*, No. 22-90126, ECF No. 141, JW Third Monthly Fee Statement, at 8 (Bankr. S.D. Tex. Oct. 18, 2022) (in September 2022, Ms. Chaikin billed time for a call with Ms. Freeman regarding a hearing).

65. Jackson Walker again makes no claim that Ms. Freeman did not work on or receive income from cases mediated by Judge Jones. Ms. Freeman worked on and *attended* four[8] mediations with Judge Jones after Jackson Walker admittedly knew of the ongoing romantic relationship, yet it still did not disclose it in violation of Local Rule 16.4.I(2).[9] Jackson Walker remained silent even when the *GWG* mediation led to Ms. Freeman's lucrative appointment as Wind-Down Trustee.[10] *See In re GWG Holdings, Inc*., No. 22-90032, UST Obj. to Final Fee Appl., ECF No. 2415 at ¶¶ 54, 60 (Bankr. S.D. Tex. Mar. 29, 2024).

66. The "reasonable" steps Jackson Walker took are meaningless in the absence of disclosure and are an extraordinary departure from how professionals should act. Jackson Walker again made a considered decision, despite knowing that Ms. Freeman's relationship was ongoing, not to disclose the relationship in any of the 26 cases in which Judge Jones was then or later presiding as judge or acting as a mediator.

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[8] In *IEH*, Ms. Freeman's firm was separately retained. But that does not alter Jackson Walker's disclosure obligation under Local Rule 16.4.I(2).

[9] Jackson Walker claims, without citing any evidentiary support, that the mediation parties in *HONX* knew of the Jones-Freeman relationship before confirmation, JW Opp. at ¶ 60 n.40, but tellingly does not suggest that they knew about it before the mediation.

[10] In *GWG*, Ms. Freeman was a Jackson Walker partner when it applied to be retained, she worked as a contract attorney for Jackson Walker during the mediation, and Jackson Walker represented Ms. Freeman in her capacity as Wind-Down Trustee. *See In re GWG Holdings, Inc*., Case No. 22-90032, UST Obj. to Final Fee Appl., ECF No. 2415 at ¶¶ 41, 47, 50–54, 58, 59–60 (Bankr. S.D. Tex. Mar. 29, 2024).

67. What Jackson Walker's supposedly reasonable steps indisputably show is that Jackson Walker knew there was at least a potential conflict of interest. *See In re eToys, Inc.*, 331 B.R. 176, 191 (Bankr. D. Del. 2005) (rejecting assertion that law firm "solved" a conflict of interest by hiring other counsel). Indeed, Jackson Walker admits that it "knew the status quo was not appropriate." JW Opp. at ¶ 50. As the *eToys* court explained, while a firm may not need to disclose "every imaginable conflict," the disclosure requirements "certainly compel[] disclosure where, as here, the party had contemplated and discussed a specific situation involving a potentiality for conflict." *eToys, Inc.*, 331 B.R. at 191 (internal quotation marks omitted).

68. Ironically, while Jackson Walker extols its own actions for refusing to provide the disclosure Judge Jones and Ms. Freeman's counsel proposed because the statement that they had a "close personal relationship" was "insufficient" and "misleading," JW Opp. at ¶¶ 52, 56–57, it simultaneously insists that its own failure to disclose was perfectly acceptable. But Jackson Walker's newly revealed *ex parte* communication with Judge Jones shows that the firm fully appreciated that it was deceptive to leave parties with the impression that Judge Jones and Ms. Freeman had a purely platonic relationship, a problem that could only be solved by disclosure. Jackson Walker's current position that its years-long silence was appropriate cannot be reconciled with its assertion that it previously had "insist[ed] on a full and complete disclosure." *Id.* at ¶ 55.

69. Additionally, the fact that Judge Jones called a Jackson Walker partner into an *ex parte* conference where he "insinuated that he was unhappy with Jackson Walker's insistence on . . . Ms. Freeman's exit" from the firm, JW Opp. at ¶ 55, is a real-world example validating that Judge Jones's partiality to Ms. Freeman, and his interest in her professional and financial well-being, could influence his treatment not just of her, but of Jackson Walker.

D. Jackson Walker's Arguments that It Is Not Bound by the Disciplinary Rules Fail.

70. Jackson Walker makes several arguments as to why it is not bound by the Disciplinary Rules, but they are unavailing.

71. First, Jackson Walker argues that violations of the Disciplinary Rules do not support a cause of action between private litigants. *See* JW Opp. at ¶ 131. However, the U.S. Trustee is not asserting a "private cause of action." The U.S. Trustee seeks enforcement of the applicable law and sanctions for Jackson Walker's failure to comply with the Bankruptcy Code, Bankruptcy Rules, and Disciplinary Rules.[11] *See Off. of the U.S. Trustee v. Jones (In re Alvarado)*, 363 B.R. 484, 492 (Bankr. E.D. Va. 2007) (concluding that "Mr. Jones violated numerous of the Virginia Rules of Professional Conduct," as well as violating certain Bankruptcy Code provisions and ordering sanctions). *Cf. In re Wheatfield Bus. Park LLC*, 286 B.R. 412, 417 (Bankr. C.D. Cal. 2002) ("The employment of counsel in a bankruptcy case is governed by § 327, Rule 2014, and the *applicable rules of professional conduct*.") (emphasis added). The U.S. Trustee is not asserting a claim or seeking any compensation.

72. Further, the Court has authority to discipline attorneys under the Disciplinary Rules because they have been incorporated by the Local Rules for the Southern District of Texas. *See* S.D. Tex. Loc. R., App. A, R. 1. The Local Rules for the Southern District of Texas provide that attorneys practicing before the court must follow the "minimum standard of practice," which

[11] Even if the Court finds that violations of the Disciplinary Rules do not by themselves support vacatur or sanctions, those rules are still instructive as to whether Jackson Walker violated its obligations under the Bankruptcy Code and Bankruptcy Rules warranting vacatur and sanctions. *See In re Palumbo Fam. Ltd. P'ship*, 182 B.R. 447, 468 (Bankr. E.D. Va. 1995) ("Likewise, we believe it is appropriate to use the Code of Professional Responsibility as a guide for determining whether an attorney is not 'disinterested,' and thus not entitled to compensation under 11 U.S.C. § 328(c). Hence, a violation of Disciplinary Rule 5–106 is indicative, not dispositive, on the disinterestedness issue.").

requires compliance with the Disciplinary Rules. S.D. Tex. Loc. R., App. A, R. 1(A). The Local Rules also state that violation of the Disciplinary Rules "will be grounds for disciplinary action." S.D. Tex. Loc. R., App. A, R. 1(B). And each federal court "has the power to control admission to its bar and to discipline attorneys who appear before it." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991).

73. Second, Jackson Walker contends that even if it the Disciplinary Rules applied, it cannot be applied to the firm, but only to individual attorneys. *See* JW Opp. at ¶ 132. This argument also fails because the Court's ability to discipline attorneys is not confined to only individuals. The Local Rules provide the Court with broader disciplinary powers, stating "[v]iolation of the Texas Disciplinary Rules of Conduct will be grounds for disciplinary action, but the court is *not limited by that code*." S.D. Tex. Loc. R., App. A, R. 1(B) (emphasis added). Thus, there is no limitation under the Local Rules exempting law firms from compliance with the Disciplinary Rules. Notably, other courts have bound law firms to the requirements of the applicable ethical rules. *See, e.g.*, *In re 38-36 Greenville Ave. LLC*, No. 21-2164, 2022 WL 1153123, at *4 (3d Cir. Apr. 19, 2022) (affirming disgorgement order against law firm based on its "repeated violations of the Bankruptcy Rules and the Code, along with counsel's lack of candor"); *ESC-Toy Ltd. v. Sony Interactive Ent. LLC*, No. 21-CV-00778-EMC, 2024 WL 1335079, at *11 (N.D. Cal. Mar. 27, 2024) (holding that "[the law firm] breached the duty of the candor owed to the court, and this provides another basis for disqualification of the firm"); *In re Universal Bldg. Prod.*, 486 B.R. 650, 660–61 (Bankr. D. Del. 2010) (concluding that "[Arent Fox LLP] and [Elliott Greenleaf & Siedzikowski, P.C.] did violate Rule 7.3 and Rule 8.4 of the Model Rules of Professional Conduct and of Delaware's Rules of Professional Responsibility. The Court finds this conduct sufficient reason to disqualify AF and EG from serving as counsel to the Committee in

this case."); *In re Meridian Auto. Sys.-Composite Operations, Inc.*, 340 B.R. 740, 750–51 (Bankr. D. Del. 2006) ("Milbank's violation of Model Rule 1.9 and dogged refusal to acknowledge the same warrant disqualification from further representation of the [informal committee of holders of only first lien debt] in these cases"). *See also* Tex. Comm. On Professional Ethics, Op. 522 (1997) (finding that a law firm had to take reasonable remedial actions when it found that its partner violated certain ethical rules).

74. Third, Jackson Walker repeatedly states that it does not have the requisite knowledge to violate the Disciplinary Rules. *See* JW Opp. at ¶¶ 133, 135, 144, 146. But the opinions Jackson Walker relies on are inapposite, as they address whether attorneys have the necessary knowledge to report on misconduct of another attorney to a disciplinary authority. *See* JW Opp. at ¶¶ 133, n.157 & 159. The necessary inquiry here is whether Jackson Walker and its attorneys had the requisite knowledge when they violated the Disciplinary Rules. As discussed above, they did. *See infra* Part II.C.

75. Additionally, if Ms. Freeman was prohibited from engaging in any conduct, then Jackson Walker would have also been prohibited under the same Rules, notwithstanding what knowledge it had. *See* Disciplinary Rule 1.06(f) ("If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct."). In other words, when Ms. Freeman violated her ethical duties by failing to disclose the relationship, Jackson Walker and its attorneys also violated their ethical duties because they were prohibited from the same actions. *Cf.* Tex. Comm. On Professional Ethics, Op. 666 (2016) ("The Committee appreciates that the firm-wide imputation of spousal conflicts may in some cases lead to harsh results but those results are dictated by the current provisions of Rule 1.06(f).").

76. Fourth, Jackson Walker repeatedly contends that the firm acted reasonably so it could not have violated the Disciplinary Rules. *See* JW Opp. at ¶¶ 136, 139, 144, 146. As addressed previously, Jackson Walker's actions were neither reasonable nor adequate.[12] *See supra* Part II.C.2–3.

77. Lastly, Jackson Walker argues that its failure to disclose the relationship to the Court does not fall within the requirements of its duty of candor, ignoring the Local Rules. First, the Local Rules provide that all lawyers owe the court "candor." S.D. Tex. Local Rules, Appx. D, Guideline B. Jackson Walker's failure to disclose its partner's relationship with Judge Jones violated this duty. *See, e.g., In re Bradley*, 495 B.R. 747, 783 (Bankr. S.D. Tex. 2013) (holding failure to disclose violated this Guideline).

78. Second, Disciplinary Rule 3.03(a)(1) prohibits knowingly making a false statement to the court. Jackson Walker incorrectly asserts that "[t]he U.S. Trustee does not claim that JW made a false statement to the Court, nor could he." JW Opp. ¶ 135. Jackson Walker made a false statement every time it represented that it was disinterested and eligible to be retained as counsel. *See* 60(b) Mot., Part IV.C.1; 60(b) Mot. – Med., Arg. Part I.C.1. And the duty of candor does not end at the moment of filing; it continues "until remedial legal measures are no longer reasonably possible." Disciplinary Rule 3.03(c).

79. Jackson Walker thus cannot limit its duty of candor to Disciplinary Rule 3.03(a)(3), which prohibits attorneys from "fail[ing] to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act." *Compare, e.g., In re Brown*, 511 B.R.

[12] Jackson Walker cannot blame the pandemic for its failure to conduct a diligent inquiry upon learning of "allegations" that Ms. Freeman had a relationship with Judge Jones. JW Opp. at ¶ 139. If Jackson Walker was able to continue representing its clients through the pandemic, it could surely conduct an internal investigation during that period.

843, 852 (Bankr. S.D. Tex. 2014) (sanctioning non-disclosure as violation of duty of candor because it amounted to false statement). But Jackson Walker violated this rule, too. Both Ms. Freeman and Jackson Walker's failure to disclose qualify as fraudulent acts upon the Court. *See infra* II.G.2.c.

E. The Court Should Vacate Its Prior Orders Approving Jackson Walker's Retention and Fee Applications.

80. The U.S. Trustee established in his Motion that the orders approving Jackson Walker's retention and fee applications should be vacated under Rule 60(b)(6). *See* 60(b) Mot., Part IV.F; 60(b) Mot. – Med., Arg. Part II.A As explained in the U.S. Trustee's Motion, Rule 60(b)(6) is "a residual clause used to cover unforeseen contingencies; that is, it is a means for accomplishing justice in exceptional circumstances." *Steverson v. GlobalSantaFe Corp*., 508 F.3d 300, 303 (5th Cir. 2007) (quoting *Stipelcovich v. Sand Dollar Marine, Inc.,* 805 F. 2d 599, 604–05 (5th Cir. 1986)). Jackson Walker's repeated failure to act in compliance with applicable statutes and rules throughout Ms. Freeman's employment rises to "extraordinary circumstances," justifying relief under Rule 60(b)(6).

81. Jackson Walker cites *Seven Elves, Inc. v. Eskenazi*, which sets forth eight factors[13] that should inform a court's analysis when determining whether "extraordinary circumstances" exist to support relief under Rule 60(b). *See* JW Opp. at ¶ 32, n.61 (citing 635 F.2d 396, 402 (5th Cir. 1981)). Those factors are: "(1) [t]hat final judgments should not lightly be disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether the motion was made within a reasonable time; (5) whether if the judgment was a default or a dismissal in which there was no consideration of the merits the interest in deciding cases on the merits outweighs, in the particular

[13] Jackson Walker only lists seven factors in its opposition.

case, the interest in the finality of judgments, and there is merit in the movant's claim or defense; (6) whether if the judgment was rendered after a trial on the merits the movant had a fair opportunity to present his claim or defense; (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack." 635 F.2d at 402

82. Jackson Walker, however, fails to note that all applicable factors listed by the Fifth Circuit support vacatur here. *See id.* With respect to the first two factors, the U.S. Trustee does not approach this vacatur lightly nor seek it as a substitute for an appeal. Rather, vacatur is necessary due to the extraordinary nature of Jackson Walker's conduct in 33 cases, and an appeal would not have been possible due to the undisclosed nature of the connection. *Id.* The third factor favors the U.S. Trustee because "substantial justice" would be served by vacating orders that were entered notwithstanding the undisclosed conflict. *Id.* The fourth factor supports the U.S. Trustee because he filed the 60(b) Motions within a "reasonable time" after the news of the undisclosed relationship became public. *Id.* The fifth factor does not apply since there is no dismissal or default judgment here. *Id.* The sixth and seventh factors also favor the U.S. Trustee because the parties were not provided a "fair opportunity" to object to Jackson Walker's retention or compensation based on Ms. Freeman's relationship with Judge Jones nor seek the Judge's recusal, and the "intervening equities" (*i.e.*, the news of the secret relationship in October 2023) make it "inequitable" to allow the retention and compensation orders to stand. *Id.* Finally, the eighth factor (the catch-all) also favors the U.S. Trustee because the erosion of public confidence in the judicial system weighs in favor of vacatur. *Id.*

83. In addition, courts have not hesitated to grant Rule 60(b)(6) relief to address conflicts of interest and disclosure failures by bankruptcy professionals. 60(b) Mot. – Med. at

¶ 175. *See, e.g.*, *In re eToys, Inc.*, 331 B.R. 176, 188 (Bankr. D. Del. 2005) (granting Rule 60(b)(6) relief because professionals did not disclose conflicts of interest that would have barred their retention"); *In re Southmark Corp*., 181 B.R. 291, 295–98 (Bankr. N.D. Tex. 1995) (granting relief under Rule 60(b)(6) from final fee order that had been entered nearly three years earlier); *In re Benjamin's-Arnolds, Inc.*, No. 90-6127, 1997 WL 86463, at *10 (Bankr. D. Minn. Feb. 28, 1997) (holding that "the failure of an attorney employed by the estate to disclose a disqualifying conflict of interest, whether intentional or not, constitutes sufficient 'extraordinary circumstances' to justify relief under Rule 60(b)(6)"). To deny Rule 60(b)(6) relief would only "reward conflicted attorneys for failing to disclose their conflicts beyond the one-year period." *Benjamin's-Arnolds*, 1997 WL 86463, at *10.

84. Jackson Walker's response, that a secret romantic and financial relationship between a firm partner and the presiding judge who entered the retention and compensation orders is not a sufficiently extraordinary circumstance under Rule 60(b)(6), is mistaken. If an undisclosed financial and intimate relationship between the presiding judge and an estate-retained professional firm's partner is not an exceptional circumstance justifying relief from judgment under Rule 60(b)(6), it is hard to conceive any circumstance that would.

85. Indeed, the Fifth Circuit believed the situation sufficiently exceptional to lodge a public ethics complaint against Judge Jones. This occurred almost immediately after Business Insider broke the story that Jackson Walker had known was true for years. As a result, Judge Jones stepped down from the complex case panel, and resigned soon after. *See* General Order 2023-10, Order Designating Complex Case Panel (Oct. 13, 2023). That is undoubtedly exceptional and unforeseen.

86. Jackson Walker's reliance on its alleged pre-2022 ignorance and its supposedly reasonable steps—which included the deliberate decision not to disclose the secret relationship—is off point. Jackson Walker's excuses do not change the fundamental fact that parties did not have the information necessary to object to Jackson Walker's retention or compensation applications or to seek recusal of Judge Jones. And it is the revelation of the previously secret relationship between Ms. Freeman and Judge Jones that warrants Rule 60(b)(6) relief.

87. Jackson Walker argues that it is "ironic" that the U.S. Trustee urged disclosures be made to the judge who knew about the relationship who himself had ethical duties that he violated. JW Opp. at ¶ 1. Jackson Walker again misses the point. Parties in interest were entitled to know that the presiding or mediating judge was in an intimate relationship and shared a jointly owned home with a Jackson Walker partner. Similarly, Jackson Walker argues that neither the U.S. Trustee nor any party in interest challenged Jackson Walker's retention or compensation. But because of Jackson Walker's deceit, no one knew that a basis existed to challenge those orders.

88. The inability to seek recusal of Judge Jones based on the undisclosed relationship also warrants Rule 60(b)(6) relief under the *Liljeberg* factors. 60(b) Mot at ¶¶ 118–22. *See Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). Ignoring the cases cited above that grant Rule 60(b) relief based on professionals' non-disclosures, *supra* ¶ 83, Jackson Walker argues that it passes *Liljeberg*'s "harmless error" test. JW Opp. at ¶ 149. Specifically, Jackson Walker alleges that there is no risk of injustice in these cases or in future chapter 11 cases and that public confidence will not be undermined in the bankruptcy court and bankruptcy system if this Court denies relief to the U.S. Trustee.

89. Jackson Walker's arguments defy logic and reality. Having Judge Jones preside over these proceedings and allowing Jackson Walker to exempt itself from stringent obligations

under the Code, Bankruptcy Rules, and Disciplinary Rules is unjust to all other parties in the proceedings and signals to other professionals that non-compliance with their many duties will not result in any financial or legal consequence.

90. Despite Jackson Walker's assertion that there was not a "whisper of favoritism, impropriety, and misconduct," *id*. ¶ 162, scrutiny of its conduct has been widespread. *See, e.g.*, *Van Deelen v. Jones*, No. 4:23-cv-3729, ECF No. 10, Compl. (asserting various claims against Jackson Walker including fraud, RICO violations, aiding and abetting breach of fiduciary duties); *see also* Exhibit 1, *Van Deelen v. Jones*, No. 4:23-cv-3729, Hr'g Tr. at 72:21, 74:22–23 (S.D. Tex. June 6, 2024) (Judge Moses stating that "[i]t is unfair, counsel. It is. I mean, there's no doubt that it's unfair" when addressing whether the plaintiff had a "fair hearing" at the bankruptcy court). Media coverage also reflects that the broad and unsurprising view that it was improper for a law firm to keep secret that its partner had a romantic relationship with a judge who presided over and mediated cases where her firm represented a party. *See, e.g.*, Exhibit 4, Alex Wolf, *Jackson Walker in Legal Hot Seat Following Judge Romance Scandal*, Bloomberg Law (Mar. 26, 2024) ("Law firms are obligated to ensure their people operate within ethical guardrails, [Professor Nancy] Rapoport said."); Exhibit 5, Dakin Campbell, *The Incredible Oblivion of Marvin Isgur*, Business Insider (June 2, 2024) (stating that despite Ms. Freeman's departure from Jackson Walker, "Jackson Walker appeared to keep knowledge of the relationship to itself. The firm's attorneys continued to recommend Freeman for legal work on cases before the Southern District.").

91. This "unimaginably bad scandal" erodes confidence in the bankruptcy system in the Southern District of Texas. Exhibit 4, Alex Wolf, *Jackson Walker in Legal Hot Seat Following Judge Romance Scandal*, Bloomberg Law (Mar. 26, 2024) (quoting Professor Nancy Rapoport).

Vacatur is necessary to restore that confidence by allowing all parties to litigate Jackson Walker's retention and compensation applications before an impartial judge.

92. Jackson Walker asserts that no reasonable person would interpret this Court's denial of the U.S. Trustee's Motion as "a license to ignore disclosure obligations or a tacit endorsement of former Judge Jones's alleged misconduct." JW Opp. at ¶ 156. But that is exactly the ruling Jackson Walker seeks, one that allows professionals to ignore disclosure obligations with no consequence.

93. Jackson Walker argues a litany of other reasons why it claims there are no extraordinary circumstances here justifying vacatur, mostly that Jackson Walker did good work that benefitted the estates, it did not bill that much, and even then it already voluntarily reduced its fees in some cases. JW Opp. at ¶ 78. However, even if Jackson Walker's assertions on these issues are true, they do not mitigate the extraordinary circumstances that warrant vacatur: Jackson Walker's failure to disclose, for years, that its partner was romantically involved with and living with Judge Jones in a house they jointly owned.

F. The Court Should Order Disgorgement in the Full Amount of Fees Paid to Jackson Walker Due to the Firm's Egregious Misconduct.

94. The U.S. Trustee established in his Motion that there are three sources of authority for this Court to deny Jackson Walker's fees and order it to return all fees paid: (1) 11 U.S.C. § 328(c); (2) the Court's broad supervisory powers over attorneys employed by the bankruptcy estate; and (3) the Court's inherent authority to impose sanctions for violations of this Court's rules. *See, e.g.,* 60(b) Mot., Part III.A–B; 60(b) Mot. – Med., Arg. Part II. Jackson Walker's arguments that the Court should not order a return of all fees fail. Importantly, while the U.S. Trustee seeks to vacate the retention and compensation orders, vacating those orders is not required for the Court to sanction Jackson Walker for its misconduct by ordering it to disgorge fees. *See,*

e.g., Am. Int'l Refinery, 676 F.3d at 465–66 (affirming disgorgement of $135,000 as sanction for law firm's failure to disclose connections without a Rule 60(b) motion); *Matter of Prudhomme*, 43 F.3d 1000, 1003 (5th Cir. 1995) (affirming disgorgement without a Rule 60(b) motion).

1. Section 328(c) Authorizes the Court to Order Jackson Walker to Return the Compensation Received in These Cases.

95. Jackson Walker argues that the U.S. Trustee "misconstrues the temporal limitation" of section 328(c) because "the statute does not allow for compensation to be denied for a relationship that arose after a professional's employment has concluded." JW Opp. at ¶ 178. This assertion is wholly irrelevant because Ms. Freeman's relationship with Judge Jones did not arise only after Jackson Walker's employment was concluded. Ms. Freeman has admitted that she had a romantic relationship with Judge Jones, co-owned a house with him, and was the executor of, and a beneficiary under, his will, since 2017, before she began her employment with Jackson Walker. *See* Exhibit 2, Elizabeth Freeman's Responses to United States Trustee's Requests for Admission*, In re IEH Auto Parts Holding, Inc.*, No. 23-90054, Resp. 10 (admitting relationship as of April 6, 2023), Resp. 11 (admitting romantic relationship began before 2017); Resp. 12 (admitting she had a joint tenancy with Judge Jones since 2017); Exhibit 2, Elizabeth Freeman's Responses to United States Trustee's First Set of Interrogatories*, In re IEH Auto Parts Holding, Inc.*, No. 23-90054, Resp. 3.

96. Thus, for *every* case, Ms. Freeman's relationship with Judge Jones existed before Jackson Walker's services were concluded. By virtue of that relationship, Jackson Walker was not disinterested and held an adverse interest to the estate and its creditors while it was employed under section 327 or 1103. "And since section 327(a) is designed to limit even appearances of impropriety to the extent reasonably practicable, doubt as to whether a particular set of facts gives rise to a disqualifying conflict of interest normally should be resolved in favor of disqualification."

Rome v. Braunstein, 19 F.3d at 60. The Court thus may deny Jackson Walker all compensation under section 328(c).

97. Similarly off-base is Jackson Walker's argument that confirmed plans in some cases support exempting it from complying with sections 327 through 331 and 1103 once the confirmation date has passed. The confirmed plans say only that those Bankruptcy Code provisions will not apply to services rendered after the confirmation date—they do not purport to give a free pass to Jackson Walker's failure to comply with its statutory obligations when it served as counsel retained by the estate before confirmation. For example, the *EXCO* confirmation order specifies: "Upon the Confirmation Date, any requirement that Professionals comply with sections 327 through 331 and 1103 of the Bankruptcy Code in seeking retention or compensation *for services rendered after such date* shall terminate." *In re EXCO Resources, Inc.*, No. 18-30155, ECF No. 2128 at ¶ 122 (Bankr. S.D. Tex. June 18, 2019) (emphasis added).[14] The plans do not, and cannot, immunize estate professionals from complying with the law. *See, e.g., Denison v. Marina Mile Shipyard, Inc. (In re New River Dry Dock, Inc.)*, 497 F. App'x 882, 886 (11th Cir.

[14] Similar language exists in the plans and/or confirmation orders for the other cases cited by Jackson Walker. *See In re Covia Holdings Corp.*, No. 20-33295 ECF No. 1029, Art. II.B.4 (Bankr. S.D. Tex. Dec. 14, 2020) ("From and after the Confirmation Date, any requirement that Professionals comply with sections 327 through 331 and 1103 of the Bankruptcy Code or the Interim Compensation Order in seeking retention or compensation *for services rendered after such date* shall terminate . . . .") (emphasis added); *In re Volusion LLC*, No. 20-50082, ECF No. 128, Art. II.D (Bankr. S.D. Tex. Nov. 20, 2020) ("Upon the Confirmation Date, any requirement that Professionals and ordinary course Professionals comply with sections 327 through 331 and 1103 of the Bankruptcy Code in seeking retention or compensation *for services rendered after such date* shall terminate . . . .") (emphasis added); *In re Bouchard Transp., Co., Inc.*, No. 20-34682, ECF No. 1293, Art. II.C.4 (Bankr. S.D. Tex. Aug. 23, 2021) (Upon the Confirmation Date, any requirement that Professionals comply with sections 327 through 331 and 1103 of the Bankruptcy Code in seeking retention or compensation *for services rendered after such date* shall terminate . . . .") (emphasis added).

2012) ("The plan's release of liability against professionals did not affect the bankruptcy court's authority over the fees paid to those professionals.").

98. For pre-March 2022 cases only, Jackson Walker additionally argues that section 328(c) does not apply because it "did not have knowledge of any ongoing intimate relationship." JW Opp. at ¶ 179. Again, Jackson Walker fails to acknowledge that a partner's knowledge is imputed to the partnership, and also conflates the existence of a conflict of interest with knowledge of it. But section 328(c) says compensation may be denied if, "at any time" during the employment, the person "*is* not a disinterested person" or "*holds* an interest adverse to the estate," 11 U.S.C. § 328(c) (emphasis added)—not if, at any time during the employment, the person *becomes aware* it is not disinterested or holds and adverse interest. "Whether [a law firm] inadvertently or intentionally neglected to inform the court of its conflicts is of no import." *Electro-Wire Prods., Inc. v. Sirote & Permutt, P.C. (In re Prince)*, 40 F.3d 356, 361 (11th Cir. 1994) (reversing holding that law firm qualified for fees as an abuse of discretion); *see also eToys, Inc*., 331 B.R. at 194 (holding an "inadvertent oversight . . . does not excuse the failure" to disclose a conflict of interest). Thus, where a lack of disinterestedness or an adverse interest has been shown, as it has here, "'no more need be shown . . . to support a denial of compensation.'" *Consol. Bancshares,* at 1256 (quoting *Woods v. City Nat'l Bank and Tr. Co. of Chi.*, 312 U.S. 262, 268 (1940).

99. Further, Jackson Walker's alleged lack of knowledge has not been established either legally or factually. *See supra* Part II.C.1.a–b (Ms. Freeman's knowledge is imputed to Jackson Walker). Jackson Walker never explains *whose* knowledge counts as the firm's knowledge, or why Ms. Freeman's knowledge does not count while the knowledge of other unnamed partners after March 2022 does count. Nor does it acknowledge that discovery has barely begun into Jackson

Walker's knowledge. But Jackson Walker's admissions to date show that Jackson Walker knew of at least a past romantic relationship by March 2021, and an ongoing romantic relationship no later than March 2022—both of which are sufficient to create a conflict of interest—yet it made a deliberate decision not to disclose that information.

2. An Order Requiring Jackson Walker to Return All Fees Is Within the Court's Broad Supervisory Powers Over Attorneys Retained by the Estate.

100. The U.S. Trustee established in its 60(b) Motions that, under Fifth Circuit precedent, courts exercising their "broad supervisory powers" over attorneys employed by the estate, *Consol. Bancshares, Inc.,* 785 F.2d at 1254, may order disgorgement and "deny *all* compensation to professionals who fail to make adequate disclosure," *Am. Int'l Refinery, Inc.*, 676 F.3d at 465–66 (affirming disgorgement of $135,000 as sanction for law firm's failure to disclose connections); *see also Prudhomme*, 43 F.3d at 1003–04 (affirming disgorgement).

101. Essentially ignoring this Fifth Circuit precedent, Jackson Walker argues that the Court's authority to deny fees may only be used to enforce the provisions of the Bankruptcy Code, court rules, and orders of the Court. JW Opp. at ¶ 181. But Fifth Circuit law establishing the Court's authority to deny all fees, and order disgorgement, for failures to disclose is soundly rooted in the Bankruptcy Code's provisions regarding the estate's employment of professionals. *See Prudhomme*, 43 F.3d at 1003 (citing 11 U.S.C. §§ 327 and 1107(a) for its holding that "the court's broad discretion in awarding and denying fees paid in connection with bankruptcy proceedings empowers the bankruptcy court to order disgorgement as a sanction to debtors' counsel for nondisclosure"); *see also Am. Int'l Refinery, Inc.*, 676 F.3d at 465–66; *Consol. Bancshares*, 785 F.2d at 1255. And all but a few of the retention orders in these cases required disclosure. *See infra* n.16.

102. Unsurprisingly, Jackson Walker cites no case holding that a court lacks authority to deny fees or order disgorgement based on a law firm's failure to disclose a romantic relationship between one of its partners and a presiding judge or mediator. The Court's authority to do so is firmly grounded in the Bankruptcy Code, court rules, and Fifth Circuit precedent.

3. This Court Has Inherent Authority to Order Jackson Walker to Return Compensation as a Sanction for Violating this Court's Rules.

103. As established in the U.S. Trustee's motions (*see* 60(b) Mot., Part IV.G.3; 60(b) Mot. – Med., Arg. Part II.B), the Court also has inherent authority to impose disciplinary sanctions "beyond the return of compensation." *Baker v. Cage (In re Whitley)*, 737 F.3d 980, 987 (5th Cir. 2013). Jackson Walker acknowledges this power but argues that inherent-authority sanctions—unlike the Court's authority to order a return of fees under section 328(c) and its broad authority over attorneys retained by the estate—are limited to bad faith or willful misconduct. JW Opp. at ¶ 181, n.222. Even if that is true,[15] Jackson Walker's admissions so far show that it has engaged in bad faith and willful misconduct. *See also infra* Part II.G.2.c.ii.

104. Attorneys act in bad faith when they knowingly take actions that violate their obligations as lawyers, and this includes when they act intentionally and "close their eyes to the obvious." *Williams v. Lockheed Martin, Corp.*, 990 F.3d 852, 867–68 (5th Cir. 2021). *See also Toon v. Wackenhut Corr. Corp.*, 250 F.3d 950, 953–55 (5th Cir. 2001) (affirming $15,000 sanction payable to the court, holding finding of bad faith was supported by counsel's intentional act of filing document publicly despite confidentiality provision in settlement agreement where counsel lacked "any plausible good faith explanation for their conduct"). And a knowing failure to disclose

[15] *See Williams v. Lockheed Martin, Corp.,* 990 F.3d 852, 867 n.70 (5th Cir. 2021) (explaining that a court's inherent power to "shift attorney's fees" requires bad faith but noting that "not all sanctions imposed under the court's inherent powers require a finding of bad faith") (citing *Republic of the Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 74 n.11 (3d Cir. 1994)).

a conflict of interest "constitutes willful misconduct." *eToys, Inc.*, 331 B.R. at 187; *see also id.* at 188 (failure to disclose fact that would bar retention "would constitute a fraud on the Court").

105. Jackson Walker engaged in bad faith and willful misconduct because it made a knowing and intentional decision not to disclose that Ms. Freeman had a past or ongoing romantic relationship with Judge Jones, *see supra* Part II.C.; *infra* Part II.G.2.c.ii, in violation of contrary to its obligation to do so under this Court's rules and the retention orders entered in most of the cases.[16] Contrary to Jackson Walker's contention, even if (counterfactually) the willful misconduct is attributable to Ms. Freeman alone—and the firm does not dispute that she engaged in such misconduct—the firm may be sanctioned because "where, as here, an attorney acts in bad faith, his [or her] bad faith conduct is imputed to the firm that employs him or her." *Bradley*, 495 B.R. at 791. As in *Toon*, although Jackson Walker claims it acted in good faith, "counsel have not pointed to one case standing for the proposition," 250 F.3d at 953, that a law firm need not disclose that its partner has, or used to have, a romantic relationship with a presiding judge or mediator. There is simply no good faith reason for Jackson Walker not to have disclosed Ms. Freeman's relationship with Judge Jones.

4. Jackson Walker's Demand for Leniency Is Unconvincing.

106. As established in the U.S. Trustee's motions, denial of all fees is warranted in these cases. *See, e.g.,* 60(b) Mot., Part IV.G; 60(b) Mot. – Med., Arg. Part II. Denial of all compensation is the default sanction for nondisclosure of all facts bearing upon counsel's eligibility to be employed by the estate. *See Prudhomme*, 43 F.3d at 1003; *Futuronics Corp. v. Arutt, Nachamie,*

[16] The only cases that do not include this provision in the retention orders explicitly setting forth ongoing disclosure requirements are *EXCO Resources, Inc.*, *Westmoreland Coal Company*, and *Brilliant Energy, LLC*. Nevertheless, Jackson Walker attorneys acknowledged their duty in these cases to supplement their disclosures in the declarations attached to Jackson Walker's retention applications.

& Benjamin (In re Futuronics Corp.), 655 F.2d 463, 469–71 (2d Cir. 1981); *In re EWC, Inc*., 138 B.R. 276, 281–82 (Bankr. W.D. Okla. 1992).[17]

107. As the Tenth Circuit has explained, the bankruptcy system is "built upon the principle of full and candid disclosure." *SE Property Holdings, LLC v. Stewart (In re Stewart)*, 970 F.3d 1255, 1264 (10th Cir. 2020) (quotation marks omitted). "It is these disclosures which allow the public to have confidence in the system . . . . Without those beliefs, public confidence in the bankruptcy process, and perhaps far more, is placed at risk." *Id*. at 1264–65 (quotation marks omitted). Because these disclosure obligations "are difficult if not impossible to police," and those who fail to disclose are unlikely to be caught, sanctions for disclosure violations "must sting hard." *Id*. at 1265.

108. Jackson Walker's conduct is a case in point. Jackson Walker violated its disclosure obligations for years in over two dozen cases. And its nondisclosure was not the result of inadvertence, but carefully considered and intentional. As in *Futuronics*, "[w]e deal in this case not with isolated instances of oversight but with a total pattern of conduct which betrays a callous disregard of the professional obligations undertaken in these bankruptcy proceedings." *Futuronics Corp.*, 655 F.2d at 471 (quotation marks omitted). But for intrepid investigative reporting in October 2023, the public would never have discovered the truth about the years-long, undisclosed relationship between judge and lawyer because Jackson Walker concealed it from

[17] *See also, e.g., SE Property Holdings, LLC v. Stewart (In re Stewart)*, 970 F.3d 1255, 1268 (10th Cir. 2020) (holding denial of all fees is the "default sanction" for disclosure violations and bankruptcy court abused its discretion by ordering the return of only a small fraction of fees, rather than all fees, for a failure to disclose); *Law Offices of Nicholas A. Franke v. Tiffany (In re Lewis)*, 113 F.3d 1040, 1045 (9th Cir. 1997) (affirming order requiring return of both pre-petition and post-petition funds received by debtor's attorney); *Mapother & Mapother, P.S.C. v. Cooper (In re Downs)*, 103 F.3d 472, 478 (6th Cir. 1996) (affirming grant of relief under section 329 and Rule 2016 but reversing as to amount due to bankruptcy court's refusal to order return of entire retainer).

public knowledge, even while filing employment and compensation applications in 2022 with admitted knowledge of the undisclosed relationship.

109. Jackson Walker argues that this Court has discretion to order it to return less than all fees. Jackson Walker's defense relies largely on its claims that—as a firm divorced from the people that constitute it—it did not know about Ms. Freeman's relationship with Judge Jones and that, once it knew, it took "reasonable" and "appropriate steps." *See* JW Opp. at ¶ 186. But once again, Jackson Walker fails to acknowledge that Ms. Freeman's knowledge was imputed to the firm under Texas agency and partnership law. Even taking Jackson Walker's assertions as true, however, its supposedly "reasonable" and "appropriate steps" were entirely inadequate and do not mitigate its misconduct. Jackson Walker consistently and intentionally opted against taking the most important step: disclosing the relationship to the parties and the Court. Jackson Walker's actions showed an egregious disregard for the Bankruptcy Code, Bankruptcy Rules, ethical rules, and its fiduciary duties. *See supra* Part II.C.2–3 (discussing Jackson Walker's failures to act appropriately).

110. Jackson Walker also argues that it should get to keep its fees because no harm resulted from its misconduct and that its fees were reasonable. *See*, *e.g.*, JW Opp. at ¶¶ 11, 12, 78, 150, 152, 157, 160, 174, 186. Even if that were true, Jackson Walker misses the critical point: The "conduct of bankruptcy proceedings not only should be right but must seem right." *Knapp v. Seligson (In re Ira Haupt & Co.)*, 361 F.2d 164, 168 (2d Cir. 1966). The firm's self-interested view disregards the integrity of the bankruptcy process. *See, e.g., Stewart*, 970 F.3d at 1264–65.

111. Indeed, the Supreme Court long ago dispensed with Jackson Walker's "no harm, no foul" defense and conclusively established that all compensation may be denied in a reorganization proceeding for those operating under a conflict of interest, notwithstanding "fraud or unfairness

[were] not shown to have resulted." *Woods v. City Nat.*, 312 U.S. at 268 (Douglas, J.) (decided under the Code's predecessor, the 1938 Chandler Act). Nothing more than the conflict need be shown "to support a denial of compensation." *Id.* *See also West Delta Oil*, 432 F.3d at 358 n.32 (holding that where professional had adverse interest, "[i]t is irrelevant that no evidence exists pointing to actual prejudice to the estate"); *Neben & Starrett, Inc. v. Chartwell Fin. Corp. (In re Park-Helena Corp.)*, 63 F.3d 877, 881 (9th Cir. 1995) ("a disclosure violation may result in sanctions 'regardless of actual harm to the estate'") (quoting *In re Maui 14K, Ltd.*, 133 B.R. 657, 660 (Bankr. D. Haw. 1991)); *Jensen v. U.S. Trustee (In re Smitty's Truck Stop, Inc.)*, 210 B.R. 844, 849 (B.A.P. 10th Cir. 1997) (same); *In re Fretter, Inc.*, 219 B.R. 769, 776 (Bankr. N.D. Ohio 1998) (same); *In re Digioia*, No. 22-00004, 2023 WL 1785732, at *5 (Bankr. D.D.C. Feb. 3, 2023) (fees may be disgorged as sanction for non-disclosure even where client has not questioned fees).

112. It is also not a defense to claim that one's loyalty was not weakened by a conflict of interest:

> A fiduciary who represents security holders in a reorganization may not perfect his claim to compensation by insisting that although he had conflicting interests, he served his several masters equally well or that his primary loyalty was not weakened by the pull of his secondary one. Only strict adherence to these equitable principles can keep the standard of conduct for fiduciaries "at a level higher than that trodden by the crowd."

Woods, 312 U.S. at 269 (quoting *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

113. In the decades since the Supreme Court decided *Woods*, bankruptcy courts have regularly cited the case as "the decision which provides the basis for disgorgement of fees for conflicts of interest in bankruptcy cases." *Quiat v. Berger (In re Vann)*, 136 B.R. 863, 869 (D. Colo. 1992). In *Vann*, the court stated that trying to determine how much the "attorney's unethical conduct deplete[d] the value of his services" was not only contrary to *Woods*, but it improperly

"puts the burden on the court to prove the worth of the claimed fees when that burden is rightfully the attorney's." *Id.* at 871.

114. In penalizing professional misconduct, "[a] bankruptcy court does not have to calculate how much the unethical conduct depleted the value of the attorney's service, but may, in its discretion, deny compensation in whole or in part. It may also order disgorgement of all fees already paid." *In re Parklex Assocs., Inc.*, 435 B.R. 195, 209 (Bankr. S.D.N.Y. 2010) (internal quotation marks omitted). Moreover, it is impossible to prove that outcomes and decisions would have been different absent the undisclosed relationship between Judge Jones and Ms. Freeman.[18]

115. Jackson Walker likewise argues that the Court should deny relief in the mediated cases because all parties were allegedly satisfied with Judge Jones's performance in the mediation and Judge Jones personally did not enter any orders in the underlying bankruptcy case. JW Opp. at ¶¶ 172, 174.

116. That argument, however, misconstrues the relief sought by the U.S. Trustee. The U.S. Trustee does not seek to unwind the results of the mediation or vacate the confirmation order.

[18] While the U.S. Trustee cannot show how cases would have proceeded in an alternate universe, there is one indication that events may have proceeded differently if Jackson Walker had not tipped the scale in its favor. *In re Tehum Care Serv., Inc.*, No. 23-90086 demonstrates that the undisclosed relationship between Judge Jones and Ms. Freeman likely had a significant financial impact in the cases that Judge Jones mediated. Judge Jones was appointed to mediate a global settlement that included, among other matters, the settlement of a fraudulent transfer claim against a party represented by Ms. Freeman. That mediation resulted in a global settlement, reflected in a proposed plan of reorganization, in which the estate's claims would be released in return for a $37 million contribution by Ms. Freeman's client and the other settlement parties. *See* No. 23-90086, ECF No. 1072, Second Am. Chapter 11 Plan, at 17 (Bankr. S.D. Tex. Oct. 27, 2023). Following the resignation of Judge Jones, however, the bankruptcy court ordered a new mediation before a different mediator. Although that mediation involved the same claims and same parties as the mediation under Judge Jones, the resulting proposed settlement increased the settlement payment to $54 million. *Tehum Care Serv.*, No. 23-90086, ECF No. 1259, Settlement Mot. (Bankr. S.D. Tex. Jan. 16, 2024). As such, the participation of Judge Jones in *Tehum* arguably created a $17 million benefit for Ms. Freeman's client, and a $17 million detriment to the estate.

Rather, the U.S. Trustee's 60(b) Motion is directed to the compensation received by Jackson Walker because it violated its disclosure obligations and was subject to a disqualifying conflict of interest. As the U.S. Trustee explained above, these facts warrant disgorgement even if the outcome of the underlying case was unaffected. *See supra* ¶ 111.

117. For this reason, Jackson Walker's reliance on *CEATS, Inc. v. Cont'l Airlines, Inc.*, 755 F.3d 1356, 1362 (Fed. Cir. 2014), to excuse its misconduct is misplaced. That decision did not involve a court-supervised professional, and the movant in that case sought relief from a trial judgment, not a compensation order. Although the Federal Circuit in that case declined to grant Rule 60 relief because there was no evidence that an unbiased mediator would have resulted in a different jury verdict, the same concerns do not exist here, where Jackson Walker's liability for disgorgement is independent of the outcome of the underlying bankruptcy case.

118. In sum, the Court should deny all fees because Jackson Walker's conduct was knowing, intentional, repeated, and caused severe reputational damage to this Court and the bankruptcy system. Allowing fees to a law firm that time-and-again made the decision not disclose that its partner was romantically involved with the presiding judge or mediator would render impartiality requirements meaningless. Denial of all fees is necessary not just to punish Jackson Walker but also to deter future misconduct by others. *See, e.g., Prince*, 40 F.3d at 361 (reversing holding that law firm qualified for fees).

G. Jackson Walker's Attempts to Evade Any Consequence for Its Disclosure Violations Fail.

1. The U.S. Trustee Has Standing to Seek Vacatur of the Retention and Compensation Orders, Disgorgement of Compensation, and Sanctions Against Jackson Walker.

119. Jackson Walker contests the U.S. Trustee's standing to seek vacatur of orders approving the firm's retention and compensation, the return of all fees and expenses that it received, and inherent authority sanctions against Jackson Walker. JW Opp. at ¶¶ 80–89.

120. The standing and authority of the U.S. Trustee to enforce Jackson Walker's disclosure obligations in his capacity as a public interest watchdog protecting the integrity of the bankruptcy system is well established. *See Harrington v. Purdue Pharma L*P, No. 23-124, slip op. at 9 (U.S. June 27, 2024) (the U.S. Trustee is "charged with promoting the integrity of the bankruptcy system for all stakeholders . . . ."). U.S. Trustees have used this statutory authority for decades to address misconduct like Jackson Walker's. In fiscal year 2023 alone, they brought hundreds of attorney disgorgement and misconduct actions. Their enforcement activities are reported publicly on a year-by-year basis for all to see. U.S. Dep't of Just., Reports, Data & Research, https://www.justice.gov/ust/reports-data-research#annual (last visited June 21, 2024). And rather than preventing U.S. Trustees from addressing such misconduct, courts often ask them to investigate and act upon cases of perceived misconduct. *See, e.g.*, *In re The Roman Catholic Church of the Archdiocese of New Orleans*, No. 20-10846, ECF No. 1574, Order in Resp. to U.S. Trustee Report (Bankr. E.D. La. June 7, 2022) (in response to the U.S. Trustee's court-ordered investigation and filed report, the court removed committee members and issued an order to show cause to determine appropriate sanctions for an attorney's violation of a protective order); *In re Neiman Marcus Grp. Ltd.*, No. 20-32519, ECF No. 1485, Statement of Acting U.S. Truste Regarding Conduct of Marble Ridge Capital LP and Dan Kamensky (Bankr. S.D. Tex. Aug. 29,

2020) (in response to a court order, U.S. Trustee conducted investigation on the misconduct of a committee member and filed a statement of his results).

121. Indeed, Jackson Walker does not contest that U.S. Trustees have standing to object to professional retention and fees. JW Opp. at ¶ 80. Instead, Jackson Walker mischaracterizes the U.S. Trustee's motion as asserting a claim that belongs exclusively to the estate. This argument lacks merit.

122. Objections to an estate professional's employment or compensation and motions for sanctions for attorney misconduct are not "claims," nor do they seek relief that only the estate may seek. Relief is warranted because Jackson Walker deprived other parties of the opportunity to object or seek recusal based on Ms. Freeman's relationship with Judge Jones by failing to disclose it. Its argument that this failure gives rise solely to a generalized "claim" that may be pressed only by the estates ignores the statutory standing not only of the U.S. Trustee, but of all parties in interest to raise and be heard on any issue in a chapter 11 case, as well as the possibility that others can raise a particularized injury from this violation.

a. The U.S. Trustee Has Standing and Authority to Enforce Jackson Walker's Disclosure Requirements to Vindicate the Integrity of the Bankruptcy System.

123. As an officer in the Department of Justice, the U.S. Trustee has both constitutional and statutory authority to vindicate federal law. 11 U.S.C. § 307; 28 U.S.C. § 581(a)(7), § 586(a)(3)(A), § 586(a)(3)(I).

124. Congress enacted the Bankruptcy Code through its constitutional power to establish a "uniform law on the subject of Bankruptcies." U.S. Const. art. I § 8, cl. 4. Relief accorded under title 11 is "a legislatively created benefit," *United States v. Kras*, 409 U.S. 434, 446–47 (1973), allowed by Congress under that constitutional power. Congress then created the office of U.S. Trustees and gave them "important oversight and watchdog responsibilities to ensure honesty and

fairness in the administration of bankruptcy cases and to prevent and ferret out fraud." H.R. Rep. 99-764, at 18 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5227, 5231. And Congress conferred standing, through 11 U.S.C. § 307, upon the U.S. Trustee to act in the public interest to ensure that all parties are complying with the laws and rules governing this federally created bankruptcy system.

125. Reviewing and objecting to professionals' employment and fee applications fall well within the bailiwick of the U.S. Trustee's duties. *See* 28 U.S.C. § 586(a)(3)(A) (assigning duty to review and comment on applications for compensation and reimbursement under 11 U.S.C. § 330); 28 U.S.C. § 586(a)(3)(I) (assigning duty to monitor and comment on employment applications under 11 U.S.C. § 327). "Congress has clearly delegated to the UST the discretion to assure that fee awards and expense reimbursements are reasonable. . . ." *In re Busy Beaver Bldg. Ctrs, Inc.*, 19 F.3d 833, 842 (3d Cir. 1994). In filing his motion, the U.S. Trustee is simply performing one of his duties.

126. Multiple appellate courts have recognized the U.S. Trustee's standing to object to professionals' employment or to seek disgorgement of their compensation. *See*, *e.g.*, *Stanley v. McCormick, Barstow, Sheppard, Wayte & Carruth (In re Donovan Corp.),* 215 F.3d 929, 930 (9th Cir. 2000) (holding U.S. Trustee has standing to pursue appeal of order denying motion to disgorge fees); *In re Geraci*, 138 F.3d 314, 317 (7th Cir. 1998) (citing 11 U.S.C. § 307 in explaining U.S. Trustee's motion to disgorge attorney's fees); *U.S. Trustee v. Price Waterhouse*, 19 F.3d 138, 141 (3d Cir. 1994) (Alito, J.) (holding U.S. Trustee has standing to pursue appeal of order overruling objection to professionals' employment); *Michel v. Eagle-Picher Indus., Inc. (In re Eagle-Picher Indus., Inc.)*, *Inc.*, 999 F.2d 969, 970 n.2 (6th Cir. 1993) (citing 11 U.S.C. § 307 in explaining U.S. Trustee's objection to employment of professionals). Jackson Walker cites no case holding that

the U.S. Trustee lacks standing to seek sanctions against a bankruptcy professional that violated its duties of disclosure or is somehow precluded from seeking this relief because an estate might also have a cause of action based on the same violation.

127. That the estate might have a separate claim against Jackson Walker based on the same nucleus of facts does not preclude the U.S. Trustee from vindicating bankruptcy disclosure requirements. *Cf. United States v. Miss. Dep't of Pub. Safety*, 321 F.3d 495, 499 (5th Cir. 2003) (recognizing "authority of the United States to bring suit . . . for the benefit of the public generally and for [an individual's] benefit specifically" in context of an Americans with Disabilities Act action). The government has its own "real and substantial interest" in pursuing an action to vindicate federal law. *Id*. Even if that action results in "victim-specific relief," this does not "transform the United States into a mere proxy" for that individual. *Id.; see also EEOC v. Bd. of Supervisors for the Univ. of La. Sys*., 559 F.3d 270, 273 (5th Cir. 2009) (noting "EEOC plays an independent public interest role that allows it to seek victim-specific relief—even when such relief could not be pursued by the employee") (citing *EEOC v. Waffle House, Inc*., 534 U.S. 279, 291–92 (2002)). Similarly, here, the U.S. Trustee is not acting as the estate's proxy in ensuring professionals comply with their duties under the Bankruptcy Code and Rules.[19]

128. Jackson Walker's allegation that Judge Jones pressured Mr. Cavenaugh to have the law firm issue an "insufficient, inadequate, and misleading" disclosure demonstrates why U.S. Trustees have separate standing to pursue these claims. JW Opp. at ¶¶ 56–57. Debtors' counsel

[19] For this reason, Jackson Walker's argument that the "claims" pursued by the U.S. Trustee are not preserved by the confirmed chapter 11 plan, JW Opp. at ¶ 98 n.97, is irrelevant. The U.S. Trustee is not pursuing an estate cause of action. And even if the Debtors might be precluded from pursuing an unpreserved claim, that is not a barrier to the U.S. Trustee's motion for relief as he is acting in his independent public-interest role. *Cf. Miss. Dep't of Pub. Safety,* 321 F.3d at 499; *Bd. of Supervisors for the Univ. of La. Sys.*, 559 F.3d at 273; *Waffle House*, 534 U.S. at 291–92.

may fear reprisals from the judge if they pursued recusal on behalf of their clients; they may also have conflicts of interest because their failure to disclose their connection to the judge implicates their own violations of professional duties. By contrast, the U.S. Trustee is an "independent bankruptcy administrator" who is a "watchdog to prevent not only abuses by debtors, trustees, debtors-in-possession and attorneys, but also to prevent errors or abuses by bankruptcy judges themselves." *The United States Trustee System, Hearing on S-1961 before the Subcomm. on Cts of the Comm. on the Judiciary*, 99th Cong. 163 (1986) (statement of J. Ronald Trost, Chairman of the Comm. on U.S. Trustee and Bankr. Admin., Nat'l Bankr. Conference, and Lawrence King, Chairman of the Legis. Comm., Nat'l Bankr. Conference), 1986 WL 780448 at *127. "What has made the U.S. Trustee effective is the ability to appear and be heard whenever necessary, even in opposition to the bankruptcy judge." *Id.* at 165, 1986 WL 780448 at *128.

129. Contrary to Jackson Walker's contentions, the U.S. Trustee's request for disgorgement of fees rather than a civil penalty[20] does not transform his sanctions request into an estate cause of action. Rather, multiple courts—including the Fifth Circuit—have treated the denial of a professional's fees as the proper sanction for failure to comply with the disclosure obligations under the Bankruptcy Code and Rules. *See Consol. Bancshares, Inc.*, 785 F.2d at 1256 n.7 ("Another ground for denial of fees is failure to comply with the disclosure requirements of the Code and Rules."); *see also Dordevic v. Layng (In re Dordevic)*, 62 F.4th 340, 342 (7th Cir. 2023) (affirming order directing the return of all fees for failure to comply with disclosure obligation); *Stewart*, 970 F.3d at 1267 (holding denial of all fees is "the default sanction" for disclosure violations); *Rome v. Braunstein*, 19 F.3d at 62 (affirming retroactive disqualification

[20] The U.S. Trustee did ask for such further relief as may be appropriate (*see* 60(b) Mot., Part V; 60(b) Mot. – Med., Conclusion), which could include a civil penalty.

and forfeiture of all compensation); *38-36 Greenville Ave. LLC*, 2022 WL 1153123, at *5 (affirming order denying all fees because of undisclosed receipt of post-petition payments by attorney of debtor in possession and violation of law firm's duty of candor). The U.S. Trustee is thus merely seeking the appropriate sanctions for Jackson Walker's misconduct as recognized by many other courts.

b. The U.S. Trustee's Motion Does Not Assert a "Claim" Nor Is the Right to Seek a Remedy for Jackson Walker's Disclosure Violations Exclusively Held by the Estate.

130. Jackson Walker's argument that the U.S. Trustee is asserting a claim that belongs exclusively to the estate is wrong. None of the Bankruptcy Code provisions or Bankruptcy Rules applicable to Jackson Walker's underlying misconduct, as cited in the U.S. Trustee's Motion, provide a "claim" to a party as a remedy for their violation. To the contrary, the statutes and rules simply set the baseline requirements—disinterestedness and disclosure—expected of bankruptcy court judges, mediators, and bankruptcy professionals. A request for sanctions for violating these requirements is not a claim.

131. Neither section 327 nor 330 limits who may object to the employment or compensation of a bankruptcy professional. As discussed above, the U.S. Trustee has express statutory authority to do so. 11 U.S.C. § 307; 28 U.S.C. § 581(a)(7), § 586(a)(3)(A), § 586(a)(3)(I). And the Bankruptcy Rules require that the U.S. Trustee is provided notice of all employment applications and "all applications for compensation or reimbursement of expenses." Fed. R. Bankr. P. 2002(k), 2014(a). Such notice allows the U.S. Trustee an opportunity to be heard on those applications. Additionally, all creditors—who are also provided the right to raise and appear on any issue in a chapter 11 case, 11 U.S.C. § 1109(b)—must also be provided with notice of "a hearing on any entity's request for compensation or reimbursement of expenses if the request

exceeds $1,000," Fed. R. Bankr. P. 2002(a)(6), anticipating their right to be heard on such applications as well.

132. This is not "[a] situation in which a statute authorizes specific action and designates a particular party empowered to take it," from which this Court should presume exclusivity. *Hartford Underwriters Ins. v. Union Planters Bank*, 530 U.S. 1, 2 (2000). Objecting to employment or compensation is not akin to pursuing an avoidance action or other prosecution of an estate cause of action. There is no reason to treat a motion to vacate retention and compensation orders and for disgorgement of fees any differently than if the relief were sought at the outset of the law firm's application for retention and compensation.

133. All the cases cited by Jackson Walker discussing "estate" causes of actions are inapposite because they do not address the standing of the U.S. Trustee to seek relief for disclosure violations. Jackson Walker cites three factually related cases in which a movant was considered to lack standing to seek sanctions against a bankruptcy professional, none of which held the U.S. Trustee lacked standing.[21] *In re Old ANR, LLC*, No. 19-00302, 2019 WL 2179717 (Bankr. E.D. Va. May 17, 2019); *In re SunEdison, Inc.*, No. 16-10992, 2019 WL 2572250 (Bankr. S.D.N.Y. June 21, 2019); *In re SRC Liquidation LLC*, No. 15-10541, 2019 WL 4386373 (Bankr. D. Del. Sept. 12, 2019). Each case involved the same movant, Mar-Bow Value Partners, LLC, that purchased a claim against the respective debtors to enter their bankruptcy cases and seek sanctions against McKinsey Recovery and Transformation Services, who was retained as the respective debtors'

[21] JW further cites *In re Syntax-Brillian Corp.*, Civ. No. 13-337, 2016 WL 7177615 (D. Del. Dec. 9, 2016), in which a creditor sought sanctions and disgorgement against the debtor's counsel. The bankruptcy court held, and the district court affirmed, that the predicate for the sanctions motion rested on claims that were already settled by the estate's trusts and the debtor's law firm or were released by the confirmed plan. *Id*. at *4 & *12. The decision did not address the U.S. Trustee's standing to pursue sanctions. *See generally id.*

turnaround advisor and also competed with Mar-Bow's owner in the consulting industry. Without conceding that the courts' standing analysis was correct, the U.S. Trustee notes that none of the courts treated the violation of a professional's disclosure obligations as an exclusive estate cause of action *per se*; rather, they implicitly recognized that Mar-Bow could have established a personal injury but failed to meet that burden.

134. Of even greater significance, however, Jackson Walker ignores what all three cases clearly state—that if McKinsey had committed fraud on the court in its disclosure violations, then the U.S. Trustee is the appropriate person to investigate and raise those concerns.[22] Indeed, each further noted that McKinsey had reached a settlement with the U.S. Trustee in the cases before those courts, and that the settlement had expressly excluded any allegations of fraud, which the courts all agreed the U.S. Trustees were free to pursue.[23]

c. Jackson Walker Cannot Hide Behind Standing Arguments Because This Court Has Independent Authority to Sanction It for Its Nondisclosures.

135. Jackson Walker's attack on the U.S. Trustee's standing is not only meritless, but also ineffective to protect Jackson Walker from sanctions. That is because this Court has authority to reduce fees and order disgorgement *sua sponte*, and has an independent duty to do so.

136. Because of "the potential for conflicts of interest" between attorneys seeking compensation and the estate, bankruptcy courts have "an independent duty" to examine compensation requests "even absent objections." *Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d at 843 (quotations omitted); *see also Dordevic,* 62 F.4th at 342–43 (7th Cir. 2023) ("[G]iven Congress's directive, bankruptcy courts have an inescapable statutory duty to review fee arrangements.");

[22] *Old ANR*, 2019 WL 2179717 at *6 n.22; *SRC Liquidation*, 2019 WL 4386373 at *2 & *5; *SunEdison*, 2019 WL 2572250 at *10.
[23] *Old ANR*, 2019 WL 2179717 at *3 & *6 n.22; *SRC Liquidation*, 2019 WL 4386373 at *5; *SunEdison*, 2019 WL 2572250 at *10.

Stewart, 970 F.3d at 1258 ("The disclosure requirements enable bankruptcy judges to perform core and traditional role of overseeing lawyers who represent bankruptcy debtors"); *Consol. Bancshares,* 785 F.2d at 1254 ("[T]he basic premise of the Bankruptcy Code [is] that the bankruptcy court has broad supervisory powers over professional persons who render services for the estate."); *Herrera v. Dishon*, No. 4:15-cv-227, 2016 WL 7337577, at *1 (S.D. Tex. Dec. 16, 2016) ("[The professional] does contest the standing of the parties objecting to its fees, but this issue need not be labored. The bankruptcy court has an independent duty to review fee applications of professionals even in the absence of an objection.") (affirming denial of all fees based in part on failure to disclose).

137. And, as discussed above, bankruptcy courts' supervisory authority over fees includes broad discretion to order disgorgement for disclosure violations, in addition to inherent authority to impose sanctions. *See supra* Part II.F. The court has the power to impose these sanctions *sua sponte*. *See, e.g., In re 38-36 Greenville Ave. LLC*, No. 21-2164, 2022 WL 1153123, at *4 (3d Cir. Apr. 19, 2022) (affirming *sua sponte* disgorgement order against law firm based on its "repeated violations of the Bankruptcy Rules and the Code, along with counsel's lack of candor"); *Friendly Fin. Discount Corp. v. Tucker (In re Tucker)*, 224 F.3d 766, 2000 WL 992488, at *3 (5th Cir. June 28, 2000) ("§ 105 authorizes the bankruptcy court to, sua sponte, 'take any action or make any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.'") (quoting 11 U.S.C. § 105).

138. Because the Court has the independent power and duty to supervise attorneys who practice before it and impose sanctions, including disgorgement of fees, Jackson Walker's attempt to evade sanctions through a misdirected attack on the U.S. Trustee's standing cannot protect it.

2. The Releases and Exculpations in the Confirmed Plan Do Not Bar the U.S. Trustee's Motions.

139. Jackson Walker contends that the relief sought in the 60(b) Motions have been released or barred by the confirmed Plan, but those releases do not apply here. *See* JW Opp. at ¶¶ 90–98.

a. The U.S. Trustee Can Raise, and this Court Should Address, Jackson Walker's Misconduct Regardless of Whether the Estate Has Claims Against Jackson Walker.

140. As explained above in Part II.G.1.b, the U.S. Trustee does not assert "estate claims" that could be released by the Debtors under the Plan because he has independent statutory authority to enforce federal law under 28 U.S.C. § 581(a)(7) and 11 U.S.C. § 307. As a result, any release of claims the Debtors provided under the Plan does not immunize Jackson Walker from the U.S. Trustee's request for vacatur of the retention and compensation orders nor his request for sanctions for violation of the Bankruptcy Code, Bankruptcy Rules, Disciplinary Rules, and Jackson Walker's fiduciary duties.

141. Further, adopting Jackson Walker's expansive interpretation of the Plan's releases and exculpations releasing claims related to its fees (*see* JW Opp. at ¶¶ 90–91) would prevent any party in interest from objecting to professionals' final fee applications, which are filed and approved after entry of the confirmation order. This would be nonsensical, resulting in perfunctory approval of all final fee applications and also prevent the U.S. Trustee from performing his mandated-duties.

b. The U.S. Trustee Is Not a "Releasing Party" Under the Plain Language of the Plan.

142. The Plan's nondebtor releases do not apply to the U.S. Trustee. Jackson Walker appears to acknowledge that the U.S. Trustee is not a Releasing Party under the Plan. *See* JW Opp. at ¶ 92. Indeed, only the following are "Releasing Parties:"

> "Releasing Parties" means, collectively, (a) the Prepetition Secured Parties; (b) the Committee and each of its members; (c) the Plan Administrator; (d) all Holders of Claims or Interests that vote to accept or are presumed to accept the Plan; (e) all Holders of Claims or Interests that abstain from voting on the Plan and who do not affirmatively opt out of the releases provided by the Plan by checking the box on the applicable form indicating that they opt not to grant the releases provided in the Plan; (f) all Holders of Claims or Interests that vote to reject the Plan or are deemed to reject the Plan and who do not affirmatively opt out of the releases provided by the Plan by checking the box on the applicable form indicating that they opt not to grant the releases provided in the Plan; and (g) with respect to each of the Debtors, the Wind-Down Debtors, and each of the foregoing Entities in clauses (a) through (f), such Entity and its current and former Affiliates, and such Entities' and their current and former Affiliates' current and former directors, managers, officers, equity holders (regardless of whether such interests are held directly or indirectly), predecessors, successors, and assigns, subsidiaries, affiliates, managed accounts or funds, and each of their respective current and former equity holders, officers, directors, managers, principals, shareholders, members, management companies, fund advisors, employees, agents, advisory board members, financial advisors, partners, attorneys, accountants, investment bankers, consultants, representatives, and other professionals, each in their capacity as such collectively.

Plan Art. I.A.(95) (defining "Releasing Parties"). None of the categories in this definition apply to the U.S. Trustee.

c. The Releases and Exculpations Do Not Apply Because They Carve Out Acts or Omissions that Constitute Actual Fraud, Willful Misconduct, or Gross Negligence.

143. Jackson Walker contends that only its own actual fraud, willful misconduct, or gross negligence would result in the U.S. Trustee's motions being carved out of the Plan releases and exculpations. But even if the Court accepts that only Ms. Freeman, and not Jackson Walker, engaged in such conduct, that reading is inconsistent with the language of the Plan. *See* JW Opp. at ¶ 98. The Plan's nondebtor releases and exculpations include a carveout for "any claims *related to any act or omission* that is determined in a Final Order to have constituted willful misconduct, gross negligence, or actual fraud." Plan, Art. VIII.D. (emphasis added); *see also* Plan Art. VIII.E. (carving out "actions determined by a Final Order to have constituted actual fraud or gross negligence" in the exculpation). This broad carveout is not limited to Jackson Walker's acts or

omissions but encompasses claims that are "related to *any* act or omission . . . [that] constituted willful misconduct, gross negligence, or actual fraud." *See* Plan, Art. VIII.D. (emphasis added). The carveout does not state that it applies only to claims "*arising out*" of an act or omission nor only to claims "related to the *exculpated/released party's act or omission*." Rather, the carve-out broadly includes claims *related to any* act or omission that constitutes actual fraud, willful misconduct, or gross negligence—which includes Ms. Freeman's acts and omissions, even if (counterfactually) Jackson Walker did not itself engage in actual fraud, willful misconduct, or gross negligence. *See Bartenwerfer v. Buckley*, 598 U.S. 69, 80 (2023) (holding that a debtor's debt that was obtained through her partner's fraudulent acts were nondischargeable because the language of the statute "focuses on an event that occurs without respect to a specific actor, and therefore without respect to any actor's intent or culpability.") (internal quotations omitted).

i. Ms. Freeman's Alleged Conduct Constitutes Actual Fraud, Willful Misconduct, and Gross Negligence.

144. Ms. Freeman's conduct constitutes, at the very least, gross negligence and willful misconduct. Under Texas law, willful misconduct is "generally equated with gross negligence," which has two elements. *Fath v. CSFB 1999-C1 Rockhaven Place Ltd. P'ship*, 303 S.W.3d 1, 6 (Tex. App.—Dallas 2009). "First, viewed objectively from the actor's standpoint, the act or omission complained of must depart from the ordinary standard of care to such an extent that it creates an extreme degree of risk of harming others." *Id*.

145. As an experienced bankruptcy professional, Ms. Freeman was aware of the risks of violating disclosure obligations and requirements to be disinterested and conflict free—and to remain so throughout the case—under the Bankruptcy Code and Rules and the Disciplinary Rules consistent with her professional and fiduciary duties. Indeed, failing to disclose a conflict of interest can be considered willful misconduct rendering a release or exculpation inapplicable. *See,*

e.g., *eToys, Inc.*, 331 B.R. at 187 ("The allegations in Alber's Motions are, however, that the parties had actual conflicts of interest which they knowingly failed to disclose at the time of their retention and throughout the case. If this is true, the Court concludes that the exculpation clause would not protect the Respondents because it constitutes willful misconduct."); *In re New River Dry Dock, Inc.*, 451 B.R. 586, 589–90 (Bankr. S.D. Fla. 2011) ("It would be improper to allow fees which were obtained through dishonesty and non-compliance with the Bankruptcy Code only because a plan has been confirmed. This is especially true where, as here, the confirmed Plan specifically carves out an exception to the clause releasing pre-confirmation professionals for 'gross-negligence or willful misconduct.'"), *aff'd sub nom*. *Denison v. Marina Mile Shipyard, Inc.*, No. 10-62522, 2012 WL 75768 (S.D. Fla. Jan. 10, 2012), *aff'd sub nom*. *New River Dry Dock, Inc.*, 497 F. App'x at 888. *Cf. Pearson v. First NH Mortg. Corp.*, 200 F.3d 30, 41 (1st Cir. 1999) (holding that, given that the release would protect attorneys from malpractice claim arising from undisclosed conflict of interest, "release provision itself may constitute probative evidence of a fraudulent intent" that would justify vacating an order under Rule 60(b)).

146. Ms. Freeman's alleged actions here may also constitute actual fraud. Under Texas law, common law fraud has the following elements: (1) that a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the intent that the other party should act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury. *See Hill v. New Concept Energy, Inc.* (*In re Yazoo Pipeline Co.*), 459 B.R. 636, 650 (Bankr. S.D. Tex. 2011) (quoting *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 758 (Tex. 2001)).

147. By failing to disclose publicly her relationship in this matter, Ms. Freeman misled parties in interest just as if she had made an affirmatively fraudulent statement. *See United States v. Gellene*, 182 F.3d 578, 587 (7th Cir. 1999) ("[T]he omission of material information in a bankruptcy filing impedes a bankruptcy court's fulfilling of its responsibilities just as much as an explicitly false statement.") (quotation marks omitted) (affirming attorney's conviction for bankruptcy fraud). When Ms. Freeman omitted this material information and did not cause Jackson Walker to make a disclosure about her relationship, she knew or should have known that parties in interest, including the U.S. Trustee, would rely on the incomplete representation and not object to Jackson Walker's retention and compensation based on its false disclosure.

148. Moreover, Ms. Freeman's alleged actions were a fraud on the Court. "To establish fraud on the court, 'it is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision.'" *First Nat'l Bank of Louisville v. Lustig*, 96 F.3d 1554, 1573 (5th Cir. 1996) (quoting *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978)). Ms. Freeman's concealment of her financial and romantic co-habiting relationship with Judge Jones was "designed to improperly influence the court." *See Lustig*, 96 F.3d at 1573. Although the Fifth Circuit has stated that "nondisclosure to the court of facts allegedly pertinent to the matter before it will not ordinarily rise to the level of fraud on the court," *id*., this is no ordinary case. It involves not just the failure to disclose a material fact, but the nondisclosure by an estate-paid professional and officer of the Court of a romantic relationship with the presiding judge that would either require his recusal or preclude her firm's retention.

149. Disclosure and transparency by all participants in the bankruptcy process are fundamental tenets, and unremarkably courts have found that bankruptcy professionals' failure to disclose a disqualifying connection is a fraud upon the court. *See Pearson*, 200 F.3d at 35–41

(holding that attorney's false disclosure which denied any connection with creditors could support a finding that attorney had committed a fraud on the court); *eToys, Inc.*, 331 B.R. at 188 ("In this case it is alleged that the professionals did not disclose conflicts of interest that would have barred their retention. If this is true, it would constitute a fraud on the Court warranting relief even though more than a year has passed since the professionals were retained and their fees approved."); *Benjamin's-Arnolds, Inc.*, 1997 WL 86463, at *9 ("[T]he Court concludes that an attorney's intentional failure to disclose a conflict of interest in violation of § 327 and Rule 2014 amounts to fraud upon the bankruptcy court and an abuse of the judicial process.").

150. Accordingly, the relief sought by the U.S. Trustee is "related to" an "act or omission [of Ms. Freeman] . . . [that] constituted willful misconduct, gross negligence, or actual fraud," Plan, Art. VIII.D.; *see also* Plan, Art. VIII.E., and thus, it is subject to the carveout in the Plan's nondebtor releases and exculpations.

151. The full scope, veracity, and significance of the alleged misconduct will be further understood once the U.S. Trustee completes discovery.

ii. Jackson Walker's Actions Also Constitute Actual Fraud, Willful Misconduct, or Gross Negligence.

152. The U.S. Trustee's motions also are carved out of the exculpations and releases because Jackson Walker's conduct constitutes actual fraud, willful misconduct, or gross negligence. Jackson Walker failed to disclose its connection to Judge Jones both at the outset of this case and on an ongoing basis as the Bankruptcy Rules require, which resulted in willful misconduct, gross negligence, and fraud, just as Ms. Freeman committed. *See supra* Part II.C.2–3. Jackson Walker contends that it lacked the "actual" knowledge required for establishing actual fraud, willful misconduct, or gross negligence before March 2022. This brushes aside Jackson Walker's admitted knowledge of Ms. Freeman's past relationship with Judge Jones since March

2021. Even if Jackson Walker's claims of ignorance are true, Ms. Freeman's knowledge of her relationship is imputed to the firm, regardless of whether or when any other members of the firm learned of the relationship. *See supra* Part II.C.1.a–b. Thus, the knowledge requirements for claims regarding actual fraud, willful misconduct and gross negligence are met.

d. The U.S. Trustee Does Not Seek to Modify the Plan or Confirmation Order.

153. Jackson Walker argues that section 1144 bars the U.S. Trustee's requested relief but misreads the applicable Fifth Circuit law. First, the debtor releases, the nondebtor releases, and the exculpations do not apply to the U.S. Trustee, as explained above. *See supra* Part II.G.2.b–c. As a result, the Plan and Confirmation Order are not disturbed through the exclusion of the U.S. Trustee's motion in this matter.

154. Second, even if the Court finds that any release applies to the relief sought in the U.S. Trustee's motion, it is unenforceable under Fifth Circuit law without the need for modification of the Plan and are not subject to res judicata. The Fifth Circuit holds that "§ 524(e) categorically bars third-party exculpations absent express authority in another provision of the Bankruptcy Code." *NexPoint Advisors, L.P. v. Highland Cap. Mgmt., L.P.* (*In re Highland Cap. Mgmt., L.P.*), 48 F.4th 419, 436 (5th Cir. 2022) (citing *Bank of N.Y. Tr. Co. v. Off. Unsecured Creditors' Comm.* (*In re Pac. Lumber Co.*), 584 F.3d 229, 252–53 (5th Cir. 2009)), *petitions for cert. filed*, No. 22-631 (Jan. 5, 2023) and No. 22-669 (Jan. 16, 2023). *See also Purdue*, slip op. at 19 (holding that "the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants"); *QuarterN. Energy LLC v. Atl. Maritime Servs. LLC* (*In re Fieldwood Energy III LLC*), No. 22-00855, 2023 WL 2142661, at *9 (S.D. Tex. Feb. 16, 2023)

("The Fifth Circuit has repeatedly expressed its aversion to non-debtor releases and permanent injunctions.").

155. The Fifth Circuit has identified only two sources of authority to exculpate nondebtors: (1) the channeling injunction for asbestos claims (*see* 11 U.S.C. § 524(g)) and (2) the "limited qualified immunity to creditors' committee members for actions within the scope of their statutory duties" (*see* 11 U.S.C.§ 1103(c)). *See Highland Cap. Mgmt*., 48 F.4th at 437. Neither exception applies to estate-paid professionals, such as Jackson Walker. In other words, "precedent and § 524(e) require [that] any exculpation in a Chapter 11 reorganization plan be limited to the debtor, the creditors' committee and its members for conduct within the scope of their duties, 11 U.S.C. § 1103(c), and the trustees within the scope of their duties . . . ." *Id*. at 437. In *Highland Capital Management*, the Fifth Circuit held that "the exculpation of non-debtors here was unlawful" and struck other nondebtor exculpations from the plan, including "professionals retained by Highland Capital and the Committee . . . ." *Id*. at 438. *See also Bouchard v. Bouchard Transp. Co.* (*In re Bouchard Transp. Co.*), No. 21-2937, 2023 WL 1797907, at *3 (S.D. Tex. Feb. 7, 2023) (remanding the case to the bankruptcy court to modify a confirmed plan by striking nondebtors from the exculpation in accordance with *Highland Cap. Mgmt*.).

156. The Fifth Circuit has declined to apply res judicata to releases that are contrary to section 524, making it irrelevant that a plan was confirmed and became effective. Despite Jackson Walker's attempt to distinguish the case, the Fifth Circuit's decision in *Applewood Chair Co. v. Three Rivers Planning & Development District* (*In re Applewood Chair Co.*,) is instructive. 203 F.3d 914 (5th Cir. 2000). In that case, the bankruptcy court confirmed a plan of reorganization with nondebtor releases benefiting "[the debtor's] officers, directors and principals from any debt owed by those individuals to third parties." *Id.* at 917. After confirmation, a creditor began

foreclosure proceedings against the guarantors' real property when the purchasers that had assumed the original debt defaulted. *Id.* The guarantors notified the creditor that the claims were discharged under the plan, so the creditor sought clarification on whether the nondebtor claims had been released under the plan. *Id.*

157. On appeal, the Fifth Circuit acknowledged that it had previously held that "the confirmation of a clear and 'unambiguous plan' of reorganization that 'expressly released' a third-party guarantor has a res judicata effect on a subsequent action against the guarantor who is also a creditor." *Id.* at 918 (quoting *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1049–50 (5th Cir. 1987)).[24] But unlike *Shoaf* where there was an explicit release of a specific party for a specific guaranty, the debtor's plan contained only a general release for third parties. Ultimately, the court decided that it would be guided by the "general rule codified in § 524" that the discharge of a debtor does not affect the liability of any other entity and that the "abrogation of the general rule codified in § 524" could only occur if there were "specific" language releasing the nondebtor. 203 F.3d at 919–20. Moreover, despite Jackson Walker's assertion that *Applewood Chair's* reasoning only applies to the release of guarantor claims (*see* JW Opp. at ¶¶ 96–97), courts have declined to enforce other provisions in confirmed plans that were contrary to governing law. *See also Hernandez v. Larry Miller Roofing, Inc.*, 628 F. App'x 281, 287–88 (5th Cir. 2016), as revised (Jan. 6, 2016) (holding that the release provisions were "generic" and "not sufficiently specific to release claims" against a corporate officer and that res judicata did not apply); *Enter. Fin. Grp. v.*

[24] As the Fifth Circuit stated in *Applewood Chair*, the decision in *Shoaf* was limited. *See* 203 F.3d at 918. Indeed, unlike in *Applewood Chair* and this case, the nondebtor release in *Shoaf* contained a "specific paragraph for the release of Shoaf's guaranty" and "omitted a paragraph that provided a general release for non-debtors." *Id.* at 919. In this case, both the exculpations and nondebtor releases are general and release numerous nondebtors without naming specific parties. Thus, *Shoaf* is inapposite.

Curtis Mathes Corp., 197 B.R. 40, 46 (E.D. Tex. 1996) (declining to apply res judicata to a confirmed plan's retention of jurisdiction provision that was contrary to the Bankruptcy Code and never appealed).

158. Here, the language in the nondebtor releases and exculpations is generic, releasing Jackson Walker:

> from any and all any and all Claims, interests, obligations, rights, suits, damages, Causes of Action, remedies, and liabilities whatsoever. . . based on or relating to, or in any manner arising from . . . the Debtors, the purchase, sale, or rescission of the purchase or sale of any security of the Debtors or the Wind-Down Debtors, the subject matter of, or the transactions or events giving rise to, any Claim or Interest that is treated in the Plan, the business or contractual arrangements between any Debtor and any Released Party, the Debtors' in- or out-of-court restructuring efforts, intercompany transactions, the Debtors' capital structure, management, ownership, or operation thereof, the Prepetition Financing Documents or any draws thereunder, the Restructuring Transactions, the sale and marketing process, the Store Closing Sales, the Wind Down, the Chapter 11 Cases, the formulation, preparation, dissemination, negotiation, filing, or consummation of the Disclosure Statement, the Sale Transaction, the Plan . . . or any Restructuring Transaction, contract, instrument, release, or other agreement or document created or entered into in connection with the Disclosure Statement, or the Plan, the filing of the Chapter 11 Cases, the pursuit of Confirmation, the pursuit of Consummation, the administration and implementation of the Plan, including the issuance or distribution of securities pursuant to the Plan, or the distribution of property under the Plan or any other related agreement, or upon any other related act or omission, transaction, agreement, event, or other occurrence taking place on or before the Effective Date or relating to any of the forgoing.

See Plan, Art. VIII.D;

> from, any liability to any Holder of a Cause of Action, Claim, or Interest for any postpetition act or omission in connection with, relating to, or arising out of, the Chapter 11 Cases, consummation of the Sale Transaction, the formulation, preparation, dissemination, negotiation, filing, or consummation of the Disclosure Statement, the Plan, or any Restructuring Transaction, contract, instrument, release or other agreement or document created or entered into in connection with the Disclosure Statement or the Plan, the filing of the Chapter 11 Cases, the pursuit of Confirmation, the pursuit of Consummation, the administration and implementation of the Plan, including the issuance of securities pursuant to the Plan or the distribution of property under the Plan or any other related agreement . . . negotiations regarding or concerning any of the foregoing, or the administration of

> the Plan or property to be distributed hereunder, except for actions determined by a Final Order to have constituted actual fraud or gross negligence. . . .

See Plan, Art. VIII.E. To the extent the releases can be applied to the U.S. Trustee, they are not sufficiently specific to release Jackson Walker here.

e. Equitable Estoppel Precludes Jackson Walker's Defenses Due to Its Ongoing Failures to Disclose and Continuing Misrepresentations.

159. "Estoppel is an equitable doctrine invoked to avoid injustice in particular cases." *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 59 (1984). It applies where "one person makes a definite misrepresentation of fact to another person having reason to believe that the other will rely upon it and the other in reasonable reliance upon it does an act. . . ." *Id.* (quoting Restatement (Second) of Torts § 894(1) (1979) (the "Restatement of Torts")). *See also Lovett v. Cardinal Health, Inc.* (*In re Diabetes Am., Inc.*), 485 B.R. 340, 356 (Bankr. S.D. Tex. 2012) ("The elements of equitable estoppel in the Fifth Circuit are: '(1) a material misrepresentation (or concealment), (2) made with actual or constructive knowledge of the true facts, (3) with intent that the misrepresentation be acted upon by (4) a party without true knowledge or means of knowledge of the true facts, (5) who detrimentally relies or also acts on the misrepresentation.'"). "[T]he party claiming the estoppel must have relied on its adversary's conduct 'in such a manner as to change his position for the worse' and that reliance must have been reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading." *Heckler*, 467 U.S. at 59 (citations omitted).

160. Estoppel "does not require any intent to deceive by the party to be estopped." *Minard v. ITC Deltacom Commc'ns, Inc.*, 447 F.3d 352, 358–59 (5th Cir. 2006) (citing the Restatement of Torts § 894(1)). Estoppel "is appropriate even where 'the one making the representation believes that his statement is true,'" and even if "the person making the representation exercised due care in making the statement." *Id.* (quoting the Restatement of Torts

and citing *Heckler* for the proposition that "[i]n adopting the Restatement's estoppel principles, the Supreme Court evidently intended that they should be read and applied in light of the Restatement's explanatory provisions").

161. Here, all the elements of equitable estoppel are met. Jackson Walker's failure to disclose the relationship between Judge Jones and Ms. Freeman was material, and Jackson Walker was deemed to have actual knowledge of this fact through its agent, Ms. Freeman. S*ee supra* Part II.C.1.a–b. Discovery will establish whether Ms. Freeman and Jackson Walker intended for other parties to act or not to act on this omission. But the omission caused the U.S. Trustee and parties in interest not to act: they did not object to Jackson Walker's retention and compensation based on the lack of disinterestedness because they did not know this material fact and could not have known due to the secretive nature of the relationship. Thus, Jackson Walker is equitably estopped from relying on exculpations and releases that it obtained through materially deficient disclosures and misleading representations about conflicts and disinterestedness.

f. Jackson Walker May Not Rely on the Exculpations and Releases Because It Has Unclean Hands.

162. The Supreme Court recognizes the "equitable maxim that 'he who comes into equity must come with clean hands.'" *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945). The "unclean hands" doctrine "is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant." *Id*. "That doctrine is rooted in the historical concept of courts of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith." *Id*. And as the Fifth Circuit has long recognized, "[b]ankruptcy courts are courts of equity." *Nikoloutsos v. Nikoloutsos* (*In re Nikoloutsos*), 199 F.3d 233, 236 (5th Cir. 2000).

163. Equity requires that a litigant "shall have acted fairly and without fraud or deceit as to the controversy in issue." *Precision Instrument*, 324 U.S. at 814–15 (citing *Keystone Driller Co. v. Gen. Excavator Co*., 290 U.S. 240, 245 (1933); *Johnson v. Yellow Cab Transit Co*., 321 U.S. 383, 387 (1944); 2 John Norton Pomeroy & Spencer W. Symons, Equity Jurisprudence §§ 397–99 (5th ed. 1941); *see also Henderson v. United States*, 575 U.S. 622, 625 n.1 (2015) ("The unclean hands doctrine proscribes equitable relief when, but only when, an individual's misconduct has 'immediate and necessary relation to the equity that he seeks.'") (internal citation omitted).

164. A litigant's "misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character" for the unclean hands doctrine to apply. *Precision Instrument*, 324 U.S. at 815. Rather, "[a]ny willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause" to invoke the doctrine. *Id.*

165. And the Supreme Court has held that the unclean hands doctrine is of greater importance where a suit concerns public interests as well as private interests of litigants. *Id*. This is because, "if an equity court properly uses the [unclean hands] maxim to withhold its assistance in such a case it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public." *Id*.

166. The Fifth Circuit has applied the unclean hands doctrine against claims that do not arise in equity. *Kuehnert v. Texstar Corp.*, 412 F.2d 700, 704 (5th Cir. 1969) (holding that the doctrine "expresses a general principle equally suited to damage actions"). In *Kuehnert*, the Fifth Circuit held that unclean hands precluded a plaintiff's recovery in a securities fraud action where the plaintiff purchased stock based on false insider information rather than disclosing information as required by statute. *Id*. The Fifth Circuit determined that policy concerns supported applying

unclean hands under those circumstances because it better promoted "the objective of the securities laws by increasing the protection to be afforded the investing public." *Id.*; *accord James v. DuBreuil*, 500 F.2d 155, 160 (5th Cir. 1974).

167. Bankruptcy courts likewise have held that violations of disclosure requirements constituted unclean hands. *See, e.g.*, *In re Riley*, 486 B.R. 711, 716–18 (Bankr. D.S.C. 2013) (holding that the debtor's failure to truthfully disclose the extent of his assets warranted denial of his homestead and wildcard exemptions under the unclean hands doctrine); *In re Lafferty*, 469 B.R. 235, 246 (Bankr. D.S.C. 2012) ("Debtors both have unclean hands as a result of their conduct in and relating to this bankruptcy proceeding and should not be entitled to benefit from their wrongful conduct by recognition of a homestead exemption . . . .").

168. Every aspect of this litigation is rooted in the fact that Jackson Walker behaved without clean hands. Jackson Walker omitted material facts and violated disclosure obligations, putting the perceived fairness of the judicial system in jeopardy. The relationship at the center of this problematic behavior has already resulted in a Fifth Circuit Ethics Complaint against a bankruptcy judge who then resigned. The lack of disclosure and disregard for the requirements of the Bankruptcy Code and Rules, Disciplinary Rules, and Local Rules constitute "unclean hands" directly related to the relief Jackson Walker now seeks—*preemptive* immunity from liability based on releases and exculpations. The Court should not condone such behavior by permitting Jackson Walker to rely on releases and exculpations that it obtained through inequitable conduct.

III. CONCLUSION

WHEREFORE, the U.S. Trustee respectfully requests that the Court overrule Jackson Walker's objections and (1) vacate the orders approving Jackson Walker's employment and granting Jackson Walker's interim and final fee applications, (2) sanction Jackson Walker for its violations of the Bankruptcy Code, Bankruptcy Rules, their fiduciary duties, the Local Rules, and

the Disciplinary Rules by ordering the return of any paid fees and expenses, and (3) grant such other and further relief as this Court deems just and appropriate.

Date: July 1, 2024

Respectfully Submitted,

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

By: */s/ Millie Aponte Sall*

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EXHIBIT 1

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

MICHAEL D. VAN DEELEN,	*	No. 4:23-CV-3729
Plaintiff,	*	
v.	*	JUNE 6, 2024
DAVID R. JONES,	*	
ELIZABETH CAROL FREEMAN,	*	
JACKSON WALKER, LLP,	*	
KIRKLAND & ELLIS, LLP,	*	
KIRKLAND & ELLIS INTERNATIONAL, LLP,	*	
Defendants.	*	DEL RIO, TEXAS

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE ALIA MOSES
CHIEF UNITED STATES DISTRICT JUDGE
FOR THE WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

Proceedings recorded by mechanical stenography. Transcript produced by Computer-Aided transcription.

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* * * * * *

(2:04:29 P.M., START TIME)

THE COURT: Okay. DR -- well, actually, no. This is a Houston case. It's 4:23-CV-3729, Deelen versus Jones.

Announcements.

MR. WEST: Your Honor, Mikell West on behalf of Plaintiff Michael Van Deelen, here with co-counsel Robert Clore, Anne Johnson, and Mike Bagley.

THE COURT: Okay.

MS. BREVORKA: Good afternoon, Chief Judge Moses. Jennifer Brevorka and Rusty Hardin on behalf of Defendant Jackson Walker.

THE COURT: Okay.

MR. KIRKENDALL: Good afternoon, Your Honor. Tom Kirkendall on behalf of Elizabeth Freeman.

MR. SPARACINO: Good afternoon, Your Honor. John Sparacino on behalf of Defendant David Jones.

MR. HUESTON: Good afternoon, Your Honor. John Hueston and Michael Todisco of Hueston Hennigan on behalf of Kirkland and Ellis.

THE COURT: Okay. This is on the motions to dismiss. We have --

MR. BECK: Your Honor, there's one more.

THE COURT: Oh, I'm sorry. Go ahead.

MR. BECK: David Beck with Beck Redden in Houston, on behalf of two Kirkland defendants. Also Geoff Gannaway and

Jackie Furlow with our firm.

THE COURT: Okay. And I do -- I have all of those names here before me.

Now, I know that we have -- all of the parties on the defense side have essentially the same arguments on the motions to dismiss, and then there is a separate argument on the motion to dismiss that isn't available to all of the defendants. So how do you want to proceed? Do you want to do the joint matter first?

MR. WEST: Your Honor, certainly we're amenable to the Court's direction in -- in that regard. I would suggest -- I believe that the most discrete issue before the Court is the -- the issue of immunity that is available to -- to Judge Jones, the defendant. I think getting that one first and -- and taken care of. And then in response, the Court is -- is correct, I believe that a -- a lot of the issues, although not -- not --

THE COURT: Not identical.

MR. WEST: -- identical --

THE COURT: They're not identical.

MR. WEST: -- they overlap.

THE COURT: Uh-huh.

MR. WEST: I would propose in -- in the interest of the Court's time, even allowing Ms. Freeman, Kirkland & Ellis, and Jackson Walker to argue their motions, I would provide a response jointly to Jackson Walker and Kirkland & Ellis.

Mr. Clore will provide a response to Ms. Freeman, and then allow for their rebuttal. I think that would save a lot of -- of repetition.

THE COURT: Well, that's -- that had been my thought yesterday as well, is basically have the similar issues argued at one time, and then the one discrete element.

All right. This being motions to dismissed filed by the defense, you proceed first.

Let's start with that one issue. Go ahead.

MR. SPARACINO: Yes. Thank you, Your Honor.

And Your Honor, may it please the Court, John Sparacino from the law firm of McKool Smith on behalf of Defendant David Jones.

THE COURT: Uh-huh.

MR. SPARACINO: Our motion to dismiss, Your Honor, as noted, is solely premised on the basis that the plaintiff's claims against Jones must be dismissed on judicial immunity grounds. Our motion and our reply to the plaintiff's response favorably cite to multiple Supreme Court cases and multiple Fifth Circuit cases. From these cases, I'd like to reiterate a few fundamental judicial immunity points.

First, judges are afforded absolute immunity from suits for monetary liability from their judicial acts.

Second, judicial immunity is not overcome by allegations of bad faith or malice or corruption.

Third, judicial immunity applies to any theory of liability and any cause of action. There is no special carve-out for any cause of action, including RICO claims or *Bivens* claims, or any of the other plaintiff's claims in this case.

THE COURT: So let me ask you a question, counsel, because I'm looking at the statute for recusal. And it basically doesn't talk about recusal, it talks about disqualification.

So at the beginning of these proceedings, isn't there an automatic disqualification?

MR. SPARACINO: Your Honor, the disqualification under Bankruptcy Rule 5004 --

THE COURT: How about under 28 U.S.C. 455(b)?

MR. SPARACINO: That's correct, Your Honor. 5004 loops in Section Five -- 455.

THE COURT: Uh-huh.

MR. SPARACINO: That is a decision for the judge to make on the disqualification.

THE COURT: This says, He shall also disqualify himself -- it doesn't make it sound discretionary. It says "shall" -- in the following circumstances. And one of them is related to the -- it being in a -- in a relationship to the third degree of certain people.

MR. SPARACINO: Your Honor, I don't dispute what the

statute says, but --

THE COURT: Okay. So at that point does it deprive him of any jurisdiction as a -- as a presiding judge?

MR. SPARACINO: No, it does not, Your Honor. And I --

THE COURT: Why not --

MR. SPARACINO: -- and I think we make --

THE COURT: -- if he "shall" disqualify?

MR. SPARACINO: Pardon me?

THE COURT: If you -- why not since it says you "shall disqualify"? It is not -- it is not permissive, it's mandatory.

MR. SPARACINO: I think we make -- we address that point in our reply, Your Honor, with the -- specifically with the Fifth Circuit's *U.S. v. Jordan* case. And there the Fifth Circuit found that the trial judge abused her discretion by not disqualifying herself.

THE COURT: But for what reason?

MR. SPARACINO: Your Honor, I believe it was the -- the identification of -- or the disclosure of interests in relationships -- or, excuse me, disqualification on those bases.

THE COURT: On the same basis?

MR. SPARACINO: I don't know if they were ident -- I don't recall if they're identical --

THE COURT: Okay.

MR. SPARACINO: -- basis to what we're facing here, Your Honor.

THE COURT: Okay. Okay. Go ahead.

MR. SPARACINO: I do not know that. But there the trial judge, even after what was determined to be a wrongful decision to not disqualify under 455, conducted a criminal trial; that trial resulted in a criminal conviction. And -- and the Fifth Circuit did not upset that trial conviction, so plainly there was no loss of all jurisdiction.

And remember, for immunity purposes, the language is very clear. It is the clear absence of all jurisdiction. So even -- even exceeding jurisdiction doesn't strip all jurisdiction for immunity purposes. So, it --

THE COURT: I'll be honest, counsel, I have a little bit of a problem with that theory.

MR. SPARACINO: Pardon me?

THE COURT: I have a little bit of a problem with that theory. I'll be real honest.

MR. SPARACINO: How -- how --

THE COURT: And mainly -- and mainly because if you don't know at the very beginning of the case whether you shall disqualify yourself and you're -- you're legally incompetent to preside over a matter, I don't know what is.

MR. SPARACINO: Again, Your Honor, I -- I would refer to the *U.S. v. Jordan* case --

THE COURT: Okay.

MR. SPARACINO: -- where, again, the Fifth Circuit

found that the judge should have disqualified herself, found that she abused her discretion by not. And again, 455 is a --

THE COURT: But this isn't discretionary. A "shall" is not discretionary.

MR. SPARACINO: But 455 is still a decision for the judge to make.

THE COURT: So what decision should they make if it says he "shall disqualify himself"?

MR. SPARACINO: Well, Judge --

THE COURT: What's the decision there?

MR. SPARACINO: But there -- there is still decision-making that goes into determining whether there are relationships or financial interests that trigger the disqualification requirement or obligation. And that's a judicial decision. That in itself is a judicial act. That in itself is a decision that's entitled to immunity. Right or wrong. So that decision's entitled to immunity.

And the case law instructs that even getting that decision wrong, even being incorrect on failing to recuse, doesn't strip it of all jurisdiction.

And again, it's a -- it's a high bar for -- for immunity purposes as to when the judge loses all jurisdiction or -- or is in the absence of all jurisdiction.

THE COURT: Okay. And I understand in the situation where, say, you don't realize that you have a financial interest

in a company that somehow now a party is before you that has some kind of connection to that company. You find out after the fact. Oh, okay, we got a problem here. Understood.

But in a situation where you know it at the beginning of a case? And -- and you absolutely know it. There is no -- there is no doubt as to the facts. At that point, what part of you "shall disqualify yourself" is permissive?

MR. SPARACINO: Your Honor, again, whether the decision is rightly or wrongly made -- so even if David Jones was wrong not to disqualify himself from the McDermott case --

THE COURT: Uh-huh.

MR. SPARACINO: -- that decision is entitled to immunity, and that decision does not strip him of all jurisdiction for the remainder of the McDermott bankruptcy case. He -- he may be acting in excess of jurisdiction, but the case law instructs that that doesn't strip him for immunity purposes of all jurisdiction.

THE COURT: So I understand it doesn't strip jurisdiction. This was properly a matter in a bankruptcy court. But does a judge who is disqualified have the authority to rule? Authority versus jurisdiction.

MR. SPARACINO: The immunity case law somewhat touches on that question, somewhat touches on that issue, and -- and it's whether a judge is exceeding his or her authority. But again, the -- the linchpin for immunity purposes is a complete

absence of all jurisdiction. Had he -- the case -- the Fifth Circuit case law instructs even had he disqualified himself --

THE COURT: Uh-huh.

MR. SPARACINO: -- subsequently, while he should not make any further rulings or any further -- take any further action in the case, doing so -- even doing so in the face of a recusal is not -- does not call for all of his subsequent decisions to be undone.

THE COURT: I'm not -- and I'm not suggesting that. I'm not suggesting in terms of whether the decisions in the cases were -- should be undone. That's not an issue before the Court, directly at this point.

The question is whether -- let's assume for a moment I know I'm related to an attorney in this case by the third degree of the relationship, I preside over it knowing that, somebody files a motion and nobody looks into it, and so the issue is just washed over. So at that point -- I just -- I read 455 where it says you "shall disqualify yourself as a judge," as giving no discretion whatsoever at that point.

It's a "shall." Not a "may." But "shall."

Now, I get that in hindsight the Fifth Circuit says it's an abuse of discretion type of -- of a standard. I understand that. But my question is, doesn't that do away with the "shall disqualify" language?

MR. SPARACINO: Your Honor, "shall disqualify,"

there -- they're -- again, there's still -- a judge has to look at 455 --

THE COURT: Uh-huh.

MR. SPARACINO: -- and a judge has to determine there is just --

THE COURT: Well, what's a question here factually that would -- would require determination other than "shall disqualify"? Factually here, what is -- what is the -- the matter that would say, Well, maybe at the time it wasn't known, and maybe it was known, maybe it was, maybe it wasn't?

MR. SPARACINO: Well, I think --

THE COURT: Something along those lines.

MR. SPARACINO: Judge, I think the --

THE COURT: But at this point if it's -- if it's a hard and fast that it falls under one of the subsections, what is discretionary about "shall disqualify"?

MR. SPARACINO: Judge, I think the Fifth Circuit's complaint against Judge Jones that was initiated shortly after the disclosure came out is instructive there because they -- they had to delve into whether a non-spouse, whether an intimate co-habitation --

THE COURT: Uh-huh.

MR. SPARACINO: -- relationship triggered 455. So, I -- I think that right there, the fact that --

THE COURT: But that wasn't squarely before the -- the

judicial counsel and the chief judge. It was more of an appearance issue; was it not?

MR. SPARACINO: Yes. Yes, fair enough. But, again --

THE COURT: Because that body wouldn't be in a position to make this type of a determination.

MR. SPARACINO: But I -- again, I -- Your Honor, I hate to belabor the point, but it --

THE COURT: No, that's fine. Go ahead and belabor it.

MR. SPARACINO: It -- it does still loop back to the fact that -- in -- in looking at 455 --

THE COURT: Uh-huh.

MR. SPARACINO: -- a judge determines whether or not 455 applies to him or her. And -- and that's a judicial act for immunity purposes. So that decision's protected. And then, again, Fifth Circuit case law tells us that making -- being wrong in that decision and whether you think it's a 100 percent, by God, he should have made this decision; or it's a 50/50 close call.

I -- I'm not quibbling with that -- that issue, Judge. But the -- the jurisdiction is not completely stripped so as to strip the protection of immunity for things he may do now in excess of his jurisdiction or in excess of his authority. He has not been stripped clearly of all jurisdiction going forward for things done in the Dermott -- McDermott bankruptcy case.

THE COURT: I guess I look at it -- I look at "recusal" as being the discretionary word, and "disqualification" as being -- the only legally competent thing we can do is enter an order to get off a case. We'd have the jurisdiction to do that, to say, I can't preside over this case. I'm disqualified.

So I see what you're saying about jurisdiction. But my question is, I guess at that point, may be more of bad judgment as opposed to immunity.

MR. SPARACINO: And -- and, Your Honor, that's -- I'm not going to push back against that characterization. A decision was made, and right or wrong -- obviously a lot of people believe the wrong decision was made. But right or wrong, immunity still exists. And -- and I'll note that -- by the way, the plaintiff has not cited to a single case for the proposition that getting that decision wrong strips the judge of all future -- strips the judge of jurisdiction for all future matters in that case for immunity purposes. For immunity purposes.

The -- the plaintiff cites to a number of cases that are Texas constitutional disqualification cases. Those are plainly not applicable here. He does not cite to a single case that says an incorrect 455 decision strips the judge of all jurisdiction for immunity purposes going forward.

THE COURT: All right. So let me ask you a question.

How far does judicial immunity extend if decisions are made outside of the courtroom and chambers?

MR. SPARACINO: It -- it --

THE COURT: It would not, right?

MR. SPARACINO: It -- I -- not necessarily, Judge. I think that --

THE COURT: I thought that's required by the four-step test of judicial immunity.

MR. SPARACINO: Well, it's a flexible test and --

THE COURT: I don't think it's flexible -- that flexible.

MR. SPARACINO: Well, it -- I -- I guess --

THE COURT: And I -- and I get that part of what the -- part of the muddying of the water here is all of the now remote work, where we can be working from home, making judicial decisions.

MR. SPARACINO: Fair enough. But again, maybe some context, also, because I -- I think in -- in this regard, the *Holloway* case, which we --

THE COURT: You cite. Uh-huh.

MR. SPARACINO: -- address at length in our motion, our -- in our reply --

THE COURT: Uh-huh.

MR. SPARACINO: -- I think it's incredibly instructive for this case. There it was a wide-ranging conspiracy that was

alleged among many people, including a state court judge.

THE COURT: Uh-huh.

MR. SPARACINO: And the allegations in the complaint included allegations of meetings in furtherance of the conspiracy --

THE COURT: Uh-huh.

MR. SPARACINO: -- and of the judge terminating company employees. That the conspiracy resulted in the alleged theft of an oil company in *Holloway*. And the facts alleged including -- included meetings among the conspirators, the judge terminating company employees, the judge posting guards at the company's headquarters. Each of those is plainly, in a vacuum -- I mean, that's not what a judge is supposed to do on a day-in/day-out basis.

THE COURT: Uh-huh.

MR. SPARACINO: But the Fifth Circuit didn't look at each of those acts in a vacuum. The Fifth Circuit looked at, What's the harm? The harm was the oil company was stolen. And how did that happen? It was done by a judge's actions; it was done by things that the judge did as a judge, in his capacity as a judge. And immunity applied.

The Fifth Circuit eve --

THE COURT: But you're also arguing, on the other hand, the plaintiffs only cited state cases, and you're doing that with the *Holloway* case. Wasn't that a state judge work --

working under state law?

MR. SPARACINO: Um --

THE COURT: Didn't you just say it was a state judge in *Holloway*?

MR. SPARACINO: Well, it's a -- it's a Fifth Circuit decision, Your Honor.

THE COURT: I get it, but it's used -- based on state law, right?

MR. SPARACINO: Um, it --

THE COURT: On the state disqualification recusal law.

MR. SPARACINO: No. No, no, no. No, Your Honor. No. And it -- that wasn't even a -- that wasn't even -- well, excuse me. The qualification or recusal issue wasn't the key issue there. I -- I'm only talking about the judicial acts overlay of the *Holloway* case right now. I -- from memory, *Holloway* involved a jurisdictional issue in that there had been some state court --

THE COURT: They were relying on the Texas Court of Criminal Appeals, right?

MR. SPARACINO: Or a mandate for him -- for the judge to stay away from all matters with this oil company. But -- and I think that's apples and oranges, Judge. I think the -- the disqualification or recusal issue there is not --

THE COURT: But that judge would not have been under the -- the rulings of -- it wouldn't have been under 455.

MR. SPARACINO: I am not suggesting he was. I -- I --
THE COURT: But you were just saying that plaintiff's cases cannot be relied on because they were based on judges that were not under 455. Didn't you just say that about the plaintiff's case?
MR. SPARACINO: I -- I said that the -- the cases that the plaintiff has cited for --
THE COURT: Were state cases.
MR. SPARACINO: -- the -- the effect of a judge's right to proceed post-recusal or post-disqualification are not on point to immunity.
THE COURT: All right.
MR. SPARACINO: They cite to --
THE COURT: Okay, so the point is the point of disqualification; is it not? Isn't that, then, the key; the point of disqualification?
MR. SPARACINO: I -- I think there's two points because --
THE COURT: Okay.
MR. SPARACINO: -- there are two, and only two, exceptions to immunity; judicial acts, non-judicial acts.
THE COURT: Uh-huh.
MR. SPARACINO: And I think the --
THE COURT: Okay.
MR. SPARACINO: -- with *Holloway* was on that topic.

THE COURT: Okay. But -- but you're saying the -- the -- you look at the -- the acts on pre- and post-disqualification, right?

MR. SPARACINO: For -- for jurisdiction purposes.

THE COURT: Okay.

MR. SPARACINO: For -- that's the --

THE COURT: So the question, then -- one of the main questions is: Then at which point in this case, factually, did we have it clearly that there should have been a disqualification?

MR. SPARACINO: At which point in the present case?

THE COURT: Uh-huh.

MR. SPARACINO: Your Honor --

THE COURT: Based on the facts at are before the Court, because I know I'm limited to what I have.

MR. SPARACINO: Your Honor, again, I -- I'm -- I'm not going to -- Judge Jones --

THE COURT: You're not drawing that line.

MR. SPARACINO: -- Judge Jones may have made an incorrect decision --

THE COURT: No, no. I'm not -- that's not my question. That wasn't my question. My question is: In this particular case, based on these facts, based on the arguments that I have before me, where would that point have been?

MR. SPARACINO: Where would the --

THE COURT: Where would the point of knowing a judge is disqualified. Where -- when would that point have occurred?

MR. SPARACINO: Well, Your Honor, you know what Judge Jones knew in making the decision was at one point in time. And what, maybe, others --

THE COURT: Okay, so what's that point? Where is that point in time? What is it?

MR. SPARACINO: Well, again, Judge Jones knew from day one, Judge. He -- he was always --

THE COURT: Okay, if you know from day one that you're disqualified, that -- or you should be disqualified, or you should disqualify yourself, at that point why doesn't 455 kick in on the mandatory language?

MR. SPARACINO: Your Honor, 455 directs --

THE COURT: It says he shall --

MR. SPARACINO: -- directs a judge to --

THE COURT: -- also disqual -- he "shall also disqualify." It doesn't say "may." It doesn't say in their -- "in their discretion." It says "shall." That's mandatory. That is not a discretionary action. "Shall disqualify himself in the following circumstances."

Now, I get, frankly, in subsection (1) where it says -- talks about personal bias and prejudice or whatever. That's kind of -- you don't know when that's going to happen in a case, whatever. No problem there. And I realize that there's

where some of the discretion comes in in terms of this -- this particular determination.

But in terms of the provision in this particular case, it's more of a bright-line rule.

MR. SPARACINO: Well -- well, Judge, unfortunately for that position, 455 is not self-implementing. 455 --

THE COURT: No, we have the duty to do it.

MR. SPARACINO: I absolutely agree.

THE COURT: Without discretion.

MR. SPARACINO: But 455 is not self-implemented. It still requires the judge to do it. And until the judge disqualifies himself, he's not disqualified.

THE COURT: Okay. But the point is -- the point is, does it matter? And I -- and I understand what you're arguing, that it doesn't matter. But does it matter if a judge knows they "shall disqualify" themselves and they know the -- the circumstances exist and they don't? You're saying in spite of all of that, they're protected?

MR. SPARACINO: Yes. And -- and disqual --

THE COURT: Do you not have heartburn over that just a little bit?

MR. SPARACINO: I -- Your Honor, I -- the statute, again, is not self-implementing. The -- the statute --

THE COURT: I didn't mean to put you on the hot seat. That's fine. That's fine.

MR. SPARACINO: Fair enough, Judge. I --

THE COURT: I'm just -- I think --

MR. SPARACINO: I am happy to answer your questions and engage in -- in the issue --

THE COURT: And I -- and I realize for all of the parties, I am limited. This being a motion to dismiss, I'm limited to the pleadings. We're not looking outside of the pleadings. So I don't intend to ask a question that's outside of the pleadings, just so that everybody knows. I'm just, as y'all also well know, I have more criminal experience than civil. So I'm trying to make sure that I understand where we are.

MR. SPARACINO: Fair enough.

THE COURT: What -- what else on that point?

MR. SPARACINO: Your Honor, you know, we've gone for a number of minutes. I didn't want to take too much time today. I certainly don't want to rehash what we've stated in our motion and our reply. Obviously, my not speaking as to anything raised in our motion and -- and reply doesn't mean we're waiving those arguments or those positions.

I would like to just wrap up --

THE COURT: Go ahead.

MR. SPARACINO: -- with -- with --

THE COURT: This is just the immunity issue, and I'm going to let everybody have a word. Y'all have all afternoon.

Everybody has all afternoon, so you -- you're not -- no one is limited in terms of their time.

MR. SPARACINO: Fair enough. And -- and, Judge --

THE COURT: And I want to thank everybody for coming all the way to Del Rio, by the way. It gave me a change to sentence -- do some sentencings this morning.

MR. SPARACINO: Well, we -- we appreciate you accommodating us to -- to -- for time today.

THE COURT: I will be heading to Aust -- to Houston to hear some of these matters at some point so that everybody doesn't have to travel here.

MR. SPARACINO: The -- let me just wrap up --

THE COURT: Okay. Go ahead.

MR. SPARACINO: -- with this. As in -- in *Holloway*, it was the end result. It was the conspiracy that was alleged. Excuse me, it was the end result of the experience which was the theft of the oil company that the Fifth Circuit assessed for judicial act purposes.

Here, the plaintiff's case against David Jones comes down to the simple fact that the plaintiff was -- doesn't like what happened in the McDermott Chapter 11 case. That he believed that he was harmed by the result of the McDermott Chapter 11 case. And whether it be the loss of his equity in that case that resulted from that, along with 193 million other shares of common stock; or whether it be the fact that Judge

Jones dismissed the plaintiff's lawsuit against McDermott director officers at the end of that case because that lawsuit filing was violative of the plan that had been confirmed in the -- in the confirmation order; or the fact that the attorneys for the estate got paid for their work in the case; or that the plaintiff had his feelings hurt by the alleged harsh treatment that he allegedly received in Jones' court; all of that, it -- plaintiff's alleged a broad conspiracy theory, that the result of that Chapter 11 case was somehow driven by a corrupt court or by a corrupt process.

And obviously we vehemently deny any such portrayal or any such allegations. But the simple fact is that none of that matters. None of it matters for immunity purposes. Immunity prevails in the face of an allegation of corruption or malice or bad faith. Immunity applies unless there is a clear absence of all jurisdiction.

And -- and as we've gone back and forth, I -- I think you fully understand my position on -- on the intersection of disqualification and the stripping of jurisdiction for immunity purposes.

THE COURT: And -- and I -- I see jurisdiction a little bit broader, in that the matters that were in bankruptcy court were properly before a bankruptcy judge. The -- the Court had jurisdiction. The question is whether or not the judge should have been presiding over it since from day one he was in

a "shall disqualify" position.

And I haven't -- I don't dispute the fact that the matters were properly in the correct court.

MR. SPARACINO: Understand. Understand.

I'll just conclude, Your Honor --

THE COURT: Let me do this. Let me let -- anybody else that wants to speak, the plaintiff, and then I'll let you have rebuttal on the point.

MR. SPARACINO: Thank you so much.

THE COURT: Okay. Defense, anybody on the defense side that wants to address this matter specifically?

MR. KIRKENDALL: Your Honor, not specifically with regard to immunity, but I would -- I do think it would be helpful if I could point out some issues with regard to 455.

THE COURT: Come to the podium, please.

MR. KIRKENDALL: So, Your Honor -- and good afternoon. Tom Kirkendall on behalf of Elizabeth Freeman.

As you might expect, I've thought about this statute a little bit --

THE COURT: Okay.

MR. KIRKENDALL: -- over the last several months, and I think I have a pretty good understanding of it. I've researched it thoroughly.

THE COURT: You'd be -- you'd be one of the few people --

MR. KIRKENDALL: Yeah.

THE COURT: -- not the course.

MR. KIRKENDALL: I understand.

So, I wanted to take you from the top because I think you -- you characterized 455(a) correctly. You "shall" --

THE COURT: It's actually subsection (b).

MR. KIRKENDALL: Yeah. You "shall disqualify" yourself if --

THE COURT: Uh-huh.

MR. KIRKENDALL: -- if you have some bias or something. So you characterized that.

So we go -- we jump down to 455(b), and -- so on 455(b), the applicable section for this proceeding is 455(b)(5).

THE COURT: (b)(5)(ii)?

MR. SPARACINO: Yeah, (b)(5) -- that's correct, (b)(5). Well, it's actually (b)(5), and let's -- we'll just read it for the record. "He shall also disqualify himself in the following circumstances."

THE COURT: Uh-huh.

MR. SPARACINO: "He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person."

THE COURT: Uh-huh.

MR. KIRKENDALL: And then it has the three subsections. Is a party in the proceeding, or an officer, or

director, or a trustee of a party.

(ii) is, Acting as a lawyer in the proceeding.

(iii)is, Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.

So, technically, that provision is not applicable because Ms. Freeman was not Judge Jones' spouse.

THE COURT: But wasn't she a person within at least the third degree of a relationship?

MR. KIRKENDALL: No.

THE COURT: It doesn't say consanguinity or affinity.

MR. KIRKENDALL: Well --

THE COURT: It says relationship.

MR. KIRKENDALL: -- third degree of -- of relationship, I do believe, pertains to relationships. In other words --

THE COURT: Right.

MR. KIRKENDALL: -- familial relationships.

THE COURT: I -- but -- the rules used to be -- and there's some rules that talk about affinity or consanguinity, which require a more formal relationship --

MR. KIRKENDALL: Right.

THE COURT: -- either marriage or blood relationship.

MR. KIRKENDALL: Right.

THE COURT: This doesn't require that type of

relationship.

MR. KIRKENDALL: My understanding of that provision is -- is that it relates to familial relationships.

THE COURT: It doesn't say "familial relationship."

MR. KIRKENDALL: I -- I understand.

THE COURT: It says a -- if it was familial it would say "consanguinity or affinity" --

MR. KIRKENDALL: Right.

THE COURT: -- would it not?

MR. KIRKENDALL: But it -- my point is that I don't think in the context of the statute that --

THE COURT: Okay, so -- so where does it say that it has to be familial?

MR. KIRKENDALL: Well, I believe that's how it's been interpreted. And in the --

THE COURT: By -- by whom?

MR. KIRKENDALL: By courts looking at 455(b).

So, my point to the Court, though, is --

THE COURT: Uh-huh.

MR. KIRKENDALL: -- is that if, again, that is a formal requirement, third degree of relationship, all right, being a -- a girlfriend, for example, of a -- of a judge -- I have never seen it interpreted as that being within a third degree of relationship. So the point --

THE COURT: Okay. So if it's -- so if it's --

"relationship" isn't broader than consanguinity and affinity, why wouldn't it say, Within the third degree of consanguinity or affinity?

MR. KIRKENDALL: That we would have to ask Congress. I don't know. But, Your Honor --

THE COURT: Well, that -- that would be a terrible question to ask them.

MR. KIRKENDALL: Right. I agree.

But I wanted to -- so, from -- but I did want to point that out to the Court because it was not clear from Mr. Sparacino's preceding --

Ms. Freeman was not the judge's spouse. So, after 455(b)(ii), you drop down to subsection (e), which is an interesting section.

THE COURT: Uh-huh.

MR. KIRKENDALL: Okay. And (e), for the record, says, No justice judge or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b).

THE COURT: Which tells this Court that it's not discretionary --

MR. KIRKENDALL: Correct.

THE COURT: -- it's absolute.

MR. KIRKENDALL: No question about that. That's what that says. Okay.

Where the ground for disqualification arises only under Subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record for the basis for disqualification.

THE COURT: Uh-huh.

MR. KIRKENDALL: So, in the event a judge thinks that he might be -- he or she might be biased under (a), if you make a full disclosure --

THE COURT: Under (a) is not biased. That's (b)(1). Under (a) is where the impartiality may be questioned.

MR. KIRKENDALL: You -- you stated it better than I. If his -- if the judge felt like he was impartial -- impartiality was being compromised, he could move for -- he could request the parties -- or the parties could request a waiver under (e). That's my point.

THE COURT: But that's after full disclosure --

MR. KIRKENDALL: Right.

THE COURT: -- which did not happen --

MR. KIRKENDALL: That's correct.

THE COURT: -- in this case, correct?

MR. KIRKENDALL: That is correct. It did not happen.

THE COURT: Okay. So -- and that's why I see a distinction between (a) and (b); (a) being more of a discretionary with --

MR. KIRKENDALL: Right.

THE COURT: -- full disclosure, whereas (b) is not.

MR. KIRKENDALL: And I want to add a little bit of a wrinkle --

THE COURT: Okay.

MR. KIRKENDALL: -- to this analysis.

THE COURT: All right.

MR. KIRKENDALL: So clearly the -- the -- you know, the question is, is -- okay, is 455(b)(5) applicable? Well, where this -- where this becomes a murkier issue is under the commentary to Canon 3C of the judicial code which states the following: Recusal considerations applicable to a judge's spouse should also be considered with respect to a person other than a spouse with whom the judge maintains both a household and an intimate relationship.

THE COURT: Don't we have those two factors here?

MR. KIRKENDALL: So, my point to you, Your Honor, is -- clearly there was at some point an intimate relationship. And that certainly is the allegation of the plaintiffs.

THE COURT: And the same household, right?

MR. KIRKENDALL: Well, that is not so clear with regard to a household account. A household account means that the husband -- or that the man and the -- and the girlfriend share assets like --

THE COURT: But they did. They owned a home together.

MR. KIRKENDALL: They -- well, that is correct. That

was learned subsequently.

THE COURT: Well, what -- so what I'm saying is, really those two elements are met.

MR. KIRKENDALL: Well, but my point is --

THE COURT: The question is not "if," it's "when."

MR. KIRKENDALL: Yeah. My point is, is that the -- the cases with regard to the household account point to shared assets -- shared assets, shared bank liability, bank accounts --

THE COURT: Wouldn't a share also be a home?

MR. KIRKENDALL: Could be.

THE COURT: Well, don't they have a shared asset in this case? They had a home together.

MR. KIRKENDALL: It could be. I'm not saying that it isn't. But what I'm trying to explain is that there is ambiguity with regard --

THE COURT: No, there's not.

MR. KIRKENDALL: Well, with regard to how the statute is interpreted. It can be interpreted by a judge that, Look, I have a girlfriend, we don't share assets, we don't share liabilities, we don't have any interest in each other's financial affairs.

THE COURT: Uh-huh.

MR. KIRKENDALL: The judge in this case actually bought the home and --

THE COURT: Bought the home of her parents, and then

they bought a home together.

MR. KIRKENDALL: No, that's -- that's incorrect. What they did -- what happened here was, is that the judge bought the house which --

THE COURT: Wasn't that the -- her parents' house?

MR. KIRKENDALL: No. That is not.

THE COURT: Okay.

MR. KIRKENDALL: That is a house that he bought on his own from proceeds from a prior home that he owned. And at closing, he gave Ms. Freeman a joint and survivorship right in that house. Ms. Freeman is the executor of his estate, of his will. And the benefit of a joint and survivorship transfer in that situation is that if Judge Jones were to die, the --

THE COURT: I understand what that is.

MR. KIRKENDALL: Yeah, the prop -- the property would --

THE COURT: Okay, but which property -- house are you talking about?

MR. KIRKENDALL: The Rolla house. It's spelled -- the Rolla house, R-O-L-L-A.

THE COURT: I thought there were two homes that were implicated?

MR. KIRKENDALL: No. That's the only home that they -- that there's a joint ownership in.

THE COURT: Right. One is not an ownership --

MR. KIRKENDALL: Right.

THE COURT: -- but the other one is. You're saying the one that is viewed as joint ownership and is listed as joint ownership on the -- on the records is really a right of survivorship.

MR. KIRKENDALL: That -- well, it -- it's a -- a right of a --

THE COURT: Or -- or a right to -- to have the property.

MR. KIRKENDALL: Yeah. The right of survivorship. The right.

THE COURT: So basically she's the heir in terms of inheriting the house.

MR. KIRKENDALL: Correct. And my point --

THE COURT: So why would that --

MR. KIRKENDALL: -- my only point --

THE COURT: -- why would a person then be listed on appraisal records under that circumstance?

MR. KIRKENDALL: Well, because for record title purposes, she does own an interest in the -- in the house --

THE COURT: They do own --

MR. KIRKENDALL: -- in the property.

THE COURT: -- the home jointly.

MR. KIRKENDALL: That is correct. I'm not disputing that.

THE COURT: Okay.

MR. KIRKENDALL: But the point I'm trying to make is, with regard to 455 is, that there is ambiguity with regard to the statute.

Now, you or I may read that and not believe that it is ambiguous as it -- as it would seem to somebody else. But with regard to a judge who does not have a spouse, and who is looking at this in terms of whether his girlfriend is -- is -- you know, basically a spouse for purposes of 455(b) --

THE COURT: This should have been very clear to any judge, Mr. Kirkendall, quite --

MR. KIRKENDALL: I under -- I understand.

THE COURT: -- quite frankly.

MR. KIRKENDALL: Yeah. But my point to you is, is that I want to make sure that the Court understood the analysis that a judge could have made with regard to a non-spouse girlfriend.

THE COURT: Okay. So, I -- and I understand that. I don't necessarily disagree with the fact that somebody could think along those lines.

MR. KIRKENDALL: Right.

THE COURT: But if -- if you know it's close enough to have to go through the analysis in your mind, let's say, a judge -- not Judge Jones, but say a third judge, any other judge -- you think, Boy, this is a questionable situation.

Wouldn't you at least fall back on subsection (a) that says, Any justice judge or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

And because it can be waived, wouldn't you fully disclose -- disclose everything to the parties and then determine whether they want to waive that particular matter? And if they waive it, it's done. But you had full disclosure.

MR. KIRKENDALL: Right.

THE COURT: Okay.

MR. KIRKENDALL: So, and -- and what you just stated is a very reasonable way to proceed as a judge. But a judge could also, I think, take a look at the statute and say, Well, I'm clearly not -- you know, I'm clearly impartial with regard to this case; I don't have any favoritism for anybody, so (a) isn't applicable.

And really, the question is whether (b) -- 455(b)(5) is applicable. And, again, the only point I'm trying to make is that there's ambiguity with regard to this interpretation and --

THE COURT: Wait. Let me be clear. I don't find ambiguity in the interpretation of the statute. What may be ambiguous is how it would apply to the facts of this case as they proceed.

MR. KIRKENDALL: That may be a better way to put it, but my point is, is that -- and I -- I counsel young lawyers

with regard to this all the time. It is difficult sometimes, particularly in a high profile case, to remove oneself from hindsight bias in terms of, you know, All right, this is what I would have done in this situation.

THE COURT: Uh-huh.

MR. KIRKENDALL: And my point is, is that you can't do that. That's hindsight bias. You have to put yourself in the place of the judge at the time, looking at --

THE COURT: But you've got to --

MR. KIRKENDALL: -- looking --

THE COURT: But one thing that we all know is we have a very highly qualified person wearing the robe in this case that would -- that would be able to look at these facts and make a determination. At the very minimum, disclose it to the parties. If they don't want the judge to recuse themself, that's fine. No problem. They may be able to waive it under subsection (a). It may be waivable. But that wasn't done in this case, right?

MR. KIRKENDALL: That's absolutely correct.

THE COURT: Okay.

MR. KIRKENDALL: And I think it's clear that the judge in this case thought that 455(b) was applicable, and that 455(b)(5) did not rise to the level of being a disqualifying -- a disqualifying statute for him.

THE COURT: So -- so you're saying that --

MR. KIRKENDALL: I think that's pretty clear.
THE COURT: -- there was a belief that having a live-in relationship with a person in a joint household who is a lawyer in the proceeding wasn't disqualifying?
MR. KIRKENDALL: That -- I believe that in term -- 455(b)(5) says nothing with regard to the -- the lawyer --
THE COURT: Yeah, it does. Is -- is acting --
MR. KIRKENDALL: -- the non-spouse --
THE COURT: -- as a lawyer in the proceeding.
MR. KIRKENDALL: Right. Right. But --
THE COURT: That's subsection (2).
MR. KIRKENDALL: -- but it talks about a non-spouse. And so my point --
THE COURT: No, it talks about a person within the third degree of relationship to either the judge or a spouse of a judge --
MR. KIRKENDALL: Right.
THE COURT: -- if they happen to be married.
MR. KIRKENDALL: Right. And so it's based upon a spouse or a -- or a person within a third degree of relationship. And I -- I would maintain that this -- a girlfriend is not a third-degree relationship.
THE COURT: So, let -- outside of consanguinity and affinity -- and by "affinity" I mean a formal marriage --
MR. KIRKENDALL: Right.

THE COURT: -- a formal civil, say, marriage -- how would you define a third-degree relationship?

MR. KIRKENDALL: I -- I would -- I viewed it -- in cases that I reviewed, I viewed it in a familial situation. That's the way I interpreted it.

THE COURT: Okay. So then the question then becomes -- we have to presume, based on statutory interpretation, that Congress knew what they were doing when they phrased it this way and they didn't limit it to the third degree of consanguinity or affinity.

MR. KIRKENDALL: You make a good argument. I can't --

THE COURT: Well, that's statutory construction law, isn't it?

MR. KIRKENDALL: Right. I can -- I can understand.

THE COURT: Okay.

MR. KIRKENDALL: I don't believe that's the way it's been interpreted, but I understand completely your -- your view.

THE COURT: Okay. So that's where you're saying the ambiguity comes in?

MR. KIRKENDALL: Yes. I'm saying where the ambiguity comes in is that we are dealing with a non-spouse not within the third degree of relationship and who did not share a household account with the judge.

THE COURT: Okay. What --

MR. KIRKENDALL: Okay.

THE COURT: -- what else do you want to say on this point?

MR. KIRKENDALL: That was really it.

THE COURT: Anybody else on the defense side that wants to address anything having to do with the judicial immunity matter?

MR. KIRKENDALL: Thank you, Your Honor.

THE COURT: Okay. No. All right. Plaintiffs?

MR. CLORE: May it please the Court. My name is Robert Clore. I represent the plaintiff, Michael Van Deelen, along with Mikell West, and Anne Johnson, and Mr. Bagley.

I don't want to belabor the jurisdictional issue much longer. I'll just say I think the Fifth Circuit already, more or less, addressed all those matters when it found probable cause that Judge Jones engaged in misconduct under 28 U.S.C. 455, and --

THE COURT: Well, but if that were the determinative factor, we wouldn't be here arguing this again.

MR. CLORE: Right. But I think it -- it speaks volumes as to whether the -- there is a case for disqual -- disqualification, whether it was mandatory. I think it's certainly, at the bare minimum, a persuasive finding.

THE COURT: I'm -- I'm still thinking that one over, because if it were, this wouldn't be an issue anymore. This would be a matter that would have been settled by the chief

judge of the Circuit, and has been decided by the chief judge of the circuit, and it's not. It's not a final determination. It still has to be -- this Court still has to make that determination.

MR. CLORE: Right. I guess I was just saying that Judge Jones didn't dispute, didn't contest the Fifth Circuit complaint and resigned, so that's all we have to go on from the Fifth Circuit.

THE COURT: Okay. Keep going.

MR. CLORE: Okay. So, I -- I kind of wanted to direct my attention to -- to other points, and that is that in fact the plaintiff has alleged non-judicial acts. The -- the defendants have tried to confine our pleadings to the orders, but in fact we have made several allegations of non-judicial acts. Number one, that Jones concealed the intimate domestic relationship with Ms. Freeman.

And number two, as recently revealed in Jackson Walker's May 22nd filing, which we've sought leave to amend in the -- in the unlikely event that the Court grants any of these motions to dismiss, but Judge Jones was directing Jackson Walker on how to go about filing a Rule 2014 disclosure, and specifically advancing a fraudulent disclosure listing Ms. Freeman among other close friend -- personal friends. And so neither of those acts can be considered judicial acts.

THE COURT: Why -- why would an order of the Court not

be a judicial act, though?

MR. CLORE: No, I'm not disputing -- certainly an order is. The two facts that we're alleging are non-judicial are, one, Judge Jones conspiring with the others to conceal the relationship. And number two, his meeting with a partner, Matthew Cavenaugh, to instruct him -- or to direct him how to complete a disclosure not in court, but in a meeting having nothing to do with this case, but directing him to do that in all cases.

So those are non-judicial acts. I -- agree with Your Honor, orders are clearly judicial acts.

THE COURT: But if a judge is instructing parties how to comply with the structure of the court, how -- what is -- how does that fall outside of the judicial realm?

MR. CLORE: Because it's a personal meeting with a -- with an attorney not on a specific case, albeit in chambers. But it's not a judge's place to say, I want you to disclose this, but not this, and I want you to do it in this manner, in such a manner where you bury it -- bury that relationship and its other relationships, and don't give full disclosure.

That is way beyond any kind of judicial responsibility.

THE COURT: And that's not in what now?

MR. CLORE: Pardon?

THE COURT: And that's been disclosed where?

MR. CLORE: So, Your Honor, we filed a --

THE COURT: And I do have that before me. I'm just trying to be concerned and cognizant of the fact that right now it's based on the pleadings as opposed to any outside additional documents.

MR. CLORE: Okay. Fair enough. So that is where that comes from. And then just in general, it's our position that concealing a relation -- an intimate relationship, a disqualifying relationship, is not a judicial act. And so --

THE COURT: What about Mr. Kirkendall's statement where he is indicating that it wasn't necessarily that?

MR. CLORE: It wasn't necessarily...

THE COURT: A romantic relationship or formal relationship.

MR. CLORE: Well, I mean, we're going off our well-pled facts. We have many bases to claim that there was an intimate relationship. That's scattered throughout the pleadings. And nobody's -- in fact, nobody disputed it in the motions to dismiss. So, I mean, I don't see how that's even a subject for discussion. In fact, Judge Jones has admitted it on the record to the press. So, I think that's -- that ship has sailed.

THE COURT: Proceed.

MR. CLORE: So, Judge Jones tries to -- tries to sweep everything under the rubric of, This is a -- this arose under a

Chapter 11 case. And but for the bankruptcy, none of it would have occurred.

But *Jones versus King* from the Fifth Circuit says look to the nature of the function performed, not the identity of the actor.

And if Your Honor will bear with me going through the four factors.

THE COURT: But I -- and I -- believe it or not, I just had another issue with judicial immunity that's now pending resolution by the Fifth Circuit.

MR. CLORE: Oh, really.

THE COURT: It's on an interlocutory appeal, so I'm -- I'm aware of that four-part test. It's got to be a matter that happens in a courtroom or in a -- a place adjacent to where court work is done, it has to be in parties -- in a matter of controversy, it's got -- so I'm -- I -- I realize what the -- there are four factors.

MR. CLORE: Okay.

THE COURT: So which is the one that you're alleging does not apply in this case?

MR. CLORE: So, I'm allege -- alleging, essentially, all do not apply, and I'll go through --

THE COURT: Go ahead.

MR. CLORE: -- each with you, if that's okay.

So the first is -- is the precise act and normal

judicial function. And again, it's how you frame the issue. We frame the issue as Judge Jones is concealing an intimate, qualifying relationship. That's not a normal part of a judicial function. They have phrased it as, Oh, well, the decision to recuse is a normal judicial function. And I can't disagree with that. And orders, of course, are part of a normal judicial function. But concealing a relationship, and then the -- the additional facts which were -- we would ask leave to amend or supplement if the motion to dismiss is granted. Those further illustrate this is not a normal judicial function. So that's our argument on the first point.

Second is whether it occurred in the courtroom or adjunct spaces. And so -- so a concealing of the relationship, I think, occurred in the courtroom and outside the courtroom in both instances, so I think that factor can kind of be weighed either way.

The third is whether it's sent around -- centers around a case pending before the court. And -- so, the -- the instructions were the concealing by -- of the relationship was not specific to the McDermott bankruptcy involving Mr. Van Deelen -- Van Deelen. It's across the board. And, you know, and that -- that's made very clear in the -- in the most recent filings that we submitted.

And then, finally, whether the acts arose directly out of a visit to the judge in his official capacity. No --

concealing a relationship is something that -- that the lot of them conspired to do outside of the courtroom. It also -- you know, the effect was in the courtroom, but the -- there was no visit to the judge in his official capacity in this sense.

Let's go through a few cases cited. The *Holloway* case involved a receivership and an injunction. Again, we're not talk -- I'm not focusing on orders. The concealing of the relationship and directing counsel on how to go about completing disclosure, completely different. And more -- and our -- from our perspective, more like an administrative act as in *Jones versus King* and *Ex Parte versus Virginia* [sic], which we cite -- cited in our response where -- in fact, *Jones versus King* is Western District, recent case, where some of the acts were found to be judicial acts and some were not. And the one that was not was qualifying jurors for general assemblies, which can be performed by anyone, not just a judge. And in our position, it's -- that's the same type of argument that we're making with respect to --

THE COURT: Okay, so let's take -- let's take your argument one step further.

MR. CLORE: Okay.

THE COURT: Okay. So let's say the concealment itself happened outside of any judicial process. All right. So it -- it in itself may not get judicial immunity qualifications.

MR. CLORE: Uh-huh.

THE COURT: But then it translates into judicial acts. And isn't your client claiming that it's the basis of those judicial acts that led to his injury?

MR. CLORE: So --

THE COURT: So what -- doesn't -- doesn't the judicial immunity consideration come in at that point?

MR. CLORE: So my -- my client also claims damages that are separate and apart from the bankruptcy proceeding. He -- because -- based on this decision or the judge's concealing of this relationship, he went and argued a motion -- spent money and -- and argued a motion to recuse, and then prosecuted it, and is continuing to prosecute it. And so --

THE COURT: But the motion to recuse and the prosecution of that occurs in a courtroom.

MR. CLORE: Right. But if -- the harm stems from the concealing of the relationship, and so --

THE COURT: I do -- I do understand that, but the -- but in the middle of that continuum of activity, you have some court orders, and it's really the court orders that led to the harm if -- in terms of -- and I'm not -- I don't want to presume what the -- any outcome or any harm. But I'm just saying, the concealment is there, but it's the actual outcome of the orders that caused the harm.

MR. CLORE: But Judge Jones didn't enter the orders on -- on the motion to recuse.

THE COURT: No, it was Judge Hanen --

MR. CLORE: Right. So --

THE COURT: -- Judge Hanen.

MR. CLORE: Correct. And so, you know, we're -- he's asking for immunity for his acts. And his act is the concealing of the relationship. And my client's having to incur -- having to go to a motion to recuse when no -- when everybody should have stepped up and nobody did, and having to incur that expense, that was -- that was not a result of a judicial act. It was because of the concealing of a relationship in the first instance.

THE COURT: But -- okay, so let me ask you this. Let's start backwards.

MR. CLORE: Okay.

THE COURT: The injury in this case is?

MR. CLORE: Well, there are multiple injuries, but one of them is one to which I'm referring and that is Mr. Van Deelen went to file a motion to recuse, and -- based on an anonymous -- an anonymous letter that he received. And rather than come forward and saying, "You know what, he's right. It's time. We better come clean," they fought it. Instead of coming forward and doing the right thing, they fought it and advocated against him. And he's prosecuted it over the years, and he has incurred expense for that. So we're seeking, you know, costs in connection with that motion to recuse.

And in addition, as we've alleged in our complaint, he has incurred -- he has --

THE COURT: But -- but that harm, let's -- let's take -- let's make some assumptions here. That harm, though, would have been caused not by a Judge Jones order, would it?

MR. CLORE: No.

THE COURT: So, how does this -- how did this enure to your client's benefit against Judge Jones?

MR. CLORE: Because it goes back to his concealing the relationship when he had an obligation to disclose it and disqualify himself.

THE COURT: So the real issue in this case is, at which point was the judge required to either disclose or disqualify themselves, or was it an absolute requirement of disqualification?

MR. CLORE: Well, you definitely know what my answer's going to be. At the outset --

THE COURT: Well, I -- I know what your answer's going to be, and --

MR. CLORE: Yeah.

THE COURT: -- I know what their answer's going to be.

MR. CLORE: Right.

THE COURT: But the -- so the question is, in the absence of any cases that say that, why should this Court choose that as the remedy; is -- in terms of saying the concealment

killed all decisions down the line and caused harm?

MR. CLORE: Well, I can't cite the -- Your Honor, a case because this is a one-off. I'm not aware of this -- similar circumstances anywhere.

THE COURT: Uh-huh.

MR. CLORE: And so to use that as a -- as a -- you know, a way to escape liability, I think, is -- is not -- not fair to my client and it's -- it doesn't serve the integrity of the judicial system to -- to say, Well, it's never happened before so we don't have to bother with -- with it.

THE COURT: And I think that's part of what I was saying to counsel in terms of, Doesn't this bother you a little bit? And I'm not speaking necessarily about Judge Jones. I'm talking about any judge in the United States. It gives me a little bit of pause to think that we can misbehave, walk into court, issue an order, and then be completely absolved of our misconduct. But if the -- if the rule and the case law don't allow for any intentional act or any bad faith on the part of the judge, if it doesn't require that in terms of saying they're denied judicial immunity if the parties can show bad faith, if they're still entitled to judicial immunity, isn't that a problem of the law?

MR. CLORE: Well, I -- I still go back to this is not a judicial act. So, it's -- you don't need to get there because immunity doesn't apply when it's a non-judicial act. And -- and

again, it's how you frame --

THE COURT: You're saying the concealment?

MR. CLORE: Correct.

THE COURT: But -- but the -- I guess where I'm trying to get to is, in between the concealment and the end result, it required judicial acts.

MR. CLORE: Right. But those aren't even Judge Jones' acts, so we're not complaining about -- we're focus -- our focus is on this specific --

THE COURT: But -- but it's the intervening acts of another judge that caused the loss and the prosecution, to a certain degree, of the -- of the matter. I understand what you're saying. If Judge Jones hadn't concealed this matter or the parties hadn't concealed this matter, it would have gone to somebody else and this may or may not have happened, and the client would not have had to proceed with his -- with the motion. I understand what you're saying.

But my question is: Do intervening judicial acts defeat any problem -- any -- any harm?

MR. CLORE: I don't think so, Your Honor. No, I think it's a direct harm. And so -- and I -- I don't see how the intervening acts defeat his concealment of the relationship which resulted in -- in my client incurring expense and having to fight something which would have been cured if any -- if Judge Jones or anyone had stepped up and said, This is accurate.

THE COURT: Proceed.

MR. CLORE: I think that's about it, Your Honor, unless you have any --

THE COURT: Okay. No. I -- think for me what -- what I will have been -- I've been studying 455, and maybe this is just me from law school days. I always remember there was recusal and disqualification of judges. Recusal meant we may or may not have to step off of a case; but disqualification meant all we could do was order ourselves off the case. And to me, I'm -- I'm kind of looking at (a) and (b) under that rubric and I don't know if I'm correct in doing that.

MR. CLORE: That's how I read it. That's -- that's exactly how I read it.

THE COURT: I don't -- I don't know that I'm correct, that's why I'm looking to the parties.

MR. WEST: Your Honor, if I could attempt to -- to add some additional color to answer the Court's question. The harm was consummated already before the acts by Judge Hanen or by Judge Isgur denying the motion to recuse.

So those were judicial acts, and those were acts that we're not challenging. But those were resulting acts, not intervening acts. The harm was consummated when Mr. Van Deelen files his motion to recuse, incurs the expense to come down to the courthouse to argue that motion to recuse when none of those acts were necessary if Judge Jones had -- had disqualified

himself and -- and stepped away from the case. And so there was no intervening act. There were resulting judicial acts, but we're not complaining about those.

THE COURT: So -- but what I'm -- what I'm understanding the defendant to say is, it was discretionary with the judge to disqualify himself at that point. And because it was discretionary after the fact, it can't be -- immunity can't be defeated, is what I'm understanding the argument to be by the defense.

MR. WEST: And -- and I agree, that's the argument. I don't think it's a prevailing argument. And in -- in my view, that really injects the facts issue when -- when Mr. Kirkendall came and brought forth to the Court the -- the opinion that, Hey, maybe Judge Jones or -- or another judge could read the statute and say, Maybe the rule applies to me, maybe it doesn't.

We've alleged that Judge Jones knew the rule applied to him and that he knew disqualification was necessary. And to the extent that -- that there's some ambiguity in the interpretation of that -- the disqualifying rule, that's a fact issue, not a 12(b)(6) issue.

THE COURT: Okay. Anything else?

MR. WEST: No, Your Honor.

THE COURT: Go ahead. Rebuttal on this one issue?

MR. SPARACINO: Yes, Your Honor. Thank you. Just a couple of add -- clarifying points.

THE COURT: Uh-huh.

MR. SPARACINO: First all, thank you for stopping him in doing my work when he was speaking to facts that are not in this complaint when he was discussing the complain -- the additional meaning that he wanted to -- wants to get in his sur -- surreply.

We did find a case that I would direct your -- your attention to. *It's Oriental Financial Group versus Federal Insurance*, 467 F.Supp 2d 176. It's out of the District of Puerto Rico. And it states that --

THE COURT: So persuasive.

MR. SPARACINO: Pardon me?

THE COURT: So persuasive.

MR. SPARACINO: It --

THE COURT: Go ahead.

MR. SPARACINO: Your Honor, it goes on to discuss the third degree of relationship and what that means, and it says that it includes blood relatives of a judge, a judge's spouse, and spouses of those blood relatives. So, again, it -- it --

THE COURT: How far does blood relatives go? Does it go to the third degree, fourth degree, fifth degree? Do they say?

MR. SPARACINO: It -- it --

THE COURT: So does it have to be a blood relative?

MR. SPARACINO: Yes.

THE COURT: Based on that case that you're --

MR. SPARACINO: Yes.

THE COURT: -- you're talking about?

MR. SPARACINO: Well, Your Honor, I'm only telling you what this -- what this one case that --

THE COURT: Okay.

MR. SPARACINO: -- in a couple of minutes on the issue we -- we were able to locate.

THE COURT: Okay. We'll pull it up.

MR. SPARACINO: And I'm -- I'm happy to file a supplemental brief on the issue, if that's what you -- if you'd prefer.

THE COURT: If -- if we get to that point, I would -- I would ask the parties to do that.

MR. SPARACINO: Yeah, okay. Thank you. Thank you.

Also, you -- you've been talking about the fairness, and -- and they've been talking about the fairness, and did Judge Jones get away with something that he -- he should have disclosed or should have disqualified? This plaintiff is not the one that has the ability or the right to punish Judge Jones. Judge Jones has been punished by the process. He -- the Fifth Circuit complaint came down asserting he made the wrong call on 455, and Judge Jones resigned his -- his benchship position.

So to say that he's skated without any repercussion or any punishment is -- that's just fallacious. That's --

that's --

THE COURT: But that doesn't excuse all the potential claims for damages against a judge if we act outside of our judicial role.

MR. SPARACINO: If you act --

THE COURT: -- outside of our judicial role.

MR. SPARACINO: Outside. If --

THE COURT: I'm just -- I'm just -- I understand that the issue here is the judicial role and the extent and what got decided why. I understand that. But what I'm saying is, the fact that we get punished under one system doesn't prevent us from being punished under other systems.

MR. SPARACINO: I -- and -- and I'm not suggesting that in --

THE COURT: Uh-huh.

MR. SPARACINO: -- in a vacuum, Judge.

THE COURT: Uh-huh.

MR. SPARACINO: But I'm absolutely -- judicial immunity still applies to -- to lawsuits against judges and former judges --

THE COURT: Uh-huh.

MR. SPARACINO: -- and that's what we've got here.

Mr. Van Deelen is not suing because of a relationship between Judge Jones and Ms. Freeman. That's not actionable to Mr. Van Deelen. Mr. Van Deelen's not suing for

any concealment or non-disclosure of that relationship. That's not actionable. He's -- he's suing because he believes he got a raw deal in the McDermott Chapter 11 case and -- and he has constructed this -- this conspiracy among many parties to assert that the result of the case delivered by judicial orders, by judicial acts, was driven by or motivated by corruption, was tainted by corruption. And the case law is -- is clear and unequivocal that motivation, motivated by corruption and bad faith, that just didn't matter for immunity purposes.

THE COURT: Okay. So does it matter -- and -- and again, let's take this out of the context of a personal situation. Let's talk about a generic judge, other people.

Does it matter that the process may not have been fair, and so somebody doesn't get heard completely, and even if the outcome would have been the same, the process itself wasn't fair because of the lack of disclosure and/or concealment?

MR. SPARACINO: Your Honor, I bet in every --

THE COURT: Oh, I get it in every case.

MR. SPARACINO: -- in every litigation matter --

THE COURT: Sure.

MR. SPARACINO: -- parties believe they were treated unfairly.

THE COURT: Correct.

MR. SPARACINO: And -- and --

THE COURT: But in this particular case where you have

a taint based on certain circumstances, was it -- was the system already tilted against people that were going against connected parties, so to speak?

MR. SPARACINO: Your Honor, I -- I absolutely understand the tension. I'm not going to waver from the -- the view that absolute judicial immunity is clear, it's unequivocal, and it protects a judge from wrong decisions, from bad decisions, from improperly motivated decisions. It's -- it's there for a reason. It's --

THE COURT: But that -- it protects them from those types of decisions in the outcome of cases. Does it protect them from decisions that would -- if made at the appropriate time and properly, would have kept them from presiding over a matter?

MR. SPARACINO: Your Honor, Mr. Van Deelen could have appealed the result of the plan. He chose not to. He litigated. He litigated the plan.

THE COURT: Well, he also litigated a motion to recuse that really should have been granted, right?

MR. SPARACINO: Well, the motion to recuse, let's be clear --

THE COURT: Okay, but I'm just saying, he also litigated a motion to recuse that really should have been granted. And -- and -- under 455, it should have been granted and it wasn't. And I get that. Now, I also understand that the

outcome of the bankruptcy case, without or without this matter, may have been identical no matter what. I realize that. And I think that's part of what comes into play; does it not?

MR. SPARACINO: I -- I disagree.

THE COURT: No, I'm saying that the outcome might have still been the same, even with a different judge without these types of considerations --

MR. SPARACINO: Oh, the --

THE COURT: -- might have been the same. Isn't that a hurdle that needs to be overcome?

MR. SPARACINO: Not for immunity purposes, Judge. Again --

THE COURT: Not by you. I'm saying by the plaintiff. I mean, wouldn't that be something that this Court has to look into in terms of saying -- you know, judicial immunity all applies because there isn't any -- there isn't any allegation that the outcome would have been different but for this?

MR. SPARACINO: If -- if this got further down the road, there are a number of arguments that, Judge, we haven't made yet because we've focused on the immunity issue. But there --

THE COURT: Okay.

MR. SPARACINO: -- we're going to hear a lot of those arguments shortly, and -- and that would absolutely be one of them. There's a whole host of reasons this lawsuit fails. As

to my client, first and foremost, it's judicial immunity. And we -- we took a rifle-shot approach --

THE COURT: Uh-huh.

MR. SPARACINO: -- to our initial filing for a reason --

THE COURT: Uh-huh.

MR. SPARACINO: -- because that's what judicial immunity provides.

Back on the recusal issue or the --

THE COURT: Uh-huh.

MR. SPARACINO: -- recusal motion. Excuse me. I -- just so the record's clear, that was a pro se motion filed --

THE COURT: Right.

MR. SPARACINO: And Mr. Van Deelen lives in the Houston area, so I -- I -- let's not make it seem like he incurred great cost, great expense filing that motion to recuse and -- and driving down --

THE COURT: The sad part is, counsel, he shouldn't have had to. The -- that's the -- that's the difficult part about this case. He shouldn't have had to. It shouldn't have had to come out this way.

MR. SPARACINO: But that's -- it's not actionable against a judge.

THE COURT: I get that. I get that's the argument. Sure. I get it. I'm saying the difficult part in this case and

the tension is it may not be actionable against the judge, but it should have been taken care of at that point. It shouldn't have even gotten to this point. And I know you don't --

MR. SPARACINO: I -- I understand your position and --

THE COURT: -- necessarily disagree with that.

MR. SPARACINO: -- that Judge Jones got it wrong on the 455 question.

THE COURT: I don't think that -- he didn't decide that one. I thought it was Judge Hanen that decided that one.

MR. SPARACINO: Not the -- correct. Not the --

THE COURT: Oh, the original one.

MR. SPARACINO: -- subsequent recusal.

THE COURT: You're saying the original one.

MR. SPARACINO: I'm going back to the inception, and -- and acknowledge that that's the position that's -- it's -- it's a rational view to have.

THE COURT: Okay.

MR. SPARACINO: Unless you have any further --

THE COURT: I don't.

MR. SPARACINO: -- other questions, Your Honor --

THE COURT: I don't.

MR. SPARACINO: -- I appreciate your time. And, again, would request that the Court dismiss the plaintiff's claims against Judge Jones -- David Jones with prejudice.

THE COURT: Okay. So then let's go to the next --

next set of arguments in terms of the rest of the motions to dismiss that are -- that basically are somewhat similar, but may be a little different.

Yes, ma'am?

MS. BREVORKA: Yes, Your Honor. Jennifer Brevorka for Defendant Jackson Walker, if the --

THE COURT: Okay.

MS. BREVORKA: -- if the Court is okay with us --

THE COURT: Sure.

MS. BREVORKA: -- commencing.

Good afternoon, Chief Judge Moses. Jackson Walker has moved to dismiss on no fewer than 15 different realms, but in the interest of time and -- and as well make the Court happy, we plan on focusing on one concrete area in our arguments today. And that is the plaintiff's absolute lack of constitutional standing under Article III to bring the motion that he's brought.

This is a -- I think it's important when you're considering the three factors and constitutional standing to take a look at the underlying facts that brought us to this litigation, and it involves two separate bankruptcy proceedings. The first is the McDermott bankruptcy proceeding. That was a proceeding by the plaintiff's own admission in pleadings that he filed in the bankruptcy court, namely Docket 939 in that proceeding.

This was a prepackaged plan. McDermott and its corporate officers and creditors decided the moment before it even stepped into court that it was going to wipe out the value of equity shares, such as Mr. Van Deelen's, and it was going to put forth a plan of reorganization that changed debt into equity for certain credits.

THE COURT: Okay, so answer one question, counsel.

MS. BREVORKA: Please.

THE COURT: At that point, what remedy did Mr. Van Deelen have to protect his equity interests?

MS. BREVORKA: At that point, he could have petitioned the corporate officers in McDermott, he could have attempted to bring a derivative lawsuit as a shareholder under shareholder derivative lawsuit procedures.

THE COURT: Well, wasn't he attempting to try to do that through the bankruptcy proceeding, to say, This isn't right? Kind of as a derivative -- a shareholder derivative lawsuit, but kind of through the bankruptcy proceedings?

MS. BREVORKA: He was attempting to, but -- but this is part of the risk one takes when you invest in stock. The company makes decisions, as was made here. McDermott made this decision to reorganize in this fashion.

THE COURT: Uh-huh.

MS. BREVORKA: And as they explained in their reorganization plan, it's Docket Number Four --

THE COURT: So what you're basically saying, any shareholder that loses any future equity interest because the company decides to wipe out their equity interest, absolutely has, really, no remedy?

MS. BREVORKA: That's not exactly what I'm saying, Your Honor. In this case, Mr. Van Deelen's remedy, prior to filing for bankruptcy, was to try to petition corporate officers, bring a shareholder derivative suit. But the minute McDermott filed its Chapt -- prepackaged, as it's titled, Chapter 11 plan, that -- that was the plan that was going forward, but for -- until the confirmation hearing. Right.

THE COURT: But that wasn't -- wasn't he trying to do during the bankruptcy proceedings --

MS. BREVORKA: Indeed he was.

THE COURT: -- was to try. Okay.

MS. BREVORKA: Indeed he was.

THE COURT: Okay.

MS. BREVORKA: But -- but he stood in the same shoes as thousands of other investors.

THE COURT: Correct. I'm just -- I'm just asking -- just trying to get a good handle on some of these matters. I'm just -- my question is, because of this, McDermott was going to remain an ongoing entity?

MS. BREVORKA: Correct.

THE COURT: Okay. So if he had been able to keep his

shares, he might have had some equity value after the reorganization, but they were wiped out and he didn't have any real recourse in any proceeding to try to say, Wait; stop; I -- I want to fight this.

MS. BREVORKA: That's more or less correct. Yes. Once they -- they filed the plan and the plan was approved, he raised objections, as -- as I might note, a party in interest. The bankruptcy court's filings are replete with his motions as a party of -- of interest.

That point's important, Your Honor, because as -- as you pointed out in the last set of arguments, we're here on the pleadings.

THE COURT: Uh-huh. Right.

MS. BREVORKA: And what Mr. Van Deelen has pled is, he has cloaked himself in the moniker of being a creditor. He has done --

THE COURT: And -- and an -- I get an equity own -- holder is not a creditor, so to speak.

MS. BREVORKA: Correct.

THE COURT: I get that. But an equity -- an equity interest is extinguished in an ongoing corporation that might have value in the future, and you're saying he never had a chance to try to defend that ownership interest once it got filed in bankruptcy.

MS. BREVORKA: Once the plan was -- I mean, he -- he

took the steps that arguably other share -- I mean, other shareholders wrote letters, as did he, he went further and injected himself in the proceedings. But, yes, this was the plan.

I mean, at its essence, when you buy a share of stock it -- it's a risk. Right? The market goes up, the market goes down, companies can go belly up. You put your -- your -- investment --

THE COURT: But this company didn't go belly up; this company just decided to reorganize.

MS. BREVORKA: Correct. It did.

THE COURT: Okay. So if he had been able to keep some of his equity interest, it might have been worth something after the bankruptcy proceedings.

MS. BREVORKA: Perhaps, but --

THE COURT: But he wasn't given that opportunity to litigate that issue, was he, properly or fairly?

MS. BREVORKA: I think he was. I -- I think he was. He was allowed repeatedly to lodge objections to both the confirmation plan and attended hearings, and he -- he filed notices and motions and -- and things of that matter.

The bottom line is, when -- when he invested in the company, as with thousands of other shareholders --

THE COURT: Uh-huh.

MS. BREVORKA: -- they put that decision-making

ability into the corporate officers and the board of directors. When -- when we invest, whether it be McDermott or 7-Eleven, what we're saying is, I'm -- I'm putting money into the company and -- and you guys have the discretion to run it the way you need to run it. It's the business' discretion.

So, the bottom line is, the import of -- of the bankruptcy proceeding is this economic injury that he suffered, as did thousands of other shareholders, that was predetermined by the plan of reorganization that the McDermott company decided to engage in.

THE COURT: Okay. So, what I hear you saying is, once the case got into the bankruptcy proceedings, it was just a rubber stamp of what had been decided by the company ahead of time in the reorganization.

MS. BREVORKA: "Rubber stamp" may be a bit too far, Your Honor. It --

THE COURT: So did he have a fair opportunity to litigate, given what was going on in the background?

MS. BREVORKA: Well, I -- I think he did have a fair opportunity to litigate. He was -- he was presumed to be opposed to the plan.

THE COURT: Uh-huh.

MS. BREVORKA: And that is in Docket --

THE COURT: Uh-huh.

MS. BREVORKA: -- Entry 684 --

THE COURT: Uh-huh.

MS. BREVORKA: -- a part of the confirmation in the plan. He lodged numerous objections, which the Court overruled, and he had the ability to appeal the confirmation order, which he chose not to exercise or engage in.

THE COURT: Appeal it to the district courts, right.

MS. BREVORKA: Right. Right.

THE COURT: Uh-huh.

MS. BREVORKA: And -- and the point of drawing the Court's attention to this underlying proceeding is that the -- the way the first amendment -- amended complaint is drafted, it over, and over, and over again, as we pointed out in our Appendix A and B to our reply, cloaks the harm to Mr. Van Deelen as harm to the bankruptcy estate.

THE COURT: Which is kind of a sideways shareholder derivative suit.

MS. BREVORKA: That's exactly it, Your Honor. Thank you. And that is expressly released in the plan itself, which the bankruptcy court confirmed no -- he did not appeal it. No one appealed it. It's final and non-appealable. And those derivative claims, McDermott released them.

And so when you have before you a first amended complaint that on more -- by our count, more than 22 instances describes the harm as one to the bankruptcy estate, that utterly fails on the first prong of constitutional standing, which is

injury in fact.

As Your Honor pointed out in your decision in *Galindo*, it has to be an injury to the plaintiff himself. And -- and what is advanced here over and over again is an injury to McDermott by -- by arguing this --

THE COURT: It's a -- it's a collateral attack on the bankruptcy proceeding.

MS. BREVORKA: A hundred percent, Your Honor. Yes. And that's -- I mean, that's -- that's what we get to later on, too. That's a -- that's another ground for -- for dismissal.

THE COURT: But -- so that all comes back full circle, too, was the proceeding a fair proceeding given what was going on in the background and what everybody knew was going on back in the background?

MS. BREVORKA: I think it --

THE COURT: Or may have known. Let me -- let me rephrase that.

MS. BREVORKA: Sure. I think it was. It -- it is a non sequitur to say that -- that his economic harm -- first of all, he's -- he's pled harms that don't belong to him, so he's utterly failed on injury and fact.

THE COURT: Uh-huh.

MS. BREVORKA: And I -- and I will get to, in a moment, Your Honor, the -- the alleged harms that they raised in --

THE COURT: Uh-huh.

MS. BREVORKA: -- that Mr. Van Deelen's counsel raised in their response. But the proceeding was fair. He was given opportunities to raise his objections, he was heard, he could have appealed, he did not. And -- and the bottom line is, though, the claims that have been advanced are ones that are belonging to the bankruptcy estate which have been released.

THE COURT: Yeah, that's the -- that's the hard part in this particular case, is in terms of he's raising somebody else's claims, as opposed to whatever loss he suffered.

MS. BREVORKA: Agreed. But I think the other point that's important is when we talk about this underlying McDermott bankruptcy being prepackaged. Right?

THE COURT: Uh-huh.

MS. BREVORKA: It -- it is one -- you -- you hit the nail on the head, Your Honor. The -- the discussion between McDermott and the creditors happened before the lawyers even walked into the courthouse to file the plan.

THE COURT: Okay. So at that point the equity owners, what -- what opportunity did they have to be heard that they're about to lose equity in this company?

MS. BREVORKA: They have the opportunity to lodge objections, as Mr. Van Deelen and others did.

THE COURT: Okay, but that -- that happens, what, in the bankruptcy court or before?

MS. BREVORKA: In the bankruptcy court. Right.

THE COURT: Okay. So that's my question. Before you walk into the bankruptcy court with this prepackaged negotiated deal between the company and the creditors, the true creditors --

MS. BREVORKA: Sure.

THE COURT: -- what opportunity do people have to be heard on the loss of their property interest?

MS. BREVORKA: As a shareholder, you can petition the corporate officers --

THE COURT: So how -- what notice would they have had -- and if -- and if I'm outside of the record, please tell me. I'm just --

MS. BREVORKA: I -- I think you -- I think you are.

THE COURT: -- I'm trying to calc -- put this all in a calculus.

MS. BREVORKA: Yeah.

THE COURT: I'm just -- because I think -- yes, he doesn't have standing to bring an argument on behalf of the corporation. He would only have standing as to his harm. And what I'm hearing is, whether he had a fair hearing as to his harm, which was the loss of his equity.

MS. BREVORKA: Right. And -- and I think he did because throughout the proceedings, he's allowed to object, he's allowed to file motions, he's heard before the confirmation

hearing.

THE COURT: But what you're telling me, though, is at that point it's prepackaged, it's almost a done deal.

MS. BREVORKA: It's -- true.

THE COURT: So what good does it do to argue at that point?

MS. BREVORKA: Not much.

THE COURT: So how can you preserve your rights and your interest at that point?

MS. BREVORKA: I think that goes to the crux of why he doesn't have standing; is that this economic injury to his stock, that -- that occurred either --

THE COURT: Okay. So should his lawsuit be against McDermott for not giving him a fair share at being heard at the loss of his equity interest before they went into bankruptcy?

MS. BREVORKA: Great question, Your Honor, and that gets to the second lawsuit that is the underpinnings of this present lawsuit, which is his adverse -- what we call the adversarial suit --

THE COURT: Uh-huh.

MS. BREVORKA: -- against three McDermott officers for fraud. And he, again, tries to advance the same theory, I lost my complete value in these 30,000 shares because you engineered a reorganization plan that shouldn't have been engineered this way; it was fraudulent.

And again, first the bankruptcy court and then Judge Hanen, on a complete de novo review, reviews the bankruptcy court's decision --

THE COURT: So it was appealed to the --

MS. BREVORKA: It was --

THE COURT: -- to the district court.

MS. BREVORKA: Well, yes. Remember, we're talking two different lawsuits. There's the bankruptcy --

THE COURT: Right.

MS. BREVORKA: -- not appealed --

THE COURT: And then there's a fraud one. Right.

MS. BREVORKA: And so that's a really important fact, Your Honor, when we're considering standing and the -- the harm and -- and the fairness. I -- I get where you're going. It -- it seems --

THE COURT: Where am I going? Tell me. It might help me get back on track.

MS. BREVORKA: That's true. That's true. It -- I hear in your questions, as I heard when you were caucusing with counsel prior to me, it -- there -- there is -- it -- it -- there is a bit of -- it seems unfair, right, that --

THE COURT: Well, it is unfair, counsel. It is. I mean, there's no doubt that it's unfair. That's not the point, though.

MS. BREVORKA: Right.

THE COURT: Whether it's fair or not fair, we still have to have a cause of action that is actionable, that there is an injury that is a direct cause that is not somehow immunized. Those are two different things.

What I'm trying to get, though, is -- and I -- and I think the difficult part for this Court is the -- it -- it sounds -- and what I'm -- what I'm understanding is, there's a frustration on both sides. The frustration on one side is, I never got heard; I never got a chance to try to find a way to save my investment, not even before the corporation or before the bankruptcy court.

And I hear the frustration on the other side basically saying, We did this deal; it's done; it's over; it's been adjudicated; let's move on.

I understand what both of you are coming [sic], but that y'all are both meeting in my courtroom now to try to come up with an answer on some of this. So I understand it can't be a collateral attack by a share -- as -- as it would be in a kind of a shareholder derivative lawsuit. I understand that part. But what you're arguing is, he had a fair shot in the bankruptcy court, and yet it was a prepackaged deal that was a done deal.

So where did he get that fair shot?

MS. BREVORKA: I -- I would argue it's in the bankruptcy court, where he raised his objections, they were heard, they were overruled, the plan was heard in a confirmation

hearing, there was an order entered --

THE COURT: So who was representing the company at that point in the confirmation plan?

MS. BREVORKA: Kirkland & Ellis and Jackson Walker.

THE COURT: Okay. Isn't that the underpinning of the plaintiff's claim?

MS. BREVORKA: I don't think it is, as it's written presently. What's before Your Honor is, over and over again he argues that there was a concealment of a relationship for lawyers to get rich that harmed the bankruptcy estate. Not that harmed individual shareholders. He has chosen, perhaps to create an economic interest, to cloak himself as a creditor and he's not.

THE COURT: He's not. You're right, he's not.

MS. BREVORKA: And he's also -- he's also argued -- and -- and I will get to the -- the four paragraphs that pertain to the argument raised in response.

THE COURT: Uh-huh.

MS. BREVORKA: But he's also repeatedly argued over and over that the harm was to the bankruptcy estate. In every claim that point is advanced.

THE COURT: Uh-huh.

MS. BREVORKA: And again, as Your Honor hit upon, that's a derivative claim.

THE COURT: That's not his harm.

MS. BREVORKA: It's not his harm. Right.

I'd also add that I -- I think it's important to understand -- you're right in the aspect that there is -- there is for the investor what may seem as unfair with a prepackaged plan, but there is an aspect of this litigation when it comes to Article III standing.

Remember -- as Your Honor's aware, there's three prongs. Injury and fact -- and it has to be fairly traceable to the conduct of the defendant.

THE COURT: Uh-huh.

MS. BREVORKA: I point Your Honor to the case we cited in our reply, *Savel versus MetroHealth*, which has a passage in it that talks about a plaintiff cannot manufacture the harm.

THE COURT: Uh-huh.

MS. BREVORKA: You can't go out, sue somebody, and then say that -- that's my harm; I didn't get that lawsuit decided the right way. Right?

THE COURT: But what you're telling me, though, is that that would have been the only place he could have gotten it decided his own way. So did he manufacture it or was he protecting his interest in the bankruptcy proceedings?

MS. BREVORKA: Oh, I -- I think arguably when -- when -- within the McDermott bankruptcy, the first case, arguably he -- he was advancing or trying to protect his equity interests. But when he goes on to file -- and -- and this is

the -- the second lawsuit where the motion to recuse is, and -- and the decision that I remind the Court --

THE COURT: Wait. The motion to recuse was in this bankruptcy that then was heard by Judge Hanen.

MS. BREVORKA: Not -- not quite, Your Honor. It -- there's a motion --

THE COURT: It wasn't in the fraud case.

MS. BREVORKA: -- there's the McDermott bankruptcy --

THE COURT: Right.

MS. BREVORKA: -- and that is just for purposes of the record, Document Number 20-30336.

Then there's what several of the parties refer to as the adversarial proceeding.

THE COURT: Okay. And my understanding is that the motion to recuse with the anonymous attachment was filed in the bankruptcy proceeding, the first one that you referred to and then was referred to Judge Hanen to determine whether or not Judge Jones had to recuse himself.

MS. BREVORKA: No, Your Honor. It was filed in the adversarial proceeding. So when he stars -- he starts -- the plan is confirmed --

THE COURT: Uh-huh. Right.

MS. BREVORKA: -- it goes forward, he doesn't appeal. That summer, 2020, he sues three McDermott corporate officers in Texas State Court.

THE COURT: And so that -- I thought this was filed in federal -- the bankruptcy because --

MS. BREVORKA: It's removed. It's removed back to the bankruptcy court by Kirkland & Ellis and Jackson Walker. So his -- he -- he brings his own claims alleging three officers of McDermott committed a host of claims --

THE COURT: Uh-huh.

MS. BREVORKA: -- and it's removed.

THE COURT: Uh-huh.

MS. JOHNSON: It is within that proceeding, which starts out before Judge Jones, that was in, I believe it's March of 2021 --

THE COURT: Uh-huh.

MS. BREVORKA: -- he moves -- he had moved to recuse, but the anonymous letter surfaces --

THE COURT: Right.

MS. BREVORKA: -- and that recusal issue. Judge Isgur decides that.

THE COURT: And then it goes to Judge Hanen on appeal.

MS. BREVORKA: Correct. So because Judge Isgur finds no -- recusal's unnecessary, Judge Jones proceeds with the lawsuit.

THE COURT: Uh-huh.

MS. BREVORKA: And in that lawsuit, he gives Mr. Van Deelen two additional opportunities to amend his

pleading. And he does that because Mr. Van Deelen -- and -- and we attach one of the hearing transcripts as an exhibit to our motion -- keeps bringing derivative claims. He keeps --

THE COURT: But, counsel, this all goes back to the very beginning in that Judge Jones shouldn't have been presiding over these matters. Period.

MS. BREVORKA: Correct.

THE COURT: So it creates the appearance of impropriety at a minimum.

MS. BREVORKA: Correct.

THE COURT: Right. And at this point, all the judges along the way should have looked into it. Correct?

MS. BREVORKA: I -- I can't go that far. I mean, as far as "looking into it", I'm not sure what you mean by that, Your Honor.

THE COURT: Well, you've got a motion to recuse on a colleague that has an anonymous letter attached, you don't have a hearing and take evidence to find out whether there's any truth to it or not?

MS. BREVORKA: That was the call Judge Isgur made.

THE COURT: Okay. I get that part. But the bottom line is, at that point, all of the judges are put on notice that there could be an issue and nobody does anything to correct it. So what is a party supposed to do when you have that kind of a situation going on in the background?

MS. BREVORKA: Well, he -- he exercised his due process rights. If I may --

THE COURT: But did -- but did he get due process, given the back -- the unknown information?

MS. BREVORKA: I think he did, Your Honor, and here's -- I'll explain why if you'll --

THE COURT: Uh-huh. Sure.

MS. BREVORKA: -- give me a little latitude.

THE COURT: Sure.

MS. BREVORKA: First of all, he appeals both the -- the recusal issue and the -- the bankruptcy court's underlying decision as to his adversarial suit.

THE COURT: You're saying the fraud, the -- the one against the company?

MS. BREVORKA: The three executives. Right.

THE COURT: Okay. Let's call that B; Lawsuit B.

MS. BREVORKA: Let's call it B. Yeah. And he appeals that to the district court.

THE COURT: Uh-huh.

MS. BREVORKA: Judge Hanen performs a de novo review of all of his claims. I -- you know, in preparing for the hearing, I -- I looked at that. It's Docket Number 33. Judge Hanen performs an exhaustive review of -- of claims -- every claim that Mr. Van Deelen raises. He actually appoints -- he's looking through the record, the decision notes, he's -- Judge

Hanen is looking through the record to try to find certain allegations that Mr. Van Deelen is making. He can't find them. I mean, this is --

THE COURT: Allegations pertaining to the recusal or to the --

MS. BREVORKA: No. To the --

THE COURT: -- or to the --

MS. BREVORKA: -- just the underlying claims.

THE COURT: Okay. The claims. Okay.

MS. BREVORKA: So, when you talk about "fair" and "due process," he -- his underlying claims against the -- in Lawsuit B against the three executives, those are looked at quite closely by Judge Hanen, as is the motion to recuse. And --

THE COURT: Obviously not because the motion to recuse was raising an anonymous letter that turned out to be true and people knew that -- at some point, people knew it was true. So why not have a hearing de novo on a motion to recuse?

MS. BREVORKA: I'm not sure at that point --

THE COURT: As opposed to going with a record that didn't fully develop that because it was an anonymous letter.

MS. BREVORKA: I understand that, and -- and that was a call made by the district court. But I'll also add to this that Mr. Van Deelen has appealed to the Fifth Circuit.

THE COURT: Uh-huh.

MS. BREVORKA: That appeal is still pending.

THE COURT: Right.

MS. BREVORKA: The alleged harms that he complains of very well -- one of two ways may be remedied by the Fifth Circuit saying, Oh, yeah, we need to kick this back down and have it looked at.

Or they may provide the analysis that was done in other cases which we cite in our reply, *Patterson v. Mobil Oil*, where they found a judge should have recused, they performed a harmless error analysis, and found that his ruling on a summary judgment motion should stand.

And I also note, Your Honor, that decision involved a judge's failure to recuse under 450(a) -- 455(a), but the Court also went so far as to say, Harmless error analysis would apply under 455(b), which is the statute at issue here.

THE COURT: I don't -- I'll be honest, I don't understand how the Fifth Circuit can say that when that statute is unequivocal when it says "shall disqualify." That makes absolutely no sense. Because that means not only do we have discretion, we also could be wrong; and as long as it's not an abusive discretion, it's harmless error or beyond.

And I -- I don't see that in the statute. It is a "shall disqualify," period. It gives no room for quibbling over whether we can stay on a case or not.

The -- the exemptions are basically in the

interpretation of the underlying elements as, you know, their -- Mr. Kirkendall was talking about, What's a relationship, and then you've got whether or not somebody is biased or prejudiced against a party, things of that nature.

But the -- the opening line doesn't quibble. It's "shall disqualify." And apparently everybody, after the fact -- not before, but after the fact, is now agreeing that it was a "shall disqualify."

My question is: Why did no one look into it?

MS. BREVORKA: Your Honor, I think at -- at that time the -- the plaintiff has pled that Jackson Walker, at that time in 2021, was -- and -- and actually Ms. Freeman in her motion -- that they were misled by Ms. Freeman; that the relationship was in the past, it was over, they had not lived together, and they did not live together. And the plaintiff has noted that in its pleadings because in fact Jackson Walker has made that affirmation in -- in other pleadings in bankruptcy court in -- in the fee matters that are ongoing.

THE COURT: The ones that are not yet before the Court. I haven't decided whether or not that comes in.

MS. BREVORKA: Okay. Yes.

THE COURT: I think that's part of the --

MS. BREVORKA: Well --

THE COURT: -- the request by the plaintiff.

MS. BREVORKA: That -- that is on a slightly separate

matter. Jackson Walker, in November of 2023, filed a proceeding which the -- both the plaintiffs and several defendants note that Jackson Walker's position was that in -- when this letter surfaced, when the recusal hearing was held, Jackson Walker was told by Ms. Freeman the relationship was over, it was in the past, we do not -- have not lived together and we don't live together.

THE COURT: You're saying in 2021?

MS. BREVORKA: 2021. Correct.

I -- I would like to return for a minute, Your Honor, to the standing issue. And -- and I think we're in agreement that as the harms are pled repeatedly throughout this complaint as harms to the bankruptcy estate, that -- it doesn't give Mr. Van Deelen standing.

Our position is that plaintiff has conceded that point. They did not argue against it in their response. And in fact, they stopped using the word "creditor," and refer to him as having a financial interest in the McDermott proceedings.

What plaintiff's counsel raised in opposition was three discrete harms that they alleged they've pled that will give him standing. We disagree. And I'd -- I'd like to address those now for the Court.

THE COURT: Sure.

MS. BREVORKA: The first is they argue that Mr. Van Deelen suffered -- these proceedings were very stressful

for Mr. Van Deelen. There are a number of decisions which we cite in our reply, but one directly on point from the Seventh Circuit, *Wadsworth*, that stress alone does not an injury in fact to create standing [sic], under the first prong of Article III standing.

Second, Mr. Van Deelen argues that he suffered mental anguish from the harsh orders of Judge Jones.

I want to step back for a minute, Your Honor, and I -- I should have started with this. The -- the finite area where these alleged harms are pled can be narrowed to four paragraphs of -- of the complaint.

THE COURT: Uh-huh.

MS. BREVORKA: These are Paragraphs 58 -- and I'm being generous here. Fifty-eight, 59, 82 -- there are five -- 93, and 96. The verbiage from them are repeated occasionally in other places. But I have -- I invite the Court, and -- and I have searched the complaint numerous times, I cannot see anywhere where there are facts pled about Jackson Walker's harsh treatment of Mr. Van Deelen. And in fact what is pled is that it was Judge Jones' harsh treatment of Mr. Van Deelen.

So the mental from -- anguish from that is inapplicable. It goes to the second prong of standing. Right? You've got to have an injury that's fairly traceable to the conduct complained of.

I want to get to the -- the last -- there's another

one that Mr. Van Deelen's counsel argues that because he went to file a motion to recuse, based on the anonymous letter and -- and it was not granted and nobody spoke up, that he has incurred expenses. Those are not pled anywhere in this complaint. And in fact, the response cites to Paragraphs 125, 131, and I think it's one -- nah, that's not right, but I -- I thought it was 156. But there's another -- there's another paragraph that they cite to as having pled costs incurred. Not quite.

What those Paragraphs, 125 and 131 referred to, are the costs they want to obtain in damages from this suit. No where in here are -- is there a discussion of well-pled facts about costs or expenses.

The last aspect I want to talk about is the mental anguish. And -- and if we could -- does Your Honor need a copy of the complaint? I have one.

THE COURT: Go ahead. I've got it right here.

MS. BREVORKA: Okay.

THE COURT: I've got the first amended complaint. We're -- are you talking about Document Ten?

MS. BREVORKA: Yes, Your Honor. Thank you.

THE COURT: Okay. I have it.

MS. BREVORKA: Yeah, for purposes of the record. If -- if we could go, for example, to Paragraph 82. And -- and this phrasing is repeated throughout plaintiff's response to the motions, but also in the complaint. Again, extremely stressful.

We've talked about that. He sustained mental anguish as a result of the harsh treatment he received in court. There -- there's no conduct here describing Jackson Walker that's fairly traceable to our actions in, He sustained mental anguish damages as a result of learning his case was litigated in a courtroom corrupted by fraud, in which the law firm, Freeman, and the judge conspired to enrich themselves with no level playing field for protesting creditors and investors.

THE COURT: Okay, let's take -- let's take a hypothetical.

MS. BREVORKA: Yeah.

THE COURT: Ms. Freeman was in Jackson Walker at the time?

MS. BREVORKA: She was.

THE COURT: So why wouldn't her actions make Jackson Walker liable? If she's liable, why wouldn't her actions make Jackson Walker liable, since she is a representative of the law firm?

MS. BREVORKA: I think they're -- that certainly Mr. Van Deelen has made that legal assertion, but I -- I think the imputation of her actions, there's the element that she has affirmatively misled Jackson Walker. Right? She has -- when asked -- we've -- we've attached this to our motion. When asked, she expressly, you know, says that this letter that is -- it's Exhibit Four to our motion. It's a draft letter and it's

describing what has transpired. And she says, I have -- I reviewed the letter. I have no questions or issues. I deeply appreciate the time and efforts.

And what the letter more or less says was they had a relationship in the past and they did not live together and they have not lived together. That is what, in -- in March of 2021, Jackson Walker was told and relied upon and knew.

THE COURT: Okay. So prior to March of 2021, when she was working for Jackson Walker and a representative of Jackson Walker, why would her actions not inure against the law firm as a representative of the law firm?

MS. BREVORKA: If -- I mean, I think, Your Honor, the problem is if the law firm's not being told or --

THE COURT: But she's --

MS. BREVORKA: -- is affirmatively being misled, and also --

THE COURT: Okay. That's why I said prior to 20 -- March of 2021. March -- prior to March of 2021, she was acting on behalf of Jackson Walker, why would her actions not -- why would they not implicate Jackson Walker as an employee or as a -- a member of the law firm?

MS. BREVORKA: Well, I think at that point in -- they're not in a relationship. There's -- there's no -- in fact, what's pled in the first amended complaint is, I believe, is, Upon information and belief.

The -- the understanding is --

THE COURT: You're saying that -- prior to 2021, you're saying they weren't in a relationship?

MS. BREVORKA: They were at certain times, Your -- Your Honor. You're right.

THE COURT: Okay. So my question --

MS. BREVORKA: So when she joins the firm in 2017 and 2018, I do believe that they were in a relationship at the time.

THE COURT: I thought that -- I thought -- well, maybe -- go ahead, because I'm not sure that I read this --

MS. BREVORKA: Yeah, but I -- let's -- let's take on a hypothetical for Your Honor. Even if the relationship is imputed to Jackson Walker, right, in --

THE COURT: Uh-huh.

MS. BREVORKA: -- prior to March of 2021 when she affirmatively misleads them, that still doesn't get Mr. Van Deelen standing on -- on what he's pled here.

THE COURT: I'm not suggesting that. I'm not suggesting that at all. But you're basically saying, Because we didn't know and couldn't have known, and when we asked, it was denied, we can't be held liable.

My question is up to, say, the time that you received the denial, if there had been any time when there was that relationship and she was a representative of Jackson Walker, why would her actions -- if Mr. Van Deelen had a cause

of action, had standing -- why that would not also be problematic for Jackson Walker?

MS. BREVORKA: It could be. I -- I think the problem I'm having in going down the same path Your Honor perhaps wants me to go down is it hinges on a number of hypotheticals, the first of which is Mr. Van Deelen having a cause of action that gives him standing against Jackson Walker. And what's -- what we're here before you on is this motion --

THE COURT: You're saying -- you're saying outside of the standing issue, outside of that, he doesn't have a cause of action because Jackson Walker didn't know what Ms. Freeman was up to? That's kind of what you're arguing at this point. Outside of standing.

MS. BREVORKA: No. I think there's a variety of reasons he doesn't have standing.

THE COURT: Okay, but we -- we've gone over standing.

MS. BREVORKA: Oh, I'm sorry. Does not -- well --

THE COURT: I'm saying outside of standing --

MS. BREVORKA: Yeah, doesn't have --

THE COURT: -- you're also saying --

MS. BREVORKA: -- doesn't have -- doesn't have the ability -- doesn't have a claim, a valid claim against Jackson Walker. We've talked at length about Article III standing.

THE COURT: Right. And I'm -- and I'm saying outside of that -- we've already talked about -- but -- but I'm

understanding your argument is in addition to no standing, he doesn't have a cause of action because we didn't know what was happening.

MS. BREVORKA: I don't think -- no, that's not --

THE COURT: That's not what you're arguing?

MS. BREVORKA: -- that's not my -- no. I'm sorry, Your Honor --

THE COURT: Okay. All right.

MS. BREVORKA: -- if I went there.

THE COURT: Okay. Go ahead, then.

MS. BREVORKA: Yeah, my argument is on -- on the complaint that's pled here, there are not injury [sic] in fact that is fairly traceable to the conduct of Jackson Walker, the second prong.

THE COURT: Okay, but that's what I'm -- what I'm talking about, though, counsel. Then we are on the same wavelength. Because what I'm saying is, hypothetically speaking, nothing being decided, if it's traceable to Ms. Free -- Freeman at the time that she worked for Jackson Walker prior to, maybe, the -- the affirmative denial, why wouldn't it -- why wouldn't it bring in Jackson Walker since she was a representative of the law firm?

MS. BREVORKA: In a strictly hypothetical --

THE COURT: Right --

MS. BREVORKA: -- perspective --

THE COURT: Everything is hypothetical.

MS. BREVORKA: Sure. I think her actions as a partner of Jackson Walker, hypothetically, could be imputed to the firm, but it doesn't give him a right to bring a tort against the firm based on -- you've got to go back -- in this complaint, you've got to go back to the underlying proceedings that he's --

THE COURT: But she was acting as your representative, so she would make you liable if there's a cause of action --

MS. BREVORKA: But there --

THE COURT: -- as your representative.

MS. BREVORKA: -- that's the point, Your Honor.

THE COURT: What you're basically saying is, He may have a cause of action against one of our partners at the time she was a partner, but that doesn't implicate the law firm.

MS. BREVORKA: No, I don't think he has any cause of action against --

THE COURT: I get that part. I understand that.

MS. BREVORKA: No, and I --

THE COURT: I understand that's what you're --

MS. BREVORKA: -- I -- I mean --

THE COURT: -- where you're headed.

MS. BREVORKA: -- he just -- he doesn't. And -- and that goes back to why I started this discussion with Your Honor about the underlying bankruptcy proceed --

THE COURT: Then why are we talking about whether or

not there is no direct cause of action against the law firm? If your point is there is no cause of action or standing here, why does it matter whether or not there's anything alleged against Jackson Walker directly outside of Ms. Freeman?

MS. BREVORKA: Well, because that goes to the -- the allegations of harm that the plaintiffs have raised in their response. Right?

THE COURT: Uh-huh.

MS. BREVORKA: So, in -- in response to our motion saying he has no Article III standing because's cloaked himself as a creditor, they say, No, no, no, you're mistaken; he's got mental anguish from the harsh treatment received in court.

And what I'm saying is that's not traceable to Jackson Walker's conduct. There's no facts that are pled in this complaint that describes harsh treatment by Jackson Walker.

THE COURT: Okay. Are there facts alleged in the complaint against Ms. Freeman at a time that she was a partner?

MS. BREVORKA: Not as to harsh treatment.

THE COURT: Okay.

MS. BREVORKA: Right? So then the second point that plaintiff's counsel has raised as their injury in fact that gives them standing is that he has suffered mental anguish as a result of learning his case was litigated in a courtroom corrupted by fraud.

When you go back to a standing analysis, you have to

look at whether the injury in fact is concrete and particularized, actual or imminent. Right? And you have to be asserting your own injury, not the injury of third parties.

THE COURT: Uh-huh.

MS. BREVORKA: What this complaint does over and over again is tie this alleged fraud to the attempt to defraud the bankruptcy estate, and that's not his claim to bring. But even if it wasn't, we have to go back to the Fifth Circuit analysis on the aspects of concrete harm. Right?

I -- what I've just talked about, what he's pled, is an unparticularized harm. But the Fifth Circuit and the Supreme Court in *TransUnion* and *Spokeo* tells us to look at the concrete harm.

Intangible harms can be concrete. That is clear. But when we're looking at them, what *Perez*, the Fifth Circuit, and *TransUnion* instructs us to do is look into a common law analogue. And there is no analogue here for mental anguish of learning a case was litigated in a courtroom corrupted by fraud. There no -- there's no common law analogue as far as the claim that's bringing or an injury in fact.

And also more importantly, as pled, he's pled it that this mental anguish is due to this scheme to defraud the bankruptcy estate. And it's -- and it's inexplicably --

THE COURT: Yeah, anything that's -- that could be viewed as a shareholder derivative claim is not something that

is an appropriate cause of action. Because as you say, he doesn't have standing to bring those -- those claims.

MS. BREVORKA: That's exactly it, Your Honor. And -- and the -- this problem infects the entire complaint. I mean, I -- I'll draw -- we spent some time on Paragraph 82, but I'll -- I will just draw the Court's attention to Paragraph 96, for example. This is in their discussion of RICO. And again, the language here, Defendants intended to enrich themselves at the expense of the bankruptcy estate and creditors such as plaintiff. As a foreseeable result of defendant's conduct, plaintiff was deprived of the opportunity to have bankruptcy proceedings determined on the merits free of the influenced parties.

And then, intertwined in this like a plate of spaghetti, As a foreseeable result of defendant's conduct, plaintiff's financial recovery as a bankruptcy creditor was reduced because the bankruptcy estate available to pay creditors, including plaintiff, was diminished.

THE COURT: Uh-huh.

MS. BREVORKA: What we have here is plaintiff's pled on injuries that are -- do not belong to Mr. Van Deelen, or the harms that plaintiff has raised in response are not directly traceable to Jackson Walker.

THE COURT: Anything else?

MS. BREVORKA: That is it on the Article III --

THE COURT: Okay.

MS. BREVORKA: -- standing issue. And -- and we believe, Your Honor, I -- I would like some time to reply, if I -- if I may on rebuttal.

THE COURT: Yes. The parties will be given a time -- the defense will give -- be given a time on these issues, then we'll go to the plaintiffs to address any of them, then the defense will be given rebuttal.

MS. BREVORKA: Thank you, Your Honor.

THE COURT: Okay. Next up for the defense.

MR. HUESTON: Good afternoon, Your Honor. John Hueston --

THE COURT: Uh-huh.

MR. HUESTON: -- on behalf of Kirkland & Ellis.

Your Honor, I'm going to hit a few specific topics. In particular, proximate cause and RICO.

THE COURT: Okay.

MR. HUESTON: But before I do so, I do want to pick up on something that you've been asking about.

THE COURT: Okay.

MR. HUESTON: At a high level, a notion of fairness.

THE COURT: Uh-huh.

MR. HUESTON: And I want to address this notion of fairness with respect to Kirkland & Ellis. It is undisputed that Kirkland learned in March of 2021 that a serial litigant

had an anonymous letter --

THE COURT: Uh-huh.

MR. HUESTON: -- a letter with a hearsay allegation of another law firm's conflict; an allegation investigated by Jackson Walker and denied by Ms. Freeman, then made public in March of 2021, and then subsequently rejected by Judge Isgur in a decision affirmed on appeal.

And on those facts, Your Honor, the plaintiff attempts to build a sweeping narrative of criminal conduct of Kirkland & Ellis in the first amended complaint, saying that means, based on those facts, Kirkland was influencing the judge's orders; that Kirkland was involved in bribery; that Kirkland was promising clients favorable outcomes; that Kirkland was deliberately concealing a relationship since 2017.

All of those allegations without any factual support and with no good-faith basis to draw those claimed inferences.

And so I think that's important to place Kirkland in the right context here as I get into some of the more specific arguments. But I see you have a quizzical look.

THE COURT: Hmm, I'm just thinking. Go ahead. Keep going.

MR. HUESTON: All right. Your Honor, you mentioned it earlier with respect to one of other counsel's arguments, and that is the issue of proximate cause, and I'm going to address it now. There is no proximate causation here as alleged against

Kirkland. The McDermott shares were canceled months before Kirkland was ever awarded any fees, and a year before Van Deelen raised his then unsubstantiated allegation of a relationship.

So the effect, his plaintiff's -- his financial losses precede the supposed cause. So there is no cause and effect here. But most importantly -- and I think you alluded to this earlier -- let's just say somehow that an issue came up with Kirkland and they were not appointed. There would have been other counsel clearly appointed in Kirkland's place and would have been paid the fees which are the damages that plaintiff cites.

THE COURT: Okay. Clarify something for me, counsel.

MR. HUESTON: Yeah.

THE COURT: My understanding was that both Jackson Walker and Kirkland & Ellis all represented the -- the company.

MR. HUESTON: Yes. McDermott, yes.

THE COURT: So -- McDermott, yes.

So the question is, if McDermott had Jackson Walker, how did Kirkland & Ellis come to also represent?

MR. HUESTON: They -- the client decided to hire two different firms. So Kirkland was counsel handling most of the issues there. But Jackson Walker, consistent with what's done, frankly, in many districts across the country, came on in more of a local counsel role.

THE COURT: So -- so Kirkland and Jackson Walker were

working together in cases; one as local counsel, one as the main -- the main counsel arguing the -- the substance of the case?

MR. HUESTON: Generally, yes.

THE COURT: Okay. So Kirkland & Ellis was using, generally speaking, Jackson Walker as local counsel in Houston?

MR. HUESTON: Right.

THE COURT: But Kirkland & Ellis has an office in Houston; does it not?

MR. HUESTON: Yes, it does.

THE COURT: So why did it need local counsel?

MR. HUESTON: Your Honor, because -- simply because you have an office in the area doesn't mean that there aren't other firms with longer and historic ties.

THE COURT: Ties to whom? That's -- isn't that the key to this case?

MR. HUESTON: Well, sure.

THE COURT: Right.

MR. HUESTON: Experience with judges, Your Honor, not because --

THE COURT: Sure. That's why y'all each have a local counsel of somebody that practices in my court.

MR. HUESTON: And a great --

THE COURT: I get that part. I understand it.

MR. HUESTON: -- and a great example. There's

obviously nothing nefarious about that.

THE COURT: No. Well --

MR. HUESTON: That is simply process.

THE COURT: No, there's nothing nefarious. But I'm just saying, Kirkland & Ellis, a big law firm, did bankruptcy work on its own, I'm assuming, in various courts also in Houston. What was the need for local counsel?

MR. HUESTON: Right. Well, Your Honor again --

THE COURT: The need was that there was one connection, Ms. Freeman; was it not?

MR. HUESTON: No, it was not that way at all. In fact, Kirkland & Ellis uses local counsel for all the judges it appears before in the Southern District of Texas in the bankruptcy setting. In fact, more than half of the cases that Kirkland appears in with Jackson Walker are not with Judge Jones.

THE COURT: No, I realize that.

MR. HUESTON: There's -- there's no connection -- there's no connections. Plaintiff would like to -- to kind of draw some inference --

THE COURT: I got to tell you, it -- it is a little bit strange, though, wouldn't you say?

MR. HUESTON: No. I think that if you have a firm like Jackson Walker, which is the largest firm in Texas with a much longer history there, that they could come on board with

lower rates and provide, you know, a broad and comprehensive --

THE COURT: Okay.

MR. HUESTON: -- set of representation. It is not uncommon.

THE COURT: Okay, so you -- so that raises a good point. Jackson Walker had the ability and the experience to handle this bankruptcy matter, so they brought Kirkland in -- do you know why?

MR. HUESTON: No, there's nothing in the record, Your Honor, that --

THE COURT: That says that.

MR. HUESTON: -- suggests that either one brought the other in. That's not been alleged.

THE COURT: I thought that was in one of the pleadings.

MR. HUESTON: I don't recall seeing that, but I don't -- there's certainly no allegation that I can recall. I can be corrected by plaintiff, I suppose, that says Jackson Walker brought Kirkland in. But even if that's true, that's also not unusual. Kirkland has a huge, national, top-ranked bankruptcy practice --

THE COURT: Uh-huh.

MR. HUESTON: -- and it would be perfectly understandable in these mega-bankruptcies --

THE COURT: Uh-huh.

MR. HUESTON: -- that they would want to affiliate with a larger firm with --

THE COURT: Sure.

MR. HUESTON: -- much deeper resources in the area --

THE COURT: Sure.

MR. HUESTON: -- in the area of bankruptcy practice.

Again, none of that connects with the issue here that -- namely, that there was a failure by the judge or possibly Jackson Walker to disclose the conflict.

So what we're set with --

THE COURT: Uh-huh.

MR. HUESTON: -- let's assume that there was some other issue here and Jackson and -- and sorry -- then Kirkland was not appointed, there clearly would have been other counsel appointed in Kirkland's place. Which brings us right within *Law Funder, LLC*, the Fifth Circuit 2019 case which says, Without an allegation -- and there is none -- in the complaint that there would have been different fees paid to the replacement counsel, the case stumbles on cause. And it does so here.

So I'd now like to move to RICO claims, Your Honor.

THE COURT: Sure. Go ahead.

MR. HUESTON: And here there is -- and we've connected this with our Rule 11 motion because there is simply an inexcusable failure to allege even the basic legal and factual predicates for a RICO action against Kirkland, who at worst was

a bystander in what has happened here.

So first of all, the first amended complaint doesn't even allege that there is an enterprise separate and apart from the pattern -- the alleged pattern of racketeering activity.

Now, Jack -- plaintiff effectively concedes that, because in its opposition they try to rewrite what they were trying to plead. Which, of course, as Your Honor knows, you can't do. You can't amend your complaint in your opposition in a motion to dismiss.

THE COURT: Uh-huh.

MR. HUESTON: And what they said there is, Well, we'd like to have you think of something else; that Kirkland and Jackson Walker and Judge Jones were an enterprise doing other legal work together, and that somehow would suffice.

And, Your Honor, the case law, including *Reves versus Ernst & Young*, forecloses that. Because when you happen to have people in an industry pursuing their practices as they will -- in other words, pursuing parallel interests -- that is not a separate enterprise. And it brings you well outside of the *Diamond Consortium* case, which plaintiff cites, which truly did involve outside the immediate case these two firms hoodwinking folks on diamond grading in terms of whether they needed counsel in swapping off both in the case that was alleged there and elsewhere in their fraudulent and criminal actions.

So, no allegation whatever on the key element,

separate and apart, there was an enterprise. The RICO claim fails right there. But there's more.

The first amendment -- I'm sorry. The first amended complaint doesn't even allege a decision-making structure. Now, what they have claimed -- the plaintiff has claimed is that the *Boyle* Supreme Court opinion erased the requirement to have a decision-making structure. But it did not. A close look at *Boyle* says you don't have to allege one or another particular decision-making structure, but you've got to allege one. And then they also said, inaccurately, that the Fifth Circuit cases we cited predated *Boyle*. No, they post-date *Boyle*.

And so the *Plambeck* Fifth Circuit case in 2015 squarely states you've got to allege a decision-making structure. No question they have not done so.

And in fact, we were delighted to see their case of *Dell*, the 2018 case within the Fifth Circuit cited by plaintiff. That also says you have to have a decision-making structure.

So it fails two ways in not alleging enterprise that's separate and apart from what they have attempted to plea is a pattern of racketeering conduct.

But there's more. They also completely fail to allege another essential element; that Kirkland operated or managed the enterprise. At most, they assert a business relationship. But as Your Honor knows because you do have a criminal background, mere participation --

THE COURT: Does it -- this is -- you've got to have a criminal enterprise separate from the -- the RICO predicate offenses.

MR. HUESTON: Right.

THE COURT: That's -- that's -- I think --

MR. HUESTON: That's fundamental.

THE COURT: Fundamental. I think it's more of an "if proven." Let me be very clear, because I'm not suggesting it exists. It would at -- at best be more akin to a conspiracy than a criminal enterprise.

MR. HUESTON: Well, we'll get to conspiracy. I'll just do a quick --

THE COURT: I'm not talking about conspiracy to violate RICO.

MR. HUESTON: Yeah. Well, this -

THE COURT: Because a mere presence is a -- is an instruction for a conspiracy count.

MR. HUESTON: Right. But let me hop off and talk about conspiracy for a moment.

THE COURT: Okay.

MR. HUESTON: Because what they have done with conspiracy is simply say there was a meeting of the minds. And that very language from the first amended complaint, it's there.

THE COURT: Uh-huh.

MR. HUESTON: It has been quoted in the Fifth Circuit,

a meeting of the minds as, As a matter of law insufficient to allege conspiracy. Boom.

THE COURT: Well, that's not the case, actually, counsel, because a meeting of the minds is the first step in a conspiracy. You've got to have a meeting of the minds. You don't have to have anything in writing or a contract. However, I'm not suggesting this is a conspiracy.

MR. HUESTON: Okay. All right.

THE COURT: You still have to have --

MR. HUESTON: And all I'm saying --

THE COURT: -- you still have to have an agreement to violate the law.

MR. HUESTON: Absolutely. And -- and all I'm saying is, Your Honor, you're absolutely right. You've got to have a meeting of the minds to walk your way to a conspiracy, but your allegation in a complaint has to be more than barely saying with the words, quote/unquote, There was a meeting of the minds. That's insufficiently pled.

THE COURT: What more would you -- what more are you, hypothetically, thinking it would need?

MR. HUESTON: You need details, some fact details --

THE COURT: Oh, you're saying --

MR. HUESTON: -- some fact details --

THE COURT: Okay, you're saying detailed facts.

MR. HUESTON: -- behind it.

THE COURT: Okay.

MR. HUESTON: Yeah. I mean, we're talking --

THE COURT: You're saying not a -- not a naked allegation under --

MR. HUESTON: Exactly.

THE COURT: -- under *Twombly* and *Iqbal*.

MR. HUESTON: Which -- exactly. Which is all that is.

But now back to the RICO. It also fails because they fail to allege any operation or management of the enterprise. And again, we talked about mere participation or a business relationship, or if Kirkland was even benefiting. All that is insufficient to show that they were operating or managing the enterprise.

In fact, *Reves versus Ernst & Young* is very much on point. That involved a failure by the accounting firm to tell the board that an enterprise member was insolvent and there could be a conflict there. That was not enough to raise that level of activity to managing or operating an enterprise.

Again, all that they have described here in terms of specifics would be Kirkland's general legal services that they worked, that they filed bankruptcies, and they had local counsel, and some of their cases came before Judge Jones. That's nothing close to properly alleging operation or management.

Okay. Beyond that, they failed to adequately plead

predicate acts. And remember, their RICO claims are very broad and outrageous, frankly. They allege as predicate acts that Kirkland engaged in obstruction of justice. But there's not a single cited fact for the allegation that Kirkland did something to influence Judge Jones. That's just an outrageous, untethered allegation.

With respect to the so-called honest services fraud predicate act --

THE COURT: Well, that one requires a whole lot more than just --

MR. HUESTON: Oh, yeah. Kickbacks, quid pro quos. We're in the realm of crazy untethered there. That is certainly not appropriately pled as a predicate act.

Same with their allegation of bankruptcy fraud. It actually contradicts their honest services fraud allegation. And in the honest services fraud context, as Your Honor well knows, a public --

THE COURT: Uh-huh.

MR. HUESTON: -- official has to be getting a bribe.

THE COURT: There's got --

MR. HUESTON: But then they say --

THE COURT: -- there's got to be bribery, extortion, something else.

MR. HUESTON: Yeah. Right. Right.

THE COURT: It's a limited -- it's a limited

application.

MR. HUESTON: Right, right, right. But in the bankruptcy fraud they say, Never mind what we alleged in that, we've got a new story for you.

The -- here, the receiver of the -- a bribe is actually Kirkland, they say. And without any explanation of why they were getting this bribe or what they were doing, completely opposite of what would have to be alleged by their other predicate of honest services mail fraud.

So, allegations completely without any factual basis. They have absolutely failed to plead any sufficient predicate acts on top of the multiple additional legal and factual failures into their RICO case.

And then finally, the allegation of a RICO conspiracy. Your Honor, here again they've said in the complaint -- first of all, they don't even allege the defendants agreed or otherwise coordinated to conceal the relationship. They have only said even in this context, the RICO conspiracy, that there was a meeting -- this is a quote from the complainant. Defendants had a meeting of the minds on the object of the conspiracy.

That's as far as the allegation goes.

Your Honor, I would have you look at *Berry versus Indianapolis Life*, Northern District of Texas, 2009, dismissing plaintiff's allegations that, quote, Defendants had a meeting of

the minds in the object of the conspiracy, end quote.

That bare allegation alone is insufficient to support and allow to move forward RICO claims.

And -- and backing up, Your Honor, the courts have said that particular care and investigation has to be shown before making a damning RICO claim.

THE COURT: Okay, we'll get into the sanctions motion in a moment.

MR. HUESTON: All right. Okay. Then I'll -- I'll spare myself anything more on that.

THE COURT: Wait -- wait on the ruling of sanctions in just a moment.

MR. HUESTON: All right. There's absolutely no basis -- sufficient allegations for alleging a RICO conspiracy.

Your Honor, if we're saving time for the sanctions motion, I won't say much more, then, on RICO.

I will say this with respect to Kirkland in terms of what is at stake with this decision. What's at stake, Your Honor, I think, is whether the Court wishes to create an obligation for lawyers to go behind a judge's back and make sure a judge's disclosures in a given case are both complete and accurate, or to create an obligation for lawyers to conduct an investigation of a judge or another law firm when they hear an unsubstantiated rumor about alleged inappropriate conduct.

And if the answer is "yes" to either of those

questions, I think one has to ask oneself, What is going to be the effect on the integrity of the judicial process?

THE COURT: Well, that is a good question. What is the effect of all of this on the integrity of the judicial process? Because that -- isn't that at the heart of this case?

MR. HUESTON: Absolutely. And --

THE COURT: And so -- and I'm -- I'm smiling just because I'm -- I'm wondering how many of you went out to investigate this Court and my background before you appeared before me.

So -- attorneys do that. That's a normal thing. And I'm not saying that that creates a duty on the attorneys. That's wanting to be prepared for whoever you're appearing before.

MR. HUESTON: Absolutely. But --

THE COURT: I'm -- I'm not suggesting there's a duty to do that.

MR. HUESTON: The key here is the line drawing, which has to be drawn with Kirkland on the side. The notion that Kirkland would somehow have had an obligation based on this anonymous letter rejected all -- six different ways to Sunday by the judge and the firm that had that conflict, that they would have had some duty to do something on top of that has no basis in the law and it would be an unfair and a massive broadening of, I think, unbounded responsibility for attorneys. So thank

you.

THE COURT: I've got to think that one over. But okay. I understand.

MR. HUESTON: All right.

THE COURT: Who else on the defense side wants to go next?

MR. KIRKENDALL: I'll be brief, Your Honor.

THE COURT: Go -- all right.

MR. KIRKENDALL: Your Honor, Tom Kirkendall again on behalf of Elizabeth Freeman.

THE COURT: Uh-huh.

MR. KIRKENDALL: I'm not going to go over the standing issues or any of the issues Mr. Hueston very eloquently went over. But I do want to address some -- some questions that the Court had addressed that I think I can clarify.

THE COURT: Okay.

MR. KIRKENDALL: First of all, although this was a prepackaged bankruptcy case, the McDermott case --

THE COURT: Uh-huh.

MR. KIRKENDALL: -- simply because it's a prepackaged bankruptcy case doesn't mean that it's a done deal when it goes into the bankruptcy court. The -- the bankruptcy court still has to go through elaborate hearings in order to confirm a prepackaged bankruptcy plan.

THE COURT: Uh-huh.

MR. KIRKENDALL: And I would -- I would urge the Court --

THE COURT: Okay, so let me ask you a question, then --

MR. KIRKENDALL: Sure.

THE COURT: -- because you bring up a good point. Okay. So not an automatic rubber stamp. And I --

MR. KIRKENDALL: That's correct.

THE COURT: And my hat's off to bankruptcy judges because that is a very specialized area of the law. So my hat's off to them.

My question is, though, who are -- who are the -- the attorneys in court and arguing these issues that were being contested at the time they were being contested?

MR. KIRKENDALL: So, you have -- you have attorneys all over the place representing --

THE COURT: No, but I'm saying in this particular underlying case.

MR. KIRKENDALL: In this particular case --

THE COURT: Uh-huh.

MR. KIRKENDALL: -- on behalf of the debtor, McDermott --

THE COURT: Uh-huh.

MR. KIRKENDALL: -- you had both Kirkland & Ellis and Jackson and Walker.

THE COURT: Okay.

MR. KIRKENDALL: But you also had a creditors committee that was represented in the case. I don't know who represented them, but it was probably a big law firm. There very likely was representatives of -- of bondholders' committees. This was a huge company.

THE COURT: Uh-huh.

MR. KIRKENDALL: Just --

THE COURT: It is a huge company.

MR. KIRKENDALL: Yeah, it is. It still is.

THE COURT: Uh-huh.

MR. KIRKENDALL: But they had made some bad decisions in terms of the way they had financed it. At the time that they filed this prepackaged case, the -- the lenders of McDermott that had a lien on basically all of McDermott's properties, they converted over $3 billion of debt into new equity in McDermott. They basically became the new shareholders of McDermott.

THE COURT: So they took the shareholders' equity away to give to the creditors, and I think some members of the executive committee of the company.

MR. KIRKENDALL: Yes. In other words, there were some -- there was some equity carved out in the new equity that was created in McDermott both for officers and office -- key officers, but also for --

THE COURT: So why would the officers get a part of

the equity of those that are losing it?

MR. KIRKENDALL: That's a way to incentivize them to stay on if they're key on -- if the debtors --

THE COURT: Aren't they the ones that got them in debt?

MR. KIRKENDALL: Well, they may or may not have. May have not been. Sometimes management often changes --

THE COURT: So you're --

MR. KIRKENDALL: And so --

THE COURT: -- so you're taking away the equity of other people to give to the people that are in the executive branch that may or may not have been responsible for placing the company --

MR. KIRKENDALL: Could be.

THE COURT: -- in a reorganization?

MR. KIRKENDALL: Yeah, it could be. It -- it --

THE COURT: Okay.

MR. KIRKENDALL: -- varies in all the cases. But --

THE COURT: Sure.

MR. KIRKENDALL: -- the -- the point is, is that at the time that McDermott went into Chapter 11, the equity value was zero. I mean, it was negative compared --

THE COURT: And -- and I understand that.

MR. KIRKENDALL: Yeah.

THE COURT: So my question to you, and I -- I may be

getting out of the record, and if I am, please know that I'm not going to rely on anything not in the record in terms of the -- of the pleadings as well.

MR. KIRKENDALL: Okay.

THE COURT: So the question becomes, but if an equity person gets to keep their equity through this reorganization, once the company comes out of it, it may be worth something, correct?

MR. KIRKENDALL: Yes, it -- it would be, but to see --

THE COURT: So wouldn't that be a loss to them?

MR. KIRKENDALL: But -- well, but -- there -- there's no question that the equity holders lost their investment --

THE COURT: Right.

MR. KIRKENDALL: -- in McDermott. That -- but, again, that's the risk of investing inaccurate --

THE COURT: I understand that. But if -- I understand that, but you're creating new equity owners and I get --

MR. KIRKENDALL: Right.

THE COURT: -- that it's the creditors because you're trying to satisfy them and get rid --

MR. KIRKENDALL: Right.

THE COURT: -- of the lien and -- and get the company going forward.

MR. KIRKENDALL: Right.

THE COURT: But not all of it went to the creditors,

right?

MR. KIRKENDALL: Well, the vast majority of it did. So I think --

THE COURT: Right. Okay.

MR. KIRKENDALL: -- I think it was 90 --

THE COURT: So the vast majority did.

MR. KIRKENDALL: -- I think 94 percent of the new equity went to the secured debt.

THE COURT: Okay.

MR. KIRKENDALL: I think another six percent was given to bondholders, unsecured bondholders that were creditors in the case.

THE COURT: So that would be a hundred percent?

MR. KIRKENDALL: It's pretty close. It's --

THE COURT: Did you say -- you said 93 or 94?

MR. KIRKENDALL: I think it was 94 percent went to the secured debt. Around six percent went to the bondholders. Probably a little bit less. But it was a very little -- small amount that actually went to the executives of McDermott to incentivize them.

THE COURT: Okay, so why not give that part to the equity holders that you just took everything away from?

MR. KIRKENDALL: Well, because you have other creditors, such the unsecured bondholders who --

THE COURT: Okay, but they didn't get anything.

MR. KIRKENDALL: Well, no, they did. You see, that's what I'm saying. They -- they had to -- the bondholders that -- that were unsecured and were below the secured debt --

THE COURT: Uh-huh.

MR. KIRKENDALL: -- they ended up having to convert all of their debt -- hundreds of millions of dollars in debt --

THE COURT: Uh-huh.

MR. KIRKENDALL: -- into probably less than six percent.

THE COURT: Oh, that's the six percent you were talking about.

MR. KIRKENDALL: Under -- yeah, under the new equity. So they took a --

THE COURT: I'm just saying, the part that went to the executives, why not give a little bit of that to some of the equity holders that you just took all of their equity away?

MR. KIRKENDALL: It's a good question, but --

THE COURT: But we're not here to litigate that.

MR. KIRKENDALL: Yeah, but the -- the fact of the matter, in these negotiations --

THE COURT: Uh-huh.

MR. KIRKENDALL: -- the creditors in the bankruptcy priority scheme are higher in priority than the equity --

THE COURT: And -- and you're right. You're absolutely right. The question then becomes, at which point do

the equity holders that are about to give up -- and because of their risk that they took, that they're about to give up to the -- the creditors who are now going to be the ones that take the risk, where do they get a fair shot to be heard and to argue their position?

MR. KIRKENDALL: And -- and I heard that question before. It's a good question. It's one I want to address.

THE COURT: Good.

MR. KIRKENDALL: They could come into the bankruptcy court and be heard. Absolutely.

THE COURT: But isn't that the whole issue in this particular case, is that --

MR. KIRKENDALL: Yeah, it -- it is.

THE COURT: -- they didn't feel --

MR. KIRKENDALL: And my --

THE COURT: -- he didn't feel heard?

MR. KIRKENDALL: Right. My point is --

THE COURT: The plaintiff didn't feel heard.

MR. KIRKENDALL: -- Mr. Van Deelen --

THE COURT: Uh-huh.

MR. KIRKENDALL: -- was the only equity security holder to come in and object to the plan of reorganization. He was the only one. That -- which was his prerogative.

THE COURT: Right.

MR. KIRKENDALL: Don't get me wrong. I -- I -- and I

would submit to you, if you look at the record, Judge Jones was extremely patient with Mr. Van Deelen in terms of allowing him to object at the confirmation hearing, in listening to his objections at the confirmation hearing, sometimes under difficult circumstances because he didn't act well. You can see that in the -- in the -- in the record.

And the bottom line is, is that he was provided his due process rights to object to the confirmation of this plan. The thing that he couldn't overcome was that he didn't have anywhere near the financing available to come in and do the financing that was being done under the plan. Plus, I want to say 94 percent of the creditors of McDermott voted in favor of this plan. Ninety-four percent, and I think it was --

THE COURT: But -- but we're getting away from --

MR. KIRKENDALL: -- an equal amount of the amount.

THE COURT: -- we're getting away from the substance of this matter as opposed to the bankruptcy.

MR. KIRKENDALL: Correct.

THE COURT: I'm not revisiting, necessarily, the bankruptcy matter.

MR. KIRKENDALL: The -- the point I'm trying --

THE COURT: But -- but the point in this particular case that I'm getting from the pleadings themselves is that he is alleging that he didn't get a fair shake because of this relationship by one of the attorneys who represented the

company. That but for that relationship, he might have gotten a fair shake and may have been heard.

One of my questions early on was -- I'm not sure that I -- it's proper for me to determine some of those matters because the outcome might have been the same with different attorneys on -- on the -- on the -- on behalf of the company.

The question is that perception, though, that due process wasn't properly given because of that underlying -- or that situation.

MR. KIRKENDALL: Right. And -- and I understand that, Your Honor. But the -- the point -- I'd like to make two points.

THE COURT: Sure.

MR. KIRKENDALL: One is, is that if you look at the record that all of the defendants have cited in their -- in their briefing --

THE COURT: Uh-huh.

MR. KIRKENDALL: -- Judge Jones went out of his way to provide Mr. Van Deelen an opportunity to object both with regard to the confirmation of the plan, and then --

THE COURT: I keep -- I keep hearing that, but that doesn't take away from the situation that he -- given what was going on the background that had not been disclosed was that there is a feeling that that influenced the -- the adverse decisions. However, are those the ones that are cloaked with

the judicial immunity perceptions?

MR. KIRKENDALL: Correct. And I'm going -- I'm going to get to that with regard to my second point.

So, again, I -- I would just urge the Court to look at the very voluminous record, both with regard to the confirmation hearing, and then with regard to the lawsuit that Mr. Van Deelen filed against the officers of McDermott after confirmation --

THE COURT: I -- I can't look at anything outside of the pleadings.

MR. KIRKENDALL: It -- it's in the record.

THE COURT: Okay.

MR. KIRKENDALL: It's in the record, so you -- so you can look at it.

So, I just -- the point is, Mr. Van Deelen was afforded his due process rights to object to the plan and to object to not being able to pursue the McDermott officers.

THE COURT: But you're presuming that he had a fair hearing.

MR. KIRKENDALL: Right.

THE COURT: Given -- given this relationship that was not disclosed, you're presuming he got a fair hearing. Now, I'm not presuming he got a bad hearing, I -- but I can't presume that he got a full hearing, either.

MR. KIRKENDALL: And -- and that's the second point I

want to make. In -- in my response and to -- in my reply to the response on this motion to dismiss --

THE COURT: Uh-huh.

MR. KIRKENDALL: -- I cited a recent Fifth Circuit case. It just -- it was just published last month in the *Archdiocese of New Orleans* case. And it's a very interesting case. I would urge the Court to read it.

But in that case, you have a situation where four members of a creditor's committee were tossed off the committee summarily by the bankruptcy judge because of some bad deeds by their -- their order. They appealed that order of the bankruptcy court to the district court. I think it was assigned to the district court of Judge Guidry.

THE COURT: Uh-huh.

MR. KIRKENDALL: Judge Guidry concluded, you know, You don't even have a right to appeal, and he denied their appeal.

THE COURT: Uh-huh.

MR. KIRKENDALL: Several months later, Judge Guidry recuses himself because of publicity surrounding donations that he had made to the Archdiocese of -- of New Orleans. It -- it's after the recusal he -- the case was assigned to Judge Ashe, and members -- the committee members come in again and say, Judge Ashe, please do -- please reverse or vacate; vacate Judge Guidry's order denying our appeal because, you know, he obviously had a conflict of interest when he decided it.

(THE SOUND OF THE SALLYPORT DOORS MOVING)

THE COURT: Ms. Mendoza, tell them to stop that, please.

Go ahead.

MR. KIRKENDALL: Judge Ashe said, No, you got a fair hearing in front of Judge Guidry; I've looked at the record, you got a fair hearing, and you're not entitled to -- to be on that committee.

And they ended up appealing that to the Fifth Circuit. And so that's the -- the decision that I referred to. The Fifth Circuit agreed and said, Look, Judge Guidry should have recused himself. No question about it.

But the Fifth Circuit said, We are not in the business of mindless vacating fair decisions where the parties involved were given their due process rights. And -- and --

THE COURT: But -- but that would have been a recusal under subsection (a), an appearance of impropriety.

MR. KIRKENDALL: Yeah, I believe it was under subsect -- subsection (a). I'm not -- I'm not sure it was, but I believe it was.

But at any rate, my point is, is that --

THE COURT: I understand what you're saying.

MR. KIRKENDALL: Yeah.

THE COURT: You're saying if he got a fair shot at being heard, that's where it all ends. I understand that.

MR. KIRKENDALL: Correct.

THE COURT: I -- I understand the argument.

MR. KIRKENDALL: Okay. And then -- in that connection that -- that -- although, interestingly, the -- the case isn't cited in the Archdiocese's case by the Fifth Circuit.

But there's another case, Fifth Circuit decision from 1990 in which -- in the *Continental Airlines* case, bankruptcy case, where a judge in that case approved a fee award to a law firm, and then the next day started to negotiate leaving the bench and going to work for that law firm. A couple weeks later, he leaves and goes to work for the law firm.

So, a decision that he had made previous to that with regard to the unions in that case, the unions said, Wait a minute, this guy was negotiating with the law firm that ultimately hired him, he gave them a huge fee award; Fifth Circuit, vacate this order that he entered vis-à-vis our executory contracts.

Once again the Fifth Circuit said, No, we've looked at the entire record. Yeah, he should have recused himself, but, again, we don't mindlessly vacate fair decisions.

And I would submit to the Court that is exactly what you're dealing with here. Mr. Van Deelen was treated fairly in the process. His due process rights were -- were maintained, and there is no valid damage claim against any of the defendants. Thank you, Your Honor.

THE COURT: Okay. Who else from the defense side on the main issues on the motion to dismiss?

No? Okay. Let hear from the plaintiffs.

So let's begin with the -- the standing issue.

MR. WEST: Yes, Your Honor, I -- I've prepared a presentation, but I think the -- the best way to go through is just issue by issue in response to the arguments the defendants have raised. I'm going to try to be as -- as respectful to the Court's time as possible. But I will invite Mr. Clore to -- to make any additions or -- or corrections as necessary or to help me answer any of Your Honor's questions.

With the issue of -- of absolute lack of constitutional standing under Article III, I think that's a broad overestimation of -- of the argument the defendants are making.

They would have the Court believe that, Hey, this is a prepackaged bankruptcy; everything was signed, sealed, and delivered before -- before Kirkland and Jackson Walker and McDermott Industries walked into the courtroom.

At the same time, as the Court so accurately pointed out, how does anybody have a -- a fair shake or a fair shot in that -- in that context?

Even more so when the case is filed in the Southern District of Texas, where they know that, Hey, there's a 50/50 shot we're going to get exactly the judge that we want, who's

got a relationship with one of our attorneys.

THE COURT: Well, but that's a whole forum shopping situation that the whole system has got going on in the nation. The question here becomes, though, counsel, is how does he have standing to bring claims on behalf of the company?

MR. WEST: And, Your Honor, I -- I don't think that he is bringing claims on behalf of the company.

THE COURT: But that's what most of the -- the amended complaint is on.

MR. WEST: That is -- that is the -- the spin that the defendants would place on the argument. The -- the arguments are twofold. Number one, he lost his entire equity interest in --

THE COURT: But you didn't plead that.

MR. WEST: We -- we did plead that he lost his equity interest.

THE COURT: He -- well, you pled that he lost his equity interest, but that's not -- you're not -- you're not claiming a damage directly to his equity interest. You're saying the law firms -- the loss was in what the law firms got paid by the estate, by the bankruptcy estate. That -- wouldn't that be McDermott's place to bring that?

MR. WEST: The -- the loss to McDermott is separate and apart from the loss to -- to Mr. Van Deelen. Now, the -- the -- Kirkland and Jackson Walker got paid out of the

bankruptcy estate, and we're saying that those fees were -- were likely inflated. And those go to the -- the motivations and to the -- the various allegations of fraud that were the -- the intended benefit of their misrepresentations. But the damages to Mr. Van Deelen, aside from the loss of his equity shares, is that he never had a fair shake to -- to make those arguments to the bankruptcy court, but also the costs and expenses that he incurred in pursuing both those claims and the recusal of Judge Jones, as well as the mental anguish and -- and emotional distress --

THE COURT: But you're -- but you're claiming the loss of the equity shares as a creditor. And equity shares don't become creditors in bankruptcy.

MR. WEST: They do not. They do not.

THE COURT: So how is it that he's a creditor?

MR. WEST: Well, and was something that we corrected. He is not a creditor in the bankruptcy. He was an equity shareholder and he lost his investment in the McDermott Industries bankruptcy.

THE COURT: Okay, so point me to the paragraph where you're -- you're saying that the actions of some or all of these defendants led to the loss of his equity and that was his -- the damage that was caused, the lost of -- the loss of his equity.

MR. WEST: That is one element of damages, Your Honor; that he did not have a --

THE COURT: Okay, so point me --
MR. WEST: -- fair opportunity to --
THE COURT: Go -- go ahead and point me to that -- the paragraphs where that is brought in.
MR. WEST: Mr. Clore is helping me --
THE COURT: Sure. That's fine.
MR. WEST: -- pull it up, Your Honor.
THE COURT: Keep going while he gets those -- those paragraphs. Go ahead.
MR. WEST: I appreciate that, Your Honor.
That is just one element of damage that Mr. Van Deelen has suffered. In addition to the loss of the fair and reasonable opportunity to defend that equity interest, he suffered direct expenses just bringing his claims at all to a -- a corrupt courtroom. He filed his claims, he filed his objections to the plan, he filed his challenges to the confirmation of the plan, he filed his motion to recuse all on a playing field that was not level due to the corruption perpetrated by Judge Jones and his -- his associates, his co-conspirators at Jackson Walker and Kirkland.
THE COURT: So that brings me back to one of the original questions that I had, is that those decisions were made in a courtroom, it was a matter of a controversy in front of Judge Jones, they were made in the course of that lawsuit or that proceeding. How -- how does -- how do you defeat judicial

immunity on those matters?

MR. WEST: Your Honor, with respect to judicial immunity, the -- the inception of the harm was the non-judicial act of intentionally choosing not to disclose that relationship.

THE COURT: But how did that lead to the harm? What -- I guess my question is, but for that disclosure, how would the outcome have been different?

MR. WEST: That's a fact question, Your Honor.

THE COURT: Sure.

MR. WEST: That -- that's not a 12(b)(6) question.

THE COURT: True. But the -- but the question is, it goes to how can your client recover damages?

MR. WEST: Well, if we're talking about the equity shares, Mr. Kirkendall represented to the Court all of this is a negotiation at the bankruptcy court. You've got corporate officers who were incentivized to maintain their -- their position by receiving equity, continuing equity in the -- the reorganized company.

He also represented that Mr. Van Deelen was the only equity security holder to come and make a complaint.

There's a -- a possibility that they could have said, Hey, look, you know, this guy is the one thorn in our side, he's going to hold up the whole plan, we'll throw him a bone and we'll let him carry on some minority, some miniscule --

THE COURT: But isn't that -- but isn't that all

basically a collateral attached on the outcome of the bankruptcy matter? Isn't it in essence a shareholder derivative lawsuit?

MR. WEST: Well, no, because he's not saying that he is fighting for the -- the complete repatriation of -- of fees or reestablishment of the prior company to the -- to the estate pre-bankruptcy or the fees back to the estate. He's saying that, I need my claims redressed in this litigation. He's not asking for the bankruptcy rulings to be set aside, or the bankruptcy confirmation plan to be set aside.

THE COURT: So then how did he not get a fair proceeding if he's not asking for all of that to be set aside because it was fairly decided?

MR. WEST: Well, it wasn't fairly decided. I mean, with their -- we can't have the presumption that it was fairly decided when we've got a -- a judge, we've got attorneys who are working together to make sure that what they -- what they bring to the Court for rubber stamping, a prepackaged bankruptcy, is approved.

THE COURT: Okay. So, but -- but that is the whole point of this matter. If he's not contesting the final outcome of the bankruptcy matter, he's not -- he's not saying it shouldn't have been decided that way, then how does all of this other stuff factor into those decisions?

MR. WEST: Because he's not asking for the bankruptcy rulings and the bankruptcy confirmation plan to be undone. He's

saying, I have individualized damages that can be redressed in this litigation before this Court by these defendants who are responsible for perpetrating that fraud upon the Court and upon -- upon the plaintiff.

THE COURT: But you -- but you're basically -- and I'm looking at Paragraph -- hold on just a second. Let me make sure that I'm -- let me -- let me get to -- keep -- keep going while I find what I -- what I was just looking at. Go ahead.

MR. WEST: Sure. And just a single element of -- of Mr. Van Deelen's damages. More importantly and more directly attributable to the conduct of the defendants are the costs that he incurred in -- in litigating, period, on this uneven playing field where the deck was stacked against him. The costs that he incurred in bringing objections or complaints. You know, filing fees and transportation costs. Maybe they were inartfully pleaded as -- as costs that he hopes to recover in this litigation, but they are costs that he incurred as real and concrete damages as a result of litigating his claims in an unevil -- uneven playing field.

THE COURT: Okay, so let's talk about a hypothetical person who is complaining about the outcome of a case. Can they later bring a lawsuit for those legal fees because they -- they felt that they unfairly lost in another case? Because that's what you're ask -- that's what you're basically saying the damages are here.

MR. WEST: Well, we --

THE COURT: I litigated a case, I lost, I don't think it was fair; therefore, my damages are attorneys' fees, what -- what I spent.

MR. WEST: Well, and he didn't have any attorneys' fees in the underlying. He was pro se in the -- in the bankruptcy matter.

THE COURT: Well -- but in terms of -- that's what you're basically talking about in terms of what it cost him generally.

MR. WEST: Correct. But he incurred costs that but for the -- the concealment of this relationship, he would never have had to incur. The litigation would never have had to proceed through the -- specifically through the motion to recuse.

THE COURT: Okay. So I get back to my original question. You're saying just the relationship and the denial of the motion to recuse is sufficient to lead to damages --

MR. WEST: Those are --

THE COURT: -- as a cause of action?

MR. WEST: Those are concrete damages, and plaintiff is entitled to recover those damages as a result of the cause --

THE COURT: But under what theory of the -- of cause of -- what's your cause of action theory on that?

MR. WEST: Those are damages to his property, his

personal property, that resulted from the alleged RICO violations, as well as --

THE COURT: Which -- okay, which personal property?

MR. WEST: The personal property -- Mr. Van Deelen's personal property, his -- his hard-earned money that he spent to go and prosecute his claims and to prosecute his motion to recuse.

THE COURT: Okay, so that's my question to you. What money is that? What -- what are we talking about?

MR. WEST: Well, you know, to the extent that we're -- we weren't required to plead specifics, I can add specifics to the Court just for context, context of -- of filing fees, transportation costs to go to the courthouse, parking, research costs, printing and copying costs.

Now, they may not be as -- as large as the -- the equity value that he lost in the company, but that doesn't make them any less real or concrete or redressable.

THE COURT: Keep going.

MR. WEST: With regard to -- and that's essentially open and shut on their damages -- or their standing issue, because even if we set aside the equity that he lost in the company, which is the -- the thrust of defendants' arguments, saying, Hey, he doesn't have standing because his equity was lost before we ever walked in the door.

Even though as the Court rightfully noted, he -- he

never had a fair shot, he never had a chance to defend that interest. But he did have a chance to avoid the costs of litigating those interests had he known that, Hey, this isn't going to be a -- a legitimate litigation. Or had he known that, Hey, I'm going to be filing this motion to recuse and it's going to be vehemently opposed by attorneys who know that what I'm alleging are true; it's going to be ignored by a judge who knows the facts are true; and it's going to be referred to another judge to deny. And he prosecuted all of that.

And as I mentioned earlier, in response to the immunity argument, that harm was consummated at the time -- at the time that he incurred those costs. And that was proximately caused by the failures to disclose and the intentional concealment of that relationship by Judge Jones and all of the attorneys at the -- at Jackson Walker and Kirkland, specifically, Ms. Freeman, who were representing the debtor in that litigation and opposed his -- his opportunities for relief.

With regard to the exculpation provision that Jackson Walker alleges absolves them of liability, the exculpation provision explicitly excludes from exculpation claims for fraud, which are the exact claims that Mr. Van Deelen is bringing in this litigation; fraudulent failures to disclose, fraudulent statements of disinterestedness, and misrepresentations of this being a fair and even playing field.

And again, he was heard on all of these arguments by

a judge who knew he didn't have jurisdiction, who knew he didn't have authority, who knew that he had taken the decidedly non-judicial act of instructing and -- and collaborating with the attorney before him to hide that relationship.

That is a harm, those costs that Mr. Van Deelen incurred. Although the costs may not be large, they are concrete, they are traceable because they would not have been incurred but for the misrepresentations of the concealment, and they're redressable by award of those damages -- nominal damages, punitive damages, and attorneys' fees.

But he never got a chance because he was kicked out of the bankruptcy court by Judge Jones. And as was -- was discussed within the -- the context, the procedural posture of how this went on, he brought his claim as an equity shareholder and he was dismissed and kicked out.

He said, Okay, I -- I don't have an opportunity to redress my claims in the -- the bankruptcy court, I'm going to go file my claims not against the company, but against the shareholders -- or not the shareholders, the equit -- the officers for their individual acts in bringing the company inappropriately to bankruptcy. That's when Kirkland & Ellis and Jackson Walker said, Oh, we're not going to let you litigate these claims in a court that -- that we don't have control over. We're going to remove your claims against the officers back to the bankruptcy court so we can stomp you down again.

And that's exactly what they did. And that's when the motion to recuse was brought forth, saying, Hey, I didn't get a fair shake in this first court the first time, I don't know why, but I'm going to file a motion to recuse because I don't think I should be back before Judge Jones.

It was subsequently in March of 2021, when he received that anonymous letter, that he amended his motion to recuse.

Now, it's interesting that at that time Jackson Walker goes and talks to Elizabeth Freeman and she says, Oh, hey, I was in the relationship. That's -- that's long gone, dating back to -- to March of 2020 when COVID started. Notably, the McDermott bankruptcy was filed in January of 2021 and was assigned to Judge Jones.

So that relationship -- you know, whatever status or historicity of it was -- was -- is acknowledged or denied was ongoing at the time that the bankruptcy was filed in Judge Jones's court.

And as Your Honor questioned earlier, that was the -- the inception of when the -- the concealment, at least in this case, started. Although plaintiff has possibly alleged it dates back to 2018 when Ms. Freeman left Judge Jones' chambers as a clerk to go to Jackson Walker as a partner, an in an influx of bankruptcy filings in the Southern District of Texas by Jackson Walker and Kirkland & Ellis really kicked off.

Another quest -- or an argument -- and I may be going around a little scattershot, Your Honor, because I'm trying to address the arguments as they were presented. And I believe that was the -- the extent of -- of most of Jackson Walker's arguments this afternoon.

But one that the Court questioned Jackson Walker's counsel on was, Hey, Freeman was a partner, and her knowledge is imputed to Jackson Walker. And that's absolutely correct.

And the Court asked -- asked counsel to say, Hey, well, what about -- you know, they're relying on this denial by Ms. Freeman in -- in March of 2021 of the relationship, saying, Hey, it's over; you can trust me; I lied to you for -- for three years, but you can trust me now. And they -- they alleged -- claimed to have relied on that.

We've plausibly pleaded facts that -- that undermine that alleged reliance because we've said, No, they all knew about this. That was the whole inception. That was why Jackson Walker originally got into bed with Kirkland & Ellis back in 2018 and started filing all their mega-bankruptcies in the Southern District of Texas.

But what -- what was interesting was when the Court asked, Hey, what about before March of 2021? Let's assume you didn't know before March of 2021. You know, yeah, you can claim a defense that, Hey, she lied to us; we're relying on her -- her denials and -- and we were wrong, but -- she was wrong, but

we're allowed to rely on her denials.

Well, the Court asked, What about March of 2021? You know, you weren't relying on any kind of denial at that point. She was just a partner and why isn't all of that knowledge imputed to Jackson Walker? And I -- I didn't really hear a satisfactory answer, but what -- what struck me as -- as -- as important is when the Court asked about what happens to equity shareholders when a company goes into bankruptcy.

They say, Well, he -- he rolled his dice investing with that company and he lost.

But what's good for the goose is good for the gander. They don't want that same treatment. They rolled the dice according to their best representation of the facts when they hired Elizabeth Freeman and they lied -- she lied to them for three years. Well, all of those -- that information about the relationship that Elizabeth Freeman knew, that she was currently involved in with Judge Jones, they rolled the dice on that and lost, because they're responsible for the knowledge that she had.

THE COURT: Okay. So let's go back to what are the direct concrete damages that you are alleging due to this concealment of the relationship. Because when I go back through every cause of action, whether pled properly or not, most of the allegations all talk about what happened to the bankruptcy estate. And isn't that basically a collateral attack on the

bankruptcy proceedings, and he's doing it on behalf of the -- of the company?

MR. WEST: If he were asking to undo the bankruptcy court's orders --

THE COURT: But he's asking to redress matters that really are issues for the company.

MR. WEST: He's asking to redress the -- the specific and individualized damage that he has suffered. He's not asking for the -- the company to be rewound four years back in time. He's asking for the concrete costs that he incurred in -- in litigating his claims and his motion to recuse before the -- the bankruptcy court.

THE COURT: But he's asking for the defendants, in terms of any of the legal fees that they earned because of this matter -- he's asking that they have to repay it and it's -- that they should disgorge themselves of that ill-gotten gain. Isn't that for McDermott to do?

MR. WEST: Well, Your Honor, with -- with respect to the -- the -- and I'll ask Mr. Clore to correct me if I -- if I misstate. But with regard to the disgorgement of fees, a lot of that related to the breach of fiduciary duty claim that had been brought against Jackson Walker and against Kirkland & Ellis and --

THE COURT: Okay, but the fiduciary duty would have been to McDermott, not to your client.

MR. WEST: And -- and that's why I -- where I was headed, Your Honor. We've withdrawn those claims. I believe we -- we directly withdrew the breach of fiduciary duty claims with regard to Kirkland & Ellis, and we are doing so with regard to Jackson Walker as well.

THE COURT: Okay.

MR. WEST: And so while -- while the -- the direct disgorgement of fees and return of fees back to the bankruptcy estate would be a damage attributable to the bankruptcy estate, we are not seeking that -- that disgorgement. What we are saying, that the -- the fees that were collected and that were rubber stamped by Judge Jones for Jackson Walker and Kirkland & Ellis can be a measure of the quantum to use when evaluating the -- the magnitude of the -- the impropriety as well as the magnitude or the -- the unjust enrichment that they received as a result of the -- the inappropriate disclosure.

THE COURT: But -- but the unjust enrichment was not from your client.

MR. WEST: Well, the unjust enrichment was the -- the recipients of the enrichment were Jackson Walker and --

THE COURT: Right. But that was based on what was paid out in the bankruptcy fees, correct?

MR. WEST: That is the measure of the quantum. That's how -- that's the amount that they were enriched.

THE COURT: I get that. They were -- they were

enriched, but the -- but the person -- the -- the entity that paid those fees that might be able to claim unjust enrichment is not your client. Wouldn't it be the company?

MR. WEST: Well, they were unjustly enriched by the -- by the fraudulent disclosures that were made to the Court.

THE COURT: But how was your client damaged by that? He didn't pay those fees, right?

MR. WEST: He didn't pay those fees.

THE COURT: So how does he get to recover them?

MR. WEST: Well, they are a -- they are a measure. They are not -- we're not asking for the fees to directly be disgorged to us, but they are a measure of the --

THE COURT: But -- so, but you're asking -- but at one point you do ask for the -- that to be one of the -- one of the remedies.

MR. WEST: And that was with regard to the breach of fiduciary duty claims, which we have withdrawn.

THE COURT: Well, unfortunately, they're also kind of mentioned scattered throughout the -- the amended complaint, but okay. Keep going.

MR. WEST: Sure. And also, like I said, Your Honor, that -- that's a quantum -- that's a measure of damages if the Court -- if we get to the point of asking the jury to -- to consider punitive damages. The -- the fees that they collected and the benefit that they reaped as a result of this -- this

inequitable process, these failures to disclose, that's a measure that the jury can consider.

THE COURT: Okay. So what gives your client standing to bring those claims?

MR. WEST: Well, the claim is for the RICO violations, for the damage that he suffered.

THE COURT: Okay, so where is the enterprise?

MR. WEST: So the enterprise, Your Honor, is the -- the agreement of all of the defendants to prosecute legitimate bankruptcy litigation.

THE COURT: But isn't the -- okay, but how does that make it a criminal or an enterprise in violation of the law?

MR. WEST: So, Your Honor, the -- the enterprise, which is the -- the agreement and the operation to provide legitimate bankruptcy services and -- and judicial rulings --

THE COURT: Uh-huh.

MR. WEST: -- as well as non-judicial acts to facilitate that. The racketeering acts, which are separate and apart from and in addition to the enterprise are the mail fraud, wire fraud, obstruction of justice, and honest services fraud predicate acts.

The enterprise -- so the -- the group -- the -- the conspiracy, the -- the consortium of defendants was not limited to only committing illegal predicate acts. So Jackson Walker and Kirkland & Ellis, they -- they negotiated with shareholders;

they negotiated with creditors; they negotiated with adversary parties; they sent notices; they, you know, engaged, you know, economists and analysts to -- to determine the value of the company.

All of that work needs to be done in a legitimate bankruptcy, and the enterprise existed in addition to the -- the predicate acts to conduct those activities, those legitimate activities. That was the enterprise.

In addition to those legitimate acts, there were the illegal predicate acts of filing fraudulent disclosures, filing fraudulent statements of interest in this, using -- using the wires, using the mails, sending notices to shareholders or -- or creditors that, Hey, we're -- we're talking about your claims in an inequitable setting using the mail, using the electronic mail. Those are the predicate acts.

THE COURT: But I would have to find -- for something like that to happen, I would have to find that the proceedings were not equitable.

MR. WEST: And that's a fact issue, Your Honor.

THE COURT: Okay. I get that. I get that that's a fact issue, but the burden -- wouldn't the burden be on you to show that it would be a different outcome but for?

MR. WEST: Well, we know that the -- the injury to Mr. Van Deelen would not have occurred but for the -- the predicate acts. They filed responses to his motion to recuse,

they filed pleadings that said that they were disinterested. All that --

THE COURT: But the -- but the harm isn't from the motion to recuse that you're also saying; you're saying the -- the harm is from all of the concerted actions that were part of the -- the bankruptcy proceedings, not just the motion to recuse; are you not?

MR. WEST: Well, there are -- there are -- the harm is twofold. The harm is -- is the loss of the -- the share value, and there's the -- the harm that was more concrete, which was the -- the costs incurred in litigating his claims and in pursuing --

THE COURT: But your allegations that the loss of the share value was because he was a creditor. That's what your amended complaint says.

MR. WEST: Correct, but we -- we attempted to address that in our responses, that he was -- he was not a creditor, he was a shareholder. He was an equity shareholder.

But in addition to the loss of that value, he also had concrete costs related to his prosecution of his claims in his motion to recuse. Which, as the Court pointed out, absolutely should have been granted and should not have been litigated, denied, or -- or opposed.

THE COURT: Okay. So let's assume for a moment it had been granted and another bankruptcy judge had taken over and

you'd still have the same outcome. Now what?

MR. WEST: Well. That's a fact issue, number one.

THE COURT: I get that is a fact issue.

MR. WEST: Yeah.

THE COURT: But the bottom line is, it goes to whether or not there are damages to begin with, and whether or not -- I mean, because you're alleging that this -- this fraud consortium --

MR. WEST: Uh-huh.

THE COURT: -- engaged in conduct that led to an unfair -- and there were predicate acts. But that would be to everything, not just the motion to recuse.

MR. WEST: Correct.

THE COURT: And so wouldn't you also have to show that the direct harm from all of that was that the outcome would have been different in the bankruptcy proceedings?

MR. WEST: Well, and like I -- like I mentioned earlier, the -- the harm -- at least one harm in filing the motion to recuse was consummated upon filing, because that should have never been a cost that Mr. Van Deel -- Van Deelen needed to incur. If Judge Jones had said, Hey, I've got a connection with Jackson Walker, I can't sit on this case, A; or B, I can't appoint Jackson Walker as local counsel; or, C, I can't appoint Kirkland as lead counsel because this is all something that we all know about.

If the Court had done that, or if Jackson Walker or Kirkland had -- had honestly and truthfully filed their statements of disinterestedness and said, Hey, we've got a connection here with Judge Jones that makes things not sit right, then everything would have been either, one, changed; would -- the case would have been sent to a different court, or Kirkland and Jackson Walker would never have been appointed.

If that been the case, then Mr. Van Deelen would never have had to file a motion to recuse because it would not have been warranted on the -- on the -- the basis of that inappropriate relationship. And so the harm was already consummated.

Even if the -- the Court drilled down after, you know, discovery and summary judgment to say, Hey, maybe the only damage that's got -- and I'm not conceding this. But said, The only damage that he's got is the -- the research and the filing fee for that motion to recuse. That is a real and concrete harm that would not have been suffered but for the failures to disclose and the intentional concealment of all of the defendants of this relationship.

THE COURT: Okay. What else?

MR. WEST: Okay. In talking about the -- the responsibility of Jackson Walker and Kirkland & Ellis and Ms. Freeman, they had an obligation under Bankruptcy Rule 5002 and Bankruptcy Rule 2014 to disclose that relationship.

And the only case -- well, Jackson Walker doesn't really have an argument in response to that that I can -- I can find that's valid. They had the connection, their employee had the connection. They're imputed with the knowledge of that connection and they failed to disclose it.

The only case cited by Kirkland to say, Hey, we're -- we're a step removed, we don't have that obligation, is an unpublished non-precedential case from the Ninth Circuit that can't even be cited to courts in the Ninth Circuit because it's disallowed under the rules because it is an unpublished, non-precedential case. And so I -- I don't believe that -- that -- if that court will rely on its own opinion, that it bears any value before this Court in a different -- in a different circuit, in a different district.

But what we've got here, even -- even regardless, we've got an allegation that Kirkland & Ellis knew. We've got a plausible factual allegation that Kirkland & Ellis knew about the relationship, even though they deny it. And the fact that they deny it, that's a fact issue for the jury, not a -- a 12(b)(6) issue.

And the basis for that allegation that they knew are clearly laid out in plaintiff's amended complaint because they stem from the -- the rapid rise of bankruptcy filings in the Southern District of Texas, especially in mega -- mega-bankruptcy cases by Kirkland & Ellis in the Southern District of

Texas in Judge Jones' court. It's a 50/50 shot. But a lot of the cases that were assigned to Judge Isgur actually got mediated by Judge Jones, a fact that we've learned since pleading.

And I'll -- I'll address at the end of my presentation when I ask for -- for leave to amend our pleading should the Court find it necessary to -- to survive 12(b)(6).

But that uptick of filings happened in 2018 -- began in 2018 when Ms. Freeman left Judge Jones' chambers and went to go work for Jackson Walker. And when the -- the bankruptcy advisory committee chaired -- or -- or headed up by Judge Jones involving partners at Jackson Walker and -- and Kirkland & Ellis really kicked things off in the Southern District of Texas in a marked departure from where they were filing cases previously in other jurisdictions.

THE COURT: But that in and of itself, doesn't cause fraud or create an -- an impropriety in terms of the proceedings.

MR. WEST: It's circumstantial, Your Honor. We believe that it's circumstantial.

THE COURT: It's -- it's circumstantial, but in and of itself, it doesn't -- it's not improper.

MR. WEST: Well, filing them in the Southern District of Texas, no, it's -- it's not improper. But circumstantially, in light with all of the other -- other allegations made in

plaintiff's complaint, including the -- the reported statement in the *Financial Times* from Kirkland partners who've said, Hey, we've known about this relationship for -- for quite some time, and we -- we assumed that they -- they had gotten the thumbs-up, even though they never spoke up to say, Hey, we just want to make sure that everything's on the up and up with this relationship; we've got an obligation under the bankruptcy rules to make sure that everybody's disinterested and that we're disinterested, and that, you know, our local counsel -- who they brought into the case, they'll -- they disagree.

But that's our argument, that they had a responsibility with Jackson Walker as their chosen local counsel who they brought to -- to the Court and said, We would like you to appoint Jackson Walker as local counsel.

We're alleging that based on the fact that they knew about this relationship, they had an obligation to -- to disclose that.

THE COURT: Under what rule?

MR. WEST: Under Bankruptcy Rule 5002, which is --

THE COURT: Okay, we're not in bankruptcy court anymore.

MR. WEST: We're -- we're not in bankruptcy court anymore, but that was --

THE COURT: Okay. So under what cause of action did they have a duty to disclose?

MR. WEST: And so the cause of action is that this was a fraud perpetrated through the bankruptcy court. It's a bankruptcy fraud predicate act under the -- as a RICO violation.

THE COURT: Well, fraud under RICO is defined in 1961, so which fraud there?

MR. WEST: Well, there are -- there are a number. The -- the filing of the -- of the fraudulent disclosures using --

THE COURT: I understand, but what -- what particular type of fraud?

MR. WEST: I'm sorry?

THE COURT: I said which -- which fraud under the RICO statutes?

MR. WEST: Well, I'll ask Mr. Clore to -- to --

THE COURT: Okay.

MR. CLORE: Mail fraud, wire fraud, and bankruptcy fraud.

MR. WEST: Well, and that's where I was headed, was the wire fraud. Was that with the filings that they made were completed using telecommunications; were completed allegedly using mail to the court or to other parties or parties entitled to notice under the -- the case. That these statements were made -- these fraudulent statements were made through those activities, which are -- are subsumed under the RICO fraud acts.

THE COURT: Well, there is no one particular RICO

fraud, gentlemen.

MR. WEST: Correct.

THE COURT: So which particular fraud --

MR. WEST: And that's why we've alleged --

THE COURT: -- are you talking about under RICO?

MR. WEST: We've alleged mail fraud; that these misrepresentations were made through the mails. We've alleged wire fraud, that these representations were made using telecommunications wires. We've alleged honest services fraud. There was some discussion of -- of kickbacks earlier, and one of the allegations that we made is that fees that were being awarded to Jackson Walker and through Jackson Walker to Elizabeth Freeman were being received by the household that Judge Jones shared with Elizabeth Freeman.

THE COURT: Well, honest services has been very limited by an opinion by Justice Ginsburg in the *Skilling* case, and it's been limited even further thereafter. So honest services is not just any lack of honest service, so to speak.

MR. WEST: Right. And that's where I believe that the -- the kickbacks come in, is when money is being funneled, awarded by Judge Jones to Jackson Walker, received by Elizabeth Freeman, and then funneled right back to -- to his household that he shared with her.

THE COURT: What else, counsel?

MR. WEST: Speaking of the -- and beyond to the -- so

we talked about the enterprise doing legitimate bankruptcy work, in addition to the predicate acts. There were challenges to the allegations of structure and hierarchy. And what we've got to plead, and what we did plead for pleading a structure to the enterprise were a purpose, relationships, and longevity.

And we pleaded that the purpose was to conduct legitimate bankruptcy litigation as well as to use these connections that were fraudulently concealed to rep -- provide reputational and financial benefits to Jackson Walker, Kirkland & Ellis, Elizabeth Freeman, and Judge Jones. And the relationships that -- that gave rise to that, or that allowed those -- those purposes to be effected were the relationship between Elizabeth Freeman as Judge Jones' romantic partner, as his former clerk and as a partner at Jackson Walker, the relationship between Jackson Walker and Kirkland & Ellis as a local debtor's counsel and lead debtor's counsel, both of whom, you know, to bring it full circle, were appointed by Judge Jones, all of whom failed to disclose and intentionally chose not to disclose and to conceal this relationship.

And the hierarchy is -- is laid out in the same way. Kirkland & Ellis got appointed as lead counsel by Judge Jones. We are alleging and we have alleged in our complaint that that was at least partially obtained through the relationship with Elizabeth Freeman, based on the understanding that Kirkland & Ellis was going to bring in Jackson Walker as local counsel.

THE COURT: Let me stop you there for just a second.

MR. WEST: Yes.

THE COURT: I need to give my court reporter a short break.

MR. WEST: Certainly.

THE COURT: Okay. And -- so we'll just take a short break so she can take a break.

MR. WEST: Thank you, Your Honor.

(5:01:45 TO 5:17:42 P.M., OFF THE RECORD)

THE COURT: All right. We are back on the record, and all parties are present.

Go ahead, counsel.

MR. WEST: Thank you, Your Honor. I -- I don't have too much. I know Mr. Clore's going to have a few comments to -- to add following me.

But switching over to some of the arguments that Kirkland made about proximate cause. I think that it's clear that Mr. Van Deelen would not have incurred any litigation costs specifically related to the motion to recuse, but for the failure to disclose this relationship. And while they say, Hey, we didn't know, that's not our fault, we have plausibly alleged facts that -- that assert that they did know, both circumstantially relating to the -- the uptick in filings, as well as the -- the statements that were made to the press by Kirkland partners saying, Hey, we knew.

And it was as a result of -- of Kirkland -- of this relationship that Kirkland was led -- and Jackson Walker was brought in to file many, many cases in the Southern District of Texas before Jones, with Jackson Walker, again, as local counsel.

Then one of the alle -- arguments made about the -- the absence of an analogue, well, the analogue is fraud, Your Honor. We're talking about an analogue that -- that gives rise to -- to standing. For -- for Mr. Van Deelen's damages arising from his involvement and the cost and the expenses that he incurred specifically in -- in the litigation of his claims, and the litigation of his motion to recuse.

And I -- I think the final point that I would like to make is that even if all we get to take to the jury after all is said and done, after discovery, after summary judgments, the only damage that we've got to take to the jury is the filing expenses and the research expenses that arose from Mr. Van Deelen's filing of his motion to dismiss, that number one, I think everybody should acknowledge and the Court I think agrees should have been granted, but should have never been needed to be filed because Judge Jones was disqualified from the moment he -- he took the bench. And -- and that motion to recuse should never have been filed. And that was all necessitated by this fraudulent enterprise, this consortium to conceal that relationship.

Before I turn it over to -- to Mr. Clore, I did want to just add some specific arguments related to our alternative motion for leave or opportunity to amend or supplement our pleadings. And I wanted to provide the Court with some specific facts that we would amend or supplement to our pleadings. Specifically, related to the knowledge that Kirkland & Ellis had related to the relationship between Kirkland, Judge Jones, Elizabeth Freeman, and Jackson Walker, another bankruptcy participant in a different bankruptcy, who we also represent and who has a case before this Court, Mr. Morton Bouchard, a fact that we learned in -- in discussing with him, and the fact that it's alleged in his complaint, and that we would allege in an amended or supplemental complaint for Mr. Van Deelen, is that additional evidence supporting the allegation that Kirkland & Ellis knew about this relationship was that Mr. Bouchard was the CEO of Bouchard Transportation Company, a company that was based and formed in New York. Mr. Bouchard is a resident of Florida. And when it became apparent that Mr. Bouchard, as the -- the CEO and -- and primary or sole shareholder of Bouchard Transportation would need to file bankruptcy for that entity, he consulted with Kirkland & Ellis and Kirkland partner Ryan Bennett told Mr. Bouchard, Hey, you should file your bankruptcy -- even though you're a New York company and you live in Florida, you should file that in Houston because we've got a friend in Judge Jones in Houston.

And -- and that was a representation that we believe supports the allegation that Kirkland knew about this relationship and the benefits that were flowing from it.

Also, the recent filings by Jackson Walker and the trustee proceeding regarding the admissions by Freeman in March of 2022, acknowledging that the relationship was ongoing. And the later discussions that were had between Judge Jones and Jackson Walker partner, Matthew Cavenaugh, in Judge Jones' chambers, where Judge Jones was allegedly instructing Matthew Cavenaugh and Jackson Walker that they needed to fix this; they needed to get this figured out; they needed to get an appropriate disclosure. Not an appropriate disclosure, they needed to get a disclosure that he approved of on file; a disclosure that expressly did not explain the full extent of the relationship that he had with Ms. Freeman.

And this is all part of our -- our motion for -- for leave to file a surreply and in support of our motion for leave to amend our pleadings in the alternative.

In addition to the fact that -- that's a non-judicial act against -- we're alleging against Judge Jones, saying, Hey, it's not a judicial act for him to instruct a -- a counsel in chambers how to conceal his relationship for him. That -- that's not a judicial act. And that shows the -- the intentionality of the entire attempts to conceal this relationship.

But what is also important is that Jackson Walker acknowledges that when they had this anonymous letter revealed in 2021, they say, Hey, we took that letter and we told Kirkland about it. Right? And -- and so Kirkland knew about at least a past relationship in -- in March of 2021.

We believe, and we would plead, and we think we're entitled to the reasonable inference that Jackson Walker would have done the same thing in 2022 when Ms. Freeman admitted the extent of her relationship with Judge Jones. And so that will provide indication that in March of 2022, Kirkland as well knew of the relationship.

In addition to that, the allegation that we would add is that as -- as an indicator that all these parties had a -- a combined intent and agreed-upon intent to conceal this relationship is the fact that -- that to date plaintiff is unaware of any of these parties, any of these defendants having corrected the disclosures or amending the disclosures, or filing new disclosures that address the relationship that Ms. Freeman had, and likely continues to have, with Judge Jones.

And then finally, Kirkland alleges that, Hey, we didn't know, and the fact that we've got a bunch of cases in the Southern District of Texas isn't -- isn't circumstantially evident of -- of this relationship because half of those cases were assigned to -- to Judge Isgur and didn't even get to -- to Judge Jones.

Well, we would add factual allegations that even in some cases that were assigned to Judge Isgur, Judge Jones was appointed as a mediator in those cases and mediated those cases, providing a -- a -- arguably an additional non-judicial act -- you don't need to be a judge to be a mediator -- without disclosing his relationship with -- with Ms. Freeman, Jackson Walker, and Kirkland & Ellis.

And then finally -- I didn't address it earlier. I don't think any of -- of the defendants addressed it. With regard to several of plaintiff's state law causes of action, there's an allegation that the statute of limitations has expired as to those. We -- we responded to that in -- in depth in our response, but I would also say that these are continuing and ongoing acts. Because to date, as I stated, plaintiff's unaware that they've made any attempt to correct the -- the misstatements that they've made.

With that, if there's no further questions from the Court --

THE COURT: I have a -- a couple of questions.

MR. WEST: Sure.

THE COURT: Number one, what about the *Bivens* actions, the claim?

MR. WEST: Okay.

THE COURT: Are you still proceeding with that one or are you -- what -- what are you doing with the *Bivens*?

MR. WEST: We are proceeding on that action, Your Honor. We believe that -- that Mr. Van Deelen was denied due process by the -- the concealment of this relationship by Judge Jones. And none of the defendants in their motions to dismiss alleged any special factors that would prohibit the Court from --

THE COURT: I don't know that *Bivens* would apply to anybody who's not acting under color of law.

MR. WEST: Well, and the fact that he is saying, Hey, I am not disqualified, even though he knows that he is disqualified, I would argue that he is -- he is operating under color of law in -- in saying, Hey, I'm -- I'm a judge who's validly on this case. I have authority.

THE COURT: So how would that go against any of the other parties?

MR. WEST: And that's the -- the argument that was made by -- by several of their parties, saying, Hey, we can't -- we can't be subject to that cause of action.

There are cases that we cited. I don't have it in front of me or a citation, but it is in our response, where the Supreme Court has found liability for participants, knowing participants, in violation of 1983.

THE COURT: But even 1983 requires color of law.

MR. WEST: Right. And I -- I --

THE COURT: Which one -- one applies to state actors,

one applies to federal.

MR. WEST: Correct.

THE COURT: *Bivens* is a federal.

MR. WEST: Correct.

THE COURT: But it still has to be somebody acting under color of law. How were these other parties acting under color of law?

MR. WEST: Okay. So with respect to the other parties, we are -- our allegation is they are aiding and abetting Judge Jones' violations of -- of the *Bivens* cause of action.

THE COURT: Okay. Another question. Your client filed his adversarial claims -- what I was calling "B," earlier -- in state court when?

MR. WEST: I'm sorry?

THE COURT: They filed -- you filed it in state court on which date?

MR. WEST: I've got a -- a timeline. I can give the Court that answer.

THE COURT: Okay. Sure.

MR. WEST: It was after his -- his claims and objections were dismissed in the bankruptcy court, and it was before he filed his motion to recuse in the Fall of 2020.

THE COURT: Well, he objected to the confirmation plan in February of 2020; the orders confirming the plan were entered

in March of 2020.

MR. WEST: June 23, 2020, Your Honor, he filed his adversary proceeding against the officers of McDermott, which was removed by Jackson Walker and Kirkland to the bankruptcy court.

THE COURT: Yeah, I don't know how that got moved into bankruptcy. You don't remove from state court into a bankruptcy court.

MR. WEST: I -- I don't, either.

THE COURT: You -- you move it to district court.

MR. WEST: I -- I don't, either, Your Honor, but that's where we ended up, and it was at the -- at the request of Jackson Walker and Kirkland & Ellis, and it had landed in Judge Jones' court. And that may be as much explanation as we'll get until we get some discovery.

THE COURT: But it got filed in state court?

MR. WEST: Yes, Your Honor. In Montgomery County, I believe.

THE COURT: Okay. Uh-huh?

MR. KIRKENDALL: Since you're asking the question and I know the answer --

THE COURT: Uh-huh.

MR. KIRKENDALL: It did get removed to district court in the Southern District. But there's an automatic referral rule, which refers it to the bankruptcy court.

THE COURT: Yes, but that wasn't a bankruptcy issue. It was a separate cause of action.

MR. KIRKENDALL: It was a --

THE COURT: It could be stayed until the -- but the bankruptcy was over at that point.

MR. KIRKENDALL: Yeah. Well, it goes to the core of what we're talking about because that was a lawsuit that was conjoined under the plan. The plan had already been confirmed.

THE COURT: But that -- but that cause of action was against the company; was it not?

MR. KIRKENDALL: No.

MR. WEST: No, the cause of action was against three officers of the company.

THE COURT: Well, okay. But what I'm saying is -- officers of the company. It wasn't -- it wasn't basically challenging the bankruptcy itself, it was --

MR. KIRKENDALL: It was a violation of the confirmation order, because the confirmation order enjoined anybody, other than the debtor, from bringing lawsuits against the officers of McDermott. That's the exculpation clause.

THE COURT: I get it, counsel, but a bankruptcy court doesn't have dispositive authority. That would have been dispositive, denying a person to bring a cause of action.

MR. KIRKENDALL: Well, that's the distinction between a direct and derivative cause of action. So, yes, a part --

a -- a -- you know, a person can bring a direct cause of action against an -- an officer of McDermott, if he has one. But he can't.

THE COURT: Okay. But if he filed it in state court and he had a direct cause of action --

MR. KIRKENDALL: Right.

THE COURT: That would have gone to district court. It should not have gone back to bankruptcy.

MR. KIRKENDALL: So what happened was, is that it went in -- he filed it in state court --

THE COURT: Uh-huh.

MR. KIRKENDALL: -- he asserted derivative claims --

THE COURT: Uh-huh.

MR. KIRKENDALL: -- so the debtor removed it to the district court, automatic referral in the --

THE COURT: But he wasn't -- they weren't debtors at that point. The company's the debtor, not the individual executives, right?

MR. KIRKENDALL: That is correct, but they were --

THE COURT: So they weren't the debtors that were in bankruptcy court.

MR. KIRKENDALL: Yes, but they were protected by the confirmation order. So that was the basis of the removal, is, is that the -- the parties or the lawyers representing the McDermott executives were trying to enforce the confirmation

order's injunction and exculpation clause against the --

THE COURT: Okay, but what I'm saying is, how does a bankruptcy court have the authority, even under a confirmation plan, to enjoin any separate cause of action?

MR. KIRKENDALL: So, you're getting to the heart of the issue, which is the bankruptcy court does not have authority to enjoin a direct a cause of action, a direct claim. However, the confirmation order specifically enjoins parties from asserting derivative claims. And since the claims that were asserted in Mr. Van Deelen's state court petition were derivative in nature --

THE COURT: I get it, but even derivative claims go to district court, not to bankruptcy. I know because I've held -- I've had cases of shareholder derivative actions.

MR. KIRKENDALL: And -- and procedurally how it works in the Southern District is the case is removed to the district court. District judges don't want to deal with the bankruptcy issue, so they --

THE COURT: But usually -- but that's not a bankruptcy issue. That would have gone to a magistrate judge by referral.

MR. KIRKENDALL: That -- in the -- in the Southern District of Texas, a -- there's an automatic referral rule where when a case is removed from state court that it is from -- that relates to a bankruptcy case, it's automatically referred to the -- to the bankruptcy court for adjudication.

THE COURT: Hmm.

MR. KIRKENDALL: That's how it ended up there.

THE COURT: Interesting.

MS. BREVORKA: Your Honor, if I may, just briefly on that issue. Our Exhibit Six to the motion to dismiss is Judge Jones' decision in Lawsuit B, as we call it, or the adversarial, he performs a jurisdictional analysis on Page Six. Which if Mr. Van Deelen disagreed with that, he could have -- and perhaps he did -- raised it with the district court. And/or he could have raised it before the Fifth Circuit, where his appeal is presently pending. But that analysis as to jurisdiction was performed by the bankruptcy court in that decision.

MR. KIRKENDALL: And -- and quite --

THE COURT: Yes, but that's -- but -- but, folks, it all goes back full circle. You're going back to the same -- to the same forum that is being complained of to make that decision.

MR. WEST: Your Honor, a final comment just to -- from -- from that. I -- I don't intend to keep saying that over and over, but -- well, I'll -- I'll let Mr. Clore continue.

THE COURT: Okay.

MR. WEST: Thank you, You Honor.

THE COURT: Uh-huh.

MR. CLORE: Judge, just a few -- a few remarks. I -- I wanted to talk about two cases that I think are really

important for purposes of causation, damages, and prudential standing. And so I wanted to highlight the *Alix* opinion. I know it's a Second Circuit opinion and of course not binding, but it's a -- as far as I could tell, it's the closest case in terms of similar facts.

You have a -- you have professionals who failed to disclose conflicts under Rule 2014. And those professionals were financial advisers, and it was brought -- *Alix* was brought as a RICO case, a civil RICO case. The district court dismissed because of -- on causation and damages, then the Second Circuit reversed and says, Even if there's some kind of disconnect, this kind of fraud on a bankruptcy court, quote, causes direct harm to litigants who are entitled to a level playing field.

Another case I wanted to reference is the *SunEdison* case, which is relied on by the defendants. They don't tie it back to the *Alix* case, but it's -- it's the same plaintiff making the same kind of allegations, but in a different setting. The plaintiff in *SunEdison* actually filed into the bankruptcy and argued that -- asked for the Court to set aside the confirmation order. The Court dismissed, but they don't reference -- they don't make a tie. And in *Alix* we have the same kind of facts, but presented in a RICO case and -- and the Second Circuit said that's good enough. It said, The Court must -- quote, The Court must focus on Article III responsibility to ensure the integrity of the bankruptcy

process. If -- so -- and those participants are directly harmed.

So, just -- we'd ask the Court -- and we cite those cases in our -- in our briefing, but I think it's real important to -- to focus on the *Alix* opinion and -- and recognize that there's a different analysis when -- when the RICO violations affect the very integrity of the bank -- bankruptcy system.

Otherwise, thank you for your -- for your time, Your Honor, and I'll sit down.

THE COURT: Okay. Rebuttal? Go ahead.

MS. BREVORKA: Thank you, Your Honor.

A point of clarification, if I could --

THE COURT: Uh-huh.

MS. BREVORKA: -- because it was not clear from counsel's argument. If they are abandoning their fiduciary duty claim against Jackson Walker?

MR. WEST: Yes, Your Honor.

THE COURT: Okay.

MS. BREVORKA: Okay. Your Honor, just so the record's clear, so that claim is abandoned, that also affects their common law conspiracy claim. If you look at -- at the pleading, it hinges on a fiduciary duty claim. That's part of it. It's intertwined. I would argue, Your Honor, that that claim is now infected with the same abandonment.

THE COURT: Is that the only basis for it?

MS. BREVORKA: There -- I -- let me flip to it, Your Honor.

THE COURT: Okay.

MS. BREVORKA: I apologize. I don't have it electronically.

THE COURT: Uh-huh. That's -- that's all right.

MS. BREVORKA: I'll -- I'll come back to it --

THE COURT: That's fine.

MS. BREVORKA: -- yeah, as I look at it.

It's common law civil conspiracy, excuse me, and it's Paragraph 195. And, again, it's the -- 195 hinges on the scheme to collect millions of dollars in attorneys' fees without disclosure, which would affect the bankruptcy estate, or McDermott. And then two -- part two is, Breaching their fiduciary duty to creditors, including plaintiff.

THE COURT: Uh-huh.

MS. BREVORKA: Which --

THE COURT: He's not.

MS. BREVORKA: -- he's not.

THE COURT: Uh-huh.

MS. BREVORKA: So, I -- I think that claim is also, frankly, dead in the water because of the abandonment of the fiduciary duty claim.

I want to go to, briefly, just two -- three main points. Your Honor, you're -- you're not -- you're not

misremembering things. Indeed, it -- in the amended complaint one of the very claims of relief that they seek in Paragraph 227, Paragraph E, is an order seeking the disgorgement of profits and forfeiture of fees obtained by defendants through wrongful conduct.

As Your Honor is aware, under the Fifth Circuit's discussion of standing in *Perez*, the Fifth Circuit has said, Standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek.

They don't have standing to seek disgorgement. They conceded that point, and yet that's directly what this claim seeks.

I'd like to address another point, Your Honor. This is the second of the three, which is something you asked me in -- when -- our initial colloquy --

THE COURT: Uh-huh.

MS. BREVORKA: -- and I -- I didn't give a great answer. You asked about the imputation of Ms. Freeman's relationship to Jackson Walker. And the truth be told, Your Honor, is that's something I'd have to research because if a client came to me and asked that same question, I'd -- I'd have to look into it. But the facts are that when Ms. Freeman came to the firm in 2017/2018, she filled out a lateral partner questionnaire in which she was asked to disclose any conflicts

of interest. We referenced -- while it's not a direct part of the record, it is something which Your Honor can take judicial notice of under Rule 201, and we -- we also cite to cases --

THE COURT: I can't take judicial notice of facts that could be disputed.

MS. BREVORKA: I -- actually, your -- Your Honor, the -- the plaintiffs have asked that you take judicial notice of the --

THE COURT: Yeah, I can't take judicial notice of facts that are being contested.

MS. BREVORKA: Fair. Fair point. But as we reference in Footnote 59, Footnotes 137 and 138, the federal court pleadings in which Jackson Walker -- and we have listed the docket numbers, so, again, just for the record, it's Footnotes 59, 137, and 138 of our motion to dismiss.

THE COURT: Uh-huh.

MS. BREVORKA: We reference the bankruptcy proceedings that are ongoing where Jackson Walker has filed pleadings that describe the relationship as they knew it, the lateral questionnaire, and how Ms. Freeman did not disclose to the firm this conflict that was known to her but not to the firm.

I also want to address another point on -- on this idea of imputation and this outrageous fallacy that there's some grand conspiracy here between Jackson Walker, Kirkland & Ellis, Judge Jones, and Ms. Freeman. If there is some outrageous

conspiracy, why did Jackson Walker take the anonymous letter that was emailed to plaintiff over the weekend and file it with the court? It brought the letter to the Court's attention. Those are --

THE COURT: I thought that that was -- it was ordered to be filed under seal, the letter.

MS. BREVORKA: It was ordered to be filed under seal, but the hearing, the recusal hearing, was public. There were questions that were asked --

THE COURT: Uh-huh.

MS. BREVORKA: -- that certainly made clear what the basis of those -- that letter's facts were or what was at issue. Jackson Walk -- this idea --

THE COURT: Are we getting -- are we getting out of the record again?

MS. BREVORKA: I don't -- we're not -- we're not as far as the aspect of the facts of the pleading of Jackson Walker bringing the letter to the Court's attention. That is part --

THE COURT: Okay.

MS. BREVORKA: -- of what is pled both in our motion to dismiss and -- and others.

And I -- I think the last point I'd like to make, Your Honor, is at the heart of this, Mr. Van Deelen does not have standing. And everything what is -- what is raised here today is, is really this is ongoing in the bankruptcy court

right now. He has an appeal to the Fifth Circuit that -- I checked the docket this morning -- is live. They filed supplemental briefings on May 5th and 6th.

THE COURT: And this is on the recusal matter?

MS. BREVORKA: This is on the recusal and Lawsuit B. So this idea of costs, that is something that the Fifth Circuit can address.

And -- and I also want to just quickly bring to the Court's attention, I'm -- I understand this is in our reply, but there's a case directly on point, *LaBarbera versus Angel*, out of the Northern District of Texas, that says, Ongoing litigation costs don't give you standing for economic damages for RICO. So this idea that his costs that are still up on appeal --

THE COURT: But does it give you standing for damages under different claims --

MS. BREVORKA: No, I don't --

THE COURT: -- as opposed to RICO?

MS. BREVORKA: -- I don't think it does. It -- it --

THE COURT: Well, let me ask you a question, counsel.

MS. BREVORKA: Please.

THE COURT: But -- but for -- but for the relationship that came to light, the -- the plaintiff would not have filed -- it wouldn't have required a motion to recuse, correct?

MS. BREVORKA: I'm not -- I want to make sure I understand that -- Your Honor's question. Are you saying --

THE COURT: Well, the -- the motion to recuse was required because of this relationship in the background.

MS. BREVORKA: That's true.

THE COURT: But for that, there wouldn't have been the need to litigate that whole issue.

MS. BREVORKA: That's true.

THE COURT: Okay. So why wouldn't this concealment have led directly to that; the requirement to file a motion to recuse?

MS. BREVORKA: That --

THE COURT: It might not have changed the outcome of the ending of the proceeding --

MS. BREVORKA: Correct.

THE COURT: -- it might not stop any other litigation with -- in terms of the bankruptcy matter, but the -- but the recusal itself is directly related to the concealment of the relationship.

MS. BREVORKA: I -- I don't disagree with that, but it doesn't give him standing to bring tort claims against the defendants that he's asserted them here. He is appeal -- he is appealing. It -- it's ongoing. He's appealing the issue on the motion to recuse.

THE COURT: Uh-huh.

MS. BREVORKA: If he wants to seek costs, that's something you raise with the Fifth Circuit.

THE COURT: Okay. So you're -- you're -- it brings me back to my original question. You try to find redress elsewhere out -- for your complaints, your case gets removed to federal court and gets returned to the court that has the conflict, the --

MS. BREVORKA: Correct.

THE COURT: -- the disqualification conflict --

MS. BREVORKA: Correct.

THE COURT: -- who was also responsible for the order that then, one, prevented any further lawsuit; and two, exculpated Jackson Walker. Not Kirkland & Ellis, but Jackson Walker. So you're going back to the court that entered this order that somehow exculpates based on the confirmation order that's being contested throughout this whole situation. This vast circle doesn't give a good impression.

MS. BREVORKA: I agree. The impression is not good, but that's not the same as having a case or controversy under Article III.

THE COURT: Well, how could you have a case or controversy if the orders are written and done in a matter that you could never bring a -- a proper case because you're always going to end up back and with -- before the person who has the conflict?

MS. BREVORKA: That's not true any longer, Your Honor.

THE COURT: Well, it was then. We're not -- I'm

not -- I'm not -- we're not talking about what's happening now, we're talking about what happened then.

MS. BREVORKA: Well, I think -- I think you have to for Lawsuit B, because he appealed that to the district court, to Judge Hanen, a completely independent judge.

THE COURT: Okay. But at this point we know -- no fault of Judge Hanen, let's say.

MS. BREVORKA: Sure.

THE COURT: I don't have any problem saying that. We know that that motion to recuse was valid and should have been granted --

MS. BREVORKA: Correct.

THE COURT: -- from the get-go, right?

MS. BREVORKA: Correct.

THE COURT: So at that the point what would the Fifth Circuit do, knowing that it had legs?

MS. BREVORKA: I would direct Your Honor to *Patterson v. Mobil Oil*, where the Fifth Circuit said, Yes, the judge decide -- should have recused himself. We cite this case in our reply.

THE COURT: But this is not just a recusal, this is -- this is a situation where in the first instance when Judge Jones received the letter -- I think the first -- it first went to Judge Jones, and then he referred it to Judge Isgur --

MS. BREVORKA: That's correct.

THE COURT: -- and then it went to Judge Hanen, somewhere along the line.

MS. BREVORKA: More or less, yes.

THE COURT: Okay.

MS. BREVORKA: But the recusal --

THE COURT: It got filed in this --

MS. BREVORKA: -- yeah.

THE COURT: -- it got filed in this case first.

MS. BREVORKA: Correct.

THE COURT: So at that point he doesn't file -- he doesn't file an order disqualifying himself.

MS. BREVORKA: He does not.

THE COURT: Okay. He sends it to another judge, which sometimes --

MS. BREVORKA: Correct.

THE COURT: -- courts have those rules, that you refer it to another judge to make a determination. That's not done. It goes to Judge Hanen based on that record.

MS. BREVORKA: Correct.

THE COURT: It's not done. We now know after the fact that during all of those proceedings it in fact was true that this relationship was going on and there was a disqualification that was required by statute.

MS. BREVORKA: Correct.

THE COURT: You're telling me that the Fifth Circuit,

based on *Patterson*, is in fact going to say it's okay?

MS. BREVORKA: I don't know what the -- no. What I'm saying is the Fifth Circuit will perform an analysis that -- that what --

THE COURT: I get it, but the analysis is all these judges are okay in denying a motion to recuse that we now know should have been granted from the get-go.

MS. BREVORKA: I -- agreed, Your Honor. But -- but this idea --

THE COURT: I don't know about that one.

MS. BREVORKA: But -- but --

THE COURT: I wouldn't -- I wouldn't bet any money on the Fifth Circuit finding that.

MS. BREVORKA: I don't -- I don't know, but the -- that -- the issue is, that is presently being litigated before the Fifth Circuit. It is --

THE COURT: Okay, but the issue is in this particular case that litigation wouldn't have been necessary if the proper thing had been done at the very beginning.

MS. BREVORKA: The motion to recuse?

THE COURT: Uh-huh.

MS. BREVORKA: Perhaps. I mean, yes. But I go back to the -- the harm, the injury. Again --

THE COURT: But what I'm understanding the plaintiff now to say is the -- the concrete injury is the cost of

litigating that, which wasn't necessary. They should have recognized it, granted it from -- to begin with and be done with it.

Now, I'm not saying --

MS. BREVORKA: That wouldn't --

THE COURT: -- that that would have changed the reorganization plan outcome. I'm not suggesting that, and I'm not saying that that's -- that would be a bigger leap because it might have been the same. The outcome would -- might have been the same in terms of the reorganization plan.

MS. BREVORKA: I understand the questions Your Honor is asking, but the issue is that's not what's pled in their first amended complaint, and that's ultimately what they're bound by. They don't get to rewrite the first amended complaint --

THE COURT: They do if the Court grants them leave.

MS. BREVORKA: True. And -- and then we'll take that as it comes. But on this amended complaint, which is infected with cloaking their client as a creditor and harm to the bankruptcy estate, it's not fair.

THE COURT: Now that they can't do.

MS. BREVORKA: Yeah. And, you know --

THE COURT: Yeah, that they can't do.

MS. BREVORKA: I guess the thing, Your Honor, you -- it's clear to me from your questions that there is an aspect of

fairness that you're grappling with, and I --

THE COURT: Well, because the -- there is, because the bottom line is, this process should have been fair from day one and should have -- and I'm not saying it wasn't fair in fact, which is a problem here. Maybe it was fair in fact. But the appearance of impropriety from the very beginning kind of strips it of any appearance of fairness and a proper outcome.

MS. BREVORKA: Understood. And -- and those are the very issues that are being grappled with in a multitude of bankruptcy cases, including one in re professional fees of the matter of Jackson Walker. And the trustee is taking that very argument and bringing it before the bankruptcy court. I -- those are the arguments --

THE COURT: Which thankfully it's not before me.

MS. BREVORKA: That's true. And I -- and I -- you know, I think we run into the issue of -- one thing we haven't touched on is -- is sort of conflicting outcomes. Right? You have this idea of disgorgement of fees and imputation going on before the bankruptcy court on the very issues that are before Your Honor.

THE COURT: Well, and let me just also say, in these cases I'm technically sitting by designation in the Southern District, so I'm sitting as an appellate court even over those bankruptcy matters. But not the bankruptcy issues themselves. I'm not relitigating any bankruptcy matter.

MS. BREVORKA: Okay. That's it, Your Honor. I thank you very much for your time.

THE COURT: Okay. And counsel -- and I think I may go ahead at this point and bring up your sanctions matter.

MR. HUESTON: Thank you, Your Honor. John Hueston on behalf of Kirkland. Just very briefly before we get to the sanctions matter, on proximate cause there's no doubt the first amended complaint as alleged said it is -- the harm was the reduction to the estate of the fees paid to Kirkland. That's it. All this argument here about, Gee, you know, we might have paid some parking fees ourselves and, you know, some other fees and costs. None of that is in the first amended complaint.

And they actually cited some of that, like, Gee, we would like to come back and have a chance to amend the complaint because we're going to add such stuff that somehow might, you know, save our matter, is also futile. Because such cited fees, even if they put it back into a complaint, won't save them because it's derivative of just the main issue that was being brought up on behalf of the estate. And there's no case that they've ever cited that says, you know, legal fees coming out of these sorts of proceedings gives you some sort of separate and independent basis to allege proximate cause.

Moving to their effort to try to create more of a case against Kirkland than they actually have, what they've done is create a misleading picture of some of the statistics in the

Southern District of Texas. Now, we've outlined this in our papers; it bears repeating here. The so-called mega-bankruptcies that were filed by Kirkland, there were six of them, including several involving amounts -- stated amounts over a billion dollars that predated Ms. Freeman arriving at Jackson Walker. So there was just nothing to the idea, We're going to bring our mega-bankruptcy cases to the Southern District and Judge Jones because she's somehow got something going with Judge Jones, and Jackson Walker's got some sort of un -- ill-described kickback relationship. It just doesn't work.

Here's what else they misleadingly left out. We address in our papers that after she arrives, you'd think if this really was a conspiracy, wow, now let's unleash the cases because we've got the fix inside. The number of bankruptcies in the calendar year after she arrives, zero, filed by Kirkland and Jackson Walker before Judge Jones.

So that pattern actually, since they brought it up, helps us. It's exonerating. It certainly doesn't give some sort of suggestion that circumstantially there's a basis to allege more than the single anonymous letter that was brought in, heard, and found not to be reliable by Judge Isgur and beyond, from the perspective and perch of Kirkland.

Now, they've made a couple references to this *Financial Times* article, and they haven't spent much time on it because it doesn't help them. We cited the Fifth Circuit case,

Chapman, and there were two other cited in our papers where lawyers attempted to cite newspaper articles -- one from the *Wall Street Journal*, one from the *New York Times* -- and courts have said -- and particularly the case involving the *New York Times*, If we would allow lawyers to take unverified hearsay in newspapers and file cases, that would mean purchase of a newspaper would be all that's required to file a case. And there's nothing in that *Financial Times* piece, even if it were considered, indicating there was anything fraudulent going on. And in fact, it describes without any attribution good-faith intent such as we didn't understand how far things had advanced and thought that somehow clearance was already obtained. So even if it came in, it wouldn't help them.

So, Your Honor, what I want to do now is move to the sanctions motions, unless you have any particular questions --

THE COURT: Nope.

MR. HUESTON: -- on those issues.

THE COURT: Go ahead.

MR. HUESTON: All right. Your Honor, what we have for the RICO action -- and I was very curious about the responses that counsel would make when I laid out their deficiencies in their RICO claims, and there wasn't much of a response. Because there are no facts, as I've already laid out, to say based on what Kirkland knew, to allege these broad notions of bankruptcy fraud, I don't think they addressed that at all; honest services

fraud, as Your Honor pointed out, absolutely no basis there in law or fact to allege that; or any other widespread broad notions of fraud.

The only thing they brought up is, Well, you know one of the five predicate acts we allege is mail fraud/wire fraud, as if by invoking those words you can somehow create some kind of criminal pattern of racketeering activity out of what they've alleged in their first amended complaint is "failures to disclose an allegedly known conflict."

And of course, mere failure to disclose an alleged conflict is not enough to convert something that would be a Bankruptcy Rule 2014 issue into some kind of criminal predicate act. Even more so with respect to Kirkland, because they did not allege, as they must, that the declarant from Kirkland, a partner named Sussberg, they didn't declare that he knowingly submitted anything false. In fact, the record shows otherwise. He submitted something that said, Here are a listing of what we've researched to be Kirkland's conflicts, and there are none.

THE COURT: But, counsel, when you make an agreement to come in with another law firm, aren't you somehow also -- and you're bringing them in as -- or I guess they bring you because they're local counsel, aren't you also -- wouldn't you out of your due diligence look in to see whether or not they have a conflict --

MR. HUESTON: So --

THE COURT: -- since you're going to be partnering up and you're going to be making money based on their appointment?

MR. HUESTON: Yeah, a few things to clarify.

THE COURT: Uh-huh.

MR. HUESTON: There's no allegation in this case that Jackson Walker somehow secured the engagement for Kirkland. Each was separately retained by McDermott. So there's not one --

THE COURT: But you just -- earlier you said y'all -- you had Jackson Walker as local counsel.

MR. HUESTON: Sure. That's different.

THE COURT: Okay.

MR. HUESTON: So and --

THE COURT: How is that different if they were both secured separately?

MR. HUESTON: Well, so the client has to make the decision, A, who to hire as counsel; and, B, whether you're even going to have local counsel. So those are separate --

THE COURT: I thought Judge Jones appointed Jackson Walker.

MR. HUESTON: You have to -- ultimately they agreed. Judge Jones has to agree, has to approve fees, but the client itself has to agree to the engagement of the lawyers, the debtor's estate, and that was McDermott. They separately hired Kirkland and Jackson Walker.

And here's the key, Your Honor. Each -- under the rules, each firm has to file their own disclosure. So Kirkland had no notice that Jackson Walker may have been playing fast and loose with its filing. It properly assumed that Jackson Walker, an esteemed firm, is filing something that's truthful. And Kirkland's job is to take the 2014 disclosure obligation and honestly answer what it did, and it did. And they have critically not alleged otherwise in their first amended complaint. That is a critical, factual deficiency. There's nothing there in terms of any qualifying predicate acts for the RICO action.

THE COURT: Okay, and I -- I'm getting this from Paragraph 38 of the first amended complaint. Judge Jones appointed Jackson Walker and Kirkland & Ellis on January 15th, 2021.

MR. HUESTON: Right. But that's after they -- he has to approve the appointment, but that is after McDermott has to agree to hire these firms to represent their interests.

THE COURT: And the date of the hiring was when?

MR. HUESTON: I don't have that, Your Honor. It's not in the record. I don't have that.

THE COURT: Uh-huh. And you didn't allege it in your response, correct?

MR. HUESTON: Right, because they didn't allege anything with respect to that in -- in their papers nor in their

complaint.

THE COURT: Well, it's in Paragraph 38 of their first amended complaint. That's what I just read to you.

MR. HUESTON: Oh, that there was an appointment. Right. But that's -- but the separate hiring -- I'm -- I'm trying to clarify your question earlier.

THE COURT: That's what I'm -- I'm asking. That's in their amended complaint, so did you -- you didn't address that in your responses.

MR. HUESTON: I think we're not disputing that. Ultimately he does approve the appointment of the two separate firms, but that's just what happens in these processes, and that alone is not -- that happens in every bankruptcy.

THE COURT: Okay. Then is there anything in your filings that indicates when you were actually hired by the company?

MR. HUESTON: No.

THE COURT: Okay.

MR. HUESTON: So, Your Honor, as I've covered, there are -- there's no basis for them to argue any predicate acts for the RICO claims. And then beyond that -- so they're factually frivolous. And beyond hind that, they had no answer for their failure to include a number of the required RICO elements that they know better that have to be there, because they've been filing RICO actions in many courts and often being sanctioned by

them.

And so, for instance, the enterprise has to be separate and apart from the pattern of racketeering activity. I'm not going to repeat my arguments, but they basically got up here and said, Well, we didn't put it in our first amended complaint, but...

And then they tried to describe something not in their complaint, that somehow Judge Jones, Jackson Walker, and Kirkland were in cahoots in a separate sort of enterprise. That hasn't been alleged. And they shouldn't be allowed to try to replead that because it makes no sense and there's nothing in the record or any reasonable inference to conclude that Judge Jones, Jackson Walker, and Kirkland are not outside of what they're alleging as a pattern of racketeering activity, simply doing what they do in their jobs, following their parallel interests as the Fifth Circuit has found in *Reves versus Ernst & Young*.

Secondly, there is no allegation in there about a decision-making structure. Counsel tried to say, Well, we sort of did, that Kirkland was -- we're going to argue that Kirkland was sort of in charge in some way.

They made no such allegation. And then they tried to say, Well, we did allege that the RICO conspiracy and pattern of racketeering was ongoing. But the case law -- and we turn your attention to *Rivers*, a Northern District of Texas case,

clearly says that a decision-making requirement can't be folded into the separate ongoing requirement. So that's wholly deficient.

As I mentioned before and they didn't answer, the first amended complaint fails to allege that Kirkland is an operator or a manager. Because they can't. There is no --

THE COURT: I don't think you have to allege that, specifically.

MR. HUESTON: Your Honor, the -- the case law does require that you have to specifically allege operation or management.

THE COURT: Of the organization, not of any individual person.

MR. HUESTON: Right. Right.

THE COURT: Entity.

MR. HUESTON: Well, you have to -- you know, you have to allege that the defendant in RICO was in fact an operator or manager for liability. That is one of the requirements. And that comes out of the *Compass Bank versus Villarreal* case, which was then distinguishing that from merely having a business relationship, and that that was insufficient. You have to have the operation and management allegation, and they failed to do so here.

On top of that, as I mentioned earlier, they didn't even attempt to defend their predicate acts of obstruction of

justice, honest services, mail fraud, or the contra-factual theory of bankruptcy fraud. No connection with facts, completely speculative and improper.

The RICO conspiracy, again, the allegation there is a bare allegation of meeting of the minds. And I've already cited the cases in the Fifth Circuit that say when you put in those bare allegations and nothing more, that is insufficient as a matter of law.

And so, Your Honor, with that, I think it's -- we have asked that they be sanctioned under Rule 11. In this case -- if I can have just a moment.

THE COURT: Uh-huh.

MR. HUESTON: When considering Rule 11, Your Honor, the most important thing to consider first and foremost is the lack of merits. Under *Katzman versus Victoria's Secret Catalog*, plaintiff's lack of merit is itself sufficient to suggest an improper purpose.

And here it's completely factually bereft of alleging a criminal RICO enterprise with respect to Kirkland. And they have been --

THE COURT: Okay, but a RICO enterprise doesn't require that it be put together for a criminal purpose automatically.

MR. HUESTON: Right. But there has to be multiple and separate distinct criminal predicate acts --

THE COURT: Sure.

MR. HUESTON: -- and they've alleged none.

THE COURT: The VICAR. You're right.

MR. HUESTON: Right.

THE COURT: The VICAR. Uh-huh.

MR. HUESTON: Right. And they've alleged none. As I already went through, legally, they are deficient in multiple ways. So that is enough by itself to warrant Rule 11 sanctions. But there's more.

Plaintiff and the Bandas firm has filed -- it has been found to file excessive motions here. And the RICO claim, it's important to know --

THE COURT: Filed excessive motions with this Court?

MR. HUESTON: Not with this Court, but in the course of the McDermott bankruptcy and then observed by courts elsewhere as well.

But the point I want to focus on here --

THE COURT: But the point -- the point before the Court is whether they should be sanctioned in this case, not because of conduct in other cases.

MR. HUESTON: Well, the plaintiff -- and this is in our papers -- has previously litigated the McDermott bankruptcy plan at least five separate times, including -- Your Honor, you heard it mentioned earlier, suing the McDermott executives, saying that they put the company into bankruptcy when they

shouldn't. Which is yet another allegation of a superseding cause which would impact proximate cause.

So plaintiff has been all over the map filing excessively. And the Bandas firm, in particular, has been very quick to pull the trigger on RICO claims when the law of the Fifth Circuit is you should be very hesitant to move forward with RICO claims because of the high burdens and thresholds to --

THE COURT: Okay, but -- but you're asking this Court to hold -- to sanction them because they file a lot of RICO cases. That's not what's before this Court.

MR. HUESTON: Your Honor, it's just -- it's just an additive reason. I -- the main reason is this thing is just wholly without merit, factually and legally. And the only difference between the RICO claim and the rest of the complaint is that it has the opportunity to get treble damages. That's it. That's the incremental difference. That's what they're going for, and that alone is improper and sanctionable as a purpose.

And so, Your Honor, with that, unless you have further questions, we'll submit under Rule 11.

THE COURT: I don't. Let me do this, though. Let me ask -- anybody else on the defense, if you want to rebut anything the plaintiff said in their previous argument, and then I'll let the plaintiffs argue the Rule 11 sanctions motion.

MR. KIRKENDALL: Yes, just very briefly.

THE COURT: Okay. Go ahead, Mr. Kirkendall.

MR. KIRKENDALL: I'm cognizant of the late hour, so I'll be brief.

THE COURT: No, that's fine. We're used to it. I go -- jury trials, I'll go to 10, 11 o'clock at night.

MR. KIRKENDALL: I am extremely impressed with your endurance.

THE COURT: You shouldn't be.

MR. KIRKENDALL: Thank you.

Your Honor, just for the record, the paragraph you were reading from the amended complaint is seriously off with regard to the time in which Jackson Walker and Kirkland were approved as counsel for the debtor in possession of McDermott. That happened on March 9th of 2020, not 2021. And you can -- if you look on the docket of the McDermott case --

THE COURT: Okay. I'm just -- I was just reading from Paragraph 38.

MR. KIRKENDALL: Right. Yeah, it's under Docket 591 and 593. But it's -- that's simply way off.

Your Honor, there's -- there was discussion by the -- by plaintiff's counsel regarding Bankruptcy Rule 2014 --

THE COURT: Uh-huh.

MR. KIRKENDALL: -- and the obligation to -- to disclose under that bankruptcy rule.

THE COURT: Uh-huh.

MR. KIRKENDALL: That bankruptcy rule does not apply to disclosures regarding relationships with judges. That rule applies to --

THE COURT: That's a real thin ledge to be hanging yourself on.

MR. KIRKENDALL: Right. So I've got a copy of Rule 2014 and I'll be -- I'll be glad --

THE COURT: I -- I think I have that as well, but --

MR. KIRKENDALL: Yeah.

THE COURT: -- you -- you're welcome to bring it up.

MR. KIRKENDALL: Right. But it's easily obtainable.

THE COURT: Okay. So how does that rule, though, preempt requirements under 455?

MR. KIRKENDALL: What 20 --

THE COURT: Only that -- it doesn't cover your client.

MR. KIRKENDALL: Right. It doesn't -- it doesn't apply to 455. What 2014 does is it basically says, Look, if you want to be a professional for the debtor in possession or a creditor's committee, you've got to disclose all of your potential material adverse interests with other creditors, parties in interest, with somebody with the United States Trustee's office. But it lists in that -- as -- as the Court is reading right now --

THE COURT: Paragraph Two.

MR. KIRKENDALL: -- it lists the parties that -- that have to be addressed. And nowhere in there do you find relationships with judges. It's just not in there. The same is true with regard to Rule 5002. That has no applicability to the situation. There's no disclosure requirement with regard to relationships with judges.

So, the -- the point I'm making, Your Honor, is -- is that at some point, plaintiffs have to read the rules. And that rule simply does not --

THE COURT: Counsel, that's a real thin ledge. I promise you, that's a real thin ledge.

MR. KIRKENDALL: I -- I understand, Your Honor.

THE COURT: You're basically saying, We know we're violating the rules, and we're not going to tell anybody. We're going to keep it quiet.

Just because the rule doesn't say "judge" is a real thin sheet of ice to be on.

MR. KIRKENDALL: Your Honor, the -- but the point of the matter is, is if you're basing a lawsuit on a failure to -- on a rule that does not require disclosure of connections with judges, then don't --

THE COURT: So how does anybody think it's fair to keep this quiet? At all.

MR. KIRKENDALL: That isn't --

THE COURT: How does anybody -- how does anybody think

that's fair?

MR. KIRKENDALL: That -- that isn't the suggestion, Your Honor; that it's -- that it's fair to keep it quiet.

THE COURT: Isn't that what we're dealing with in courts, fundamental fairness?

MR. KIRKENDALL: Well, the point is, though, is this a judge disclosure issue, or is this an issue that a professional being hired as a debtor in possession counsel in a case has to disclose? And I would --

THE COURT: Well, let me -- well --

MR. KIRKENDALL: -- I would submit that in this, it's a judge disclosure issue.

THE COURT: Well, okay. And that may -- you may be absolutely right there. But the question is, you're saying somebody who wants to be hired as a professional, wouldn't a professional have a duty to disclose, too?

MR. KIRKENDALL: Your Honor, it depends upon the nature of the relationship, the nature of the --

THE COURT: I don't think that's in question anymore, is it?

MR. KIRKENDALL: It is absolutely in question, Your Honor. For purposes of -- of this motion to dismiss, it -- yeah, I mean, we're assuming is true all the allegations that are made by the plaintiffs. But I would say absolutely true in -- in dispute. And that will come out if this case proceeds.

But, Your Honor, the other point I wanted to make before we -- before we leave is I want to make clear that the confirmation order in this case --

THE COURT: Uh-huh.

MR. KIRKENDALL: -- is not being appealed. Nobody's sugg -- he is --

THE COURT: And I'm not -- and I'm not touching that.

MR. KIRKENDALL: Right. He's not suggesting that it should be vacated, should not be appealed.

THE COURT: And I'm not touching it. I'm not even in a position to even consider it.

MR. KIRKENDALL: Right. Mr. McDermott -- or excuse me. Mr. McDermott?

Mr. Van Deelen --

THE COURT: Uh-huh.

MR. KIRKENDALL: -- had his due process rights with regard to what he did to try to get around that confirmation order. What he tried to do to get around the confirmation order was file a lawsuit against the three McDermott executives in state court, in -- in Texas. That case was removed, as we discussed before, to the district court. Automatic referral to the bankruptcy court. Judge Jones, actually over a six-month period, patiently allows Mr. Van Deelen to amend his pleading several times to assert direct claims against the McDermott executives.

THE COURT: But counsel, at that point the motion to recuse over those six months would have already come out and it should have been granted.

MR. KIRKENDALL: Your Honor --

THE COURT: Period.

MR. KIRKENDALL: Your Honor, so -- I'm not exactly sure, I'd have to look at the timing of it, but -- no, I take -- I take that back. You're probably right. But the point of the matter is, is that there was an exhaustive due process procedure --

THE COURT: But the problem is due -- due process is the process due to a person to be fairly heard. The taint of not "shall disqualify" when you are -- you are now on actual notice that one person may know about it and needs to be heard, does that not taint the process due and the outcome?

MR. KIRKENDALL: Well, so --

THE COURT: Isn't that what we're here on?

MR. KIRKENDALL: Yeah. Yeah, but I don't believe that the -- the process has been tainted.

THE COURT: Well, that --

MR. KIRKENDALL: Judge --

THE COURT: -- I get that's your opinion.

MR. KIRKENDALL: Well, let --

THE COURT: I get that.

MR. KIRKENDALL: -- let's look --

THE COURT: And I'm not saying it has. And that's the difficult part in this case, because I can't say that the outcome would have been different with any other judge, disinterested judge. I can't say that, and I'm not here to say that.

MR. KIRKENDALL: Right.

THE COURT: So that's the difficult part about this particular case.

MR. KIRKENDALL: But my point to -- to the Court is, is that we can look at the record of what happened with regard to Mr. -- what Mr. Van Deelen was doing. Mr. Van Deelen, he -- look, he filed his motion to recuse months before --

THE COURT: Uh-huh.

MR. KIRKENDALL: -- the --

THE COURT: And it should have been granted, frankly.

MR. KIRKENDALL: -- the anonymous letter was -- was found out. His initial motion to recuse --

THE COURT: Was before that.

MR. KIRKENDALL: Was before --

THE COURT: Then it was supplemented in March.

MR. KIRKENDALL: And -- and the basis of it was, is that, Judge Jones is being too mean to me.

That was basically the -- the essence of it.

THE COURT: Uh-huh.

MR. KIRKENDALL: So when Mr. Van Deelen came to the

bankruptcy court, having filed the state court lawsuit that's asserting claims that he doesn't own --

THE COURT: Okay, but the state court lawsuit was filed when in relationship to the supplement -- the supplementation of the motion, which was actually done by the plaintiff, not Jackson Walker --

MR. KIRKENDALL: The state court --

THE COURT: -- in March of 2021.

MR. KIRKENDALL: No, the state court lawsuit was filed shortly after the McDermott plan went effective on June 30 of 2020.

THE COURT: Of 2020.

MR. KIRKENDALL: So probably July, I believe, of 2020.

THE COURT: So July of 2020 --

MR. KIRKENDALL: Right.

THE COURT: -- is when we have the B --

MR. KIRKENDALL: Right.

THE COURT: -- situation.

MR. KIRKENDALL: So, and --

THE COURT: And then his first motion to recuse was filed like in September --

MR. KIRKENDALL: Probably pretty --

THE COURT: -- November.

MR. KIRKENDALL: -- right around the same time.

THE COURT: Of 2020.

MR. KIRKENDALL: Yeah. I -- I think he probably did not want Judge Jones adjudicating the issue with regard to remand.

THE COURT: Right. I get that.

MR. KIRKENDALL: So --

THE COURT: I get that. And so then it got supplemented by him --

MR. KIRKENDALL: Right.

THE COURT: -- in March of 2021.

MR. KIRKENDALL: 2021.

THE COURT: Okay, at that point with the letter -- at that point the recusal should have been granted. Period. And it wasn't. So the question then becomes -- everybody's coming into court with not-so-clean hands and saying, Hmm, it was fair, even if it was tainted. Is kind of what y'all are basically saying.

MR. KIRKENDALL: Well, and, Your Honor, there is -- you know, fortunately or unfortunately, the way you want to look at it, there is Fifth Circuit -- Circuit --

THE COURT: Uh-huh.

MR. KIRKENDALL: -- support for that deal. The arch -- the *Archdiocese of New Orleans* case that I mentioned earlier --

THE COURT: Uh-huh.

MR. KIRKENDALL: -- the *Continental Airlines* case that

I mentioned earlier --

THE COURT: Uh-huh.

MR. KIRKENDALL: -- both hold on that regard.

But the real point I want to make is, Mr. Van Deelen didn't like the result that he got in the bankruptcy court. Judge -- Judge Jones dismissed his -- his lawsuit. But he has the right to appeal, which he did.

THE COURT: Wasn't that the one that's at the Fifth Circuit right now?

MR. KIRKENDALL: That is exactly right. He appealed it to Judge Hanen.

THE COURT: Uh-huh.

MR. KIRKENDALL: Judge Hanen did an exhaustive review of it, gave him his due process rights, reviewed it, he agreed with Judge Jones. Now he's appealed it to the Fifth Circuit Court of Appeals, where it is pending. All right? And the Fifth Circuit has not ruled yet.

THE COURT: Uh-huh.

MR. KIRKENDALL: But my point to the Court is, Mr. Van Deelen has been able to exercise his due process rights. He's been able to assert these claims --

THE COURT: Okay, so let me ask you a question. Real hypothetical here. Let's assume for a moment that I rule on this matter and one day you were to find out that there was some type of inappropriate -- and I'm going to call it

"inappropriate" because there was nothing necessarily inappropriate about a relationship, but it had some kind of inappropriate connection with somebody on the plaintiff's side. Would you not feel like you had been robbed of the opportunity to be fairly heard?

Would that be -- would that make my ruling still fair and proper?

MR. KIRKENDALL: Your Honor, the circumstances can all be different, but you make a very compelling case. Perhaps I would. And perhaps I would move to vacate whatever order that you entered that could potentially be tainted.

But what the Fifth Circuit very clearly tells us is, is that we're not -- meaning the Fifth Circuit -- in the business of mindlessly vacating valid orders.

THE COURT: We're not. We're not. We're not.

MR. KIRKENDALL: Yeah, we're -- it's not in the business of doing that.

THE COURT: You're right. They're right. We're not.

MR. KIRKENDALL: And -- and --

THE COURT: But we're also not here mindlessly excusing conduct that was very blatant and obvious to some very intimate people intimate to the case that should have led to a recusal of a judge that didn't happen.

MR. KIRKENDALL: Exactly. And, Your Honor, don't -- don't get me wrong, I'm not condoning --

THE COURT: No, I know. I know.

MR. KIRKENDALL: -- I'm not condoning the -- the failure to recuse by -- by --

THE COURT: I realize that.

MR. KIRKENDALL: -- by Judge Jones. But what I am saying is, is that that's completely different from being denied due process rights. And Mr. Van --

THE COURT: But isn't --

MR. KIRKENDALL: It is.

THE COURT: Isn't -- isn't --

MR. KIRKENDALL: It is.

THE COURT: -- the fundamental fairness is that people be -- believe that they're getting a fair and impartial judge and a fair and impartial trier of the -- of the -- of the -- the matters that are pending before the court?

And I go back to what I said before, I don't know that that didn't automatically already happen in this case. I can't say that, But for this relationship that they didn't -- the outcome wasn't fair. But I can't also turn a blind eye to the fact that did the judicial process work as it's supposed to as an independent body to properly adjudicate outcomes?

MR. HUESTON: Even if we assume Judge Jones was -- was tainted by his failure to recuse, Mr. Van Deelen has gotten a full and fair hearing at the de novo review, at the district court by Judge Hanen, and he's getting a full and fair review

at -- at the appellate court by the Fifth Circuit.

THE COURT: Well --

MR. HUESTON: So he has -- this -- this allegation that he has somehow been damaged by this process is simply untoward.

I also wanted to make the point -- Your Honor, this will be my last one.

THE COURT: Sure.

MR. HUESTON: Is -- is that plaintiff's counsel referred to the *AlixPartners versus McKinsey* case, and also the *SunEdison* case as examples of analogous cases where these types of claims have been approved. Nothing can be further from the truth. Both of those cases are easily distinguishable.

AlixPartners, which was involved in both cases against McKinsey, is a competitor of McKinsey's. McKinsey is -- McKinsey and AlixPartners are financial advisory firms who routinely get hired in big bankruptcy cases to provide financial advice to the debtors in possession. And what had happened in both of those cases is that McKinsey had been hired as the financial adviser. AlixPartners had gotten beaten out. And McKinsey had -- the only way to put it is, filed false 2014 statements. They -- they affirmatively did not disclose conflicts of interest that they had with other creditors, parties in interest that were involved in the bankruptcy cases.

We have none of that here. There -- there has been

not even an allegation that there has been a conflict of interest by Jackson Walker or Kirkland with regard to other parties in interest in the case.

And so I -- the -- I urge the Court to read those two decisions because they couldn't be any more different. What the courts were saying in those cases is, Hey, AlixPartners, you bought -- AlixPartners went and bought unsecured claims so they could have creditor status in those cases; they were competing with McKinsey for the business. And McKinsey was affirmatively filing with the courts in those cases false 2014 disclosures that didn't disclose material adverse interests that they had with the debtors in those cases. That's the difference.

Your Honor, again, I thank you very much. Your endurance is impressive. And have a great -- have a great evening.

THE COURT: Let me hear from -- anybody else on the defense side at this point? Let me hear from the plaintiffs on just the Rule 11 sanctions matter.

MS. JOHNSON: Good evening, Your Honor. I'm Anne Johnson. I'm here on behalf of the plaintiff, Mr. Van Deelen, and on behalf of these fine lawyers at the Bandas Law Firm, against whom the sanctions have been filed.

I think everyone in this courtroom is aware that something very wrong has occurred in this case over the last four hours and 20 minutes. But it was not the filing of this

lawsuit by Mr. Van Deelen, and it certainly wasn't any conduct by these attorneys, Mr. West and Mr. Clore.

I want to just frame this for the Court. What we have here is a very narrow and unusual motion for sanctions. Nobody here is saying that this was a frivolous lawsuit that should not have been filed. What we have instead is a very limited grounds brought only by one defendant, Kirkland & Ellis, and they are saying, No, it's only the RICO claim that is sanctionable.

And in -- and within that claim, there's only three elements that we really think in your 91-page complaint that you don't have the sufficient evidence for. I think, you know, that arguing of this motion says a lot. It was argued in conjunction with the motion to dismiss, very much a regurgitation of the motion to dismiss. And I would start --

The main -- the main point, Your Honor, on this sanctions motion is that even if the Court grants a motion to dismiss on these RICO allegations, that there has not been any showing here coming close to warranting sanctions against either the party or much less the attorneys. Lack of merit is not a basis for sanctions. And we've given the Court many cases for that. There's -- in our -- in our papers I'd point the Court to Footnote 24. If that were true, Your Honor, then sanctions would be awarded every time a motion to dismiss was granted. And that is not -- obviously not the law.

So factually I think what this all comes down to, we know there were meetings, we know there was, you know, agreements about what disclosures were going to be made. This all comes down to -- and I think Mr. Hueston said this, What Kirkland knew. What Kirkland knew. Did Kirkland & Ellis know, and when did they know about an improper relationship between Ms. Freeman and Judge Jones?

They say -- I think Mr. Hueston's words were -- we are a bystander; we were lied to just like everyone else.

And they also say, Even if we did know and even after we knew, we had no obligation of disclosure.

So, the question for the Court on the sanctions is, are there known facts and reasonable inferences that reasonably cast doubt on the assertion by Kirkland & Ellis that they knew nothing; that the -- one of the largest and certainly, I believe, the richest law firm in the country, was ignorant of a relationship that a pro se litigant on or through public information [sic]?

While there are certainly such facts, and those reasonable inferences be can -- can be found, and we would submit those should be given to a jury, they are certainly not the basis of sanctions.

What are -- what are some of those facts? The Court -- the Court raised one of them. Why did Kirkland & Ellis need local counsel in Houston? Strange, right? A very, very

large law firm that has a large presence in Houston, including many bankruptcy lawyers.

Pair those -- pair -- what -- what reasonable inferences can be drawn from that? Pair those inferences with the timing issues. And I understand there's a dispute about the timing issue, but I think what we do know is that 46 mega bankruptcies were filed by Kirkland & Ellis after 2019, after Ms. Freeman had joined Jackson Walker, and that Kirkland & Ellis was paid $162 million in attorneys' fees, based on those. And the timing -- the evidence is that from roughly the decade before that from 2006 to 2016, there were zero.

What are some of the evid -- other evidence that inferences can be drawn from? The article in the *Financial Times*. I understand. They don't like that. They say it's hearsay. We say it's an admission. The Kirkland partners were interviewed by one of the leading economic publications in the world. That publication -- and we interviewed -- our lawyers spent hundreds of hours in investigation. Let me just point that out. One of the -- some of the conversations they had were with the authors and journalists at the *Financial Times*. Do you stand by this article? Yes, they said, we do.

That article said that Kirkland partners long knew of the relationship between Judge Jones and Ms. Freeman. "Long aware," I believe, was the quote.

Now, Kirkland & Ellis has never said that article is

false. They have never said, Our parters were misquoted in that article. They have never asked the *Financial Times* for a retraction of that article.

That is not just circumstantial, reasonable inferences. That is direct evidence of what I think we agree is a key factual allegation against Kirkland & Ellis of what did they know.

And finally, Your Honor, the -- the reasonable inferences can be drawn from the fact that Kirkland's other argument is that, Even if we knew, we didn't have to do anything. No disclosure obligation after they undisputedly know of this relationship in March of 2021. No transparency. Nothing, according to them. They say they didn't have an obligation to do that. There's an unpublished Ninth Circuit opinion. That's all they're offering the Court.

So was all of this enough, and everything you've heard in our papers and from Mr. West -- was all this enough to reasonably cast doubt on Kirkland & Ellis' assertion of ignorance such that there was a good-faith basis for these lawyers and for Mr. Van Deelen to allege a RICO claim? Yes, Your Honor. This is not a sanctions case. The elements of Rule 11(b) have not been met, there was no improper purpose, the RICO claim was warranted, there were more than sufficient obligations.

What we have here, as the Court has recognized

repeatedly, is a pro se litigant who uncovered egregious misconduct. And we have a very large law firm who claims that they were ignorant of that misconduct. The Bandas firm spent 400 hours in investigation, two and a half months. They filed a nine -- 91-page pleading.

I -- I just want to close by saying all of this business about, you know, vexatious litigants and other filings as -- as the Court -- the Court already pointed all of this out. That's completely irrelevant to what happened in this case. Past conduct in other cases does not show an improper purpose in the instant case.

The Bandas Law Firm wishes that they had filed many, many RICO cases, but in fact it's only one. So, Your Honor, none of that has any relevance. We would ask the Court, respectfully, to deny the sanctions motion.

THE COURT: Mr. Hueston?

MR. HUESTON: Thank you, Your Honor. John Hueston on behalf of Kirkland.

So, there was a reason why our Rule 11 was focused on the RICO claims. Certainly Kirkland recognizes, Your Honor recognizes something terrible has been unearthed, and there are processes to deal with that. There are judicial review panels, there are attorney sanctions, bar reviews, even third-party complaints. But that doesn't give you the right to haul a party in and throw RICO at them, unless you have a factual and legal

basis to do so. And they don't have that here. I'm not going to repeat the arguments earlier. They just don't have it and it's not even close.

They just spent some time saying what we knew and when. Glad I can finish on that because that's where I started in the beginning of this hearing hours ago.

The -- what is undisputed is that we learned in March 2021 that someone who had been labeled and known as a serial litigant had an anonymous letter with hearsay allegations, and it was made public. And Judge Isgur, and later on on appeal, yet another judge found that was insufficient to show anything. That is what Kirkland knew. In other words, there was nothing for them to disclose at that point.

And the only thing they have beyond it, and I've already addressed it, was the raw hearsay of a *Financial Times* article that doesn't have any quotes from named partners. And by itself, if reviewed in total, shows even the summary of the -- kind of a summary of what is placed in there shows good-faith intentions by Kirkland and not knowledge of any kind of ongoing conspiracy.

And court after court, as I iterated earlier, says you cannot take an article and what's put in an article and use that as a basis to make claims. So they don't have any basis to be putting forward anything that they have set forth here.

So, Your Honor, we would ask that you consider

sanctions here because they just went way too far in putting a factually meritless and legally deficient in multiple ways -- I highlighted three -- the -- our papers highlight additional failings they make on the law. That wholesomely, completely devoid of fact and legal basis means that they should face sanctions here. They are an experienced firm; they know what RICO should require. They also know that there's nothing in the RICO claim added to the rest of the complaint that gives them anything more than triple damages. And that -- when you look at that in the context of the rest of the complaint, that's also been found to be an improper purpose. You can't just toss in RICO to give yourself a shot at triple damages with the reputational effects of claiming that a business is actually part of a criminal enterprise.

And thus we urge sanctions.

THE COURT: Okay. Anybody else? Anybody feel the need to file a supplemental brief? Anything of that nature, let me know at this point in time.

Let me also just put on for the record, talking about disclosure, I sit on the judicial council for the Western District of Texas. I do not sit on the review panel over this matter in any way or over any of this conduct, just for clarity.

All right. Anybody need -- the need to file any supplemental brief? I don't need any supplemental briefing, I'm just asking the parties if you -- if anybody --

MR. SPARACINO: Your Honor, that was going to be my question to you, if you -- if you'd like --

THE COURT: I don't -- I don't need any.

MR. SPARACINO: Okay. Thank you, Your Honor.

THE COURT: Uh-huh.

MR. WEST: Other than our -- our pending request to supplement our pleadings, if the -- if the Court so desires.

THE COURT: Right. I've -- what I've got before me in terms of the writings is sufficient for the Court at this point to make some rulings in terms of what I need to take care of.

Okay. All right. Thank you.

MR. WEST: Thank you, Your Honor.

THE COURT: Y'all may be excused.

(6:31:54 P.M.)

-oOo-

C E R T I F I C A T E

U.S. DISTRICT COURT)
WESTERN DISTRICT OF TEXAS)
DEL RIO DIVISION)

I, Vickie-Lee Garza, Certified Shorthand Reporter, do hereby certify that the above-styled proceedings were reported by me, later reduced to typewritten form, and that the foregoing pages are a true and correct transcript of the original notes to the best of my ability.

Certified to by me this 18th of June, 2024.

/s/ VICKIE-LEE GARZA
TX CSR #9062, Expires 10/31/25
P.O. Box 2276
Del Rio, Texas 78841

EXHIBIT 2

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

In re:	**Chapter 11**
IEH AUTO PARTS HOLDING LLC, *et al.*,	**Case No. 23-90054 (CML)**
Debtors.	**(Jointly Administered)**

RESPONSES TO UNITED STATES TRUSTEE'S
FIRST SET OF INTERROGATORIES TO
THE LAW OFFICE OF LIZ FREEMAN, PLLC, AND ELIZABETH CAROL FREEMAN

Elizabeth Carol Freeman and the Law Office of Liz Freeman, PLLC (collectively "Freeman") respond to the First Set of Interrogatories of Kevin M. Epstein, United States Trustee for Region 7 (the "UST").

Date: April 9th, 2024

Respectfully Submitted,

Tom Kirkendall
Texas State Bar No. 11517300
LAW OFFICE OF TOM KIRKENDALL
2 Violetta Ct
The Woodlands, TX 77381
713.703.3536 (mobile & text)
bigtkirk@gmail.com

COUNSEL FOR ELIZABETH CAROL FREEMAN

Certificate of Service

I hereby certify that a true and correct copy of the foregoing instrument was served on respective counsel for the other parties to this civil action via electronic transmission the 9th day of April, 2024.

Tom Kirkendall

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

VERIFICATION

BEFORE ME, the undersigned notary, on this day personally appeared, Elizabeth Carol Freeman, the affiant, a person whose identity is known to me. After I administered an oath, affiant testified as follows:

"My name is Elizabeth Carol Freeman. I am the president of Law Office of Liz Freeman, PLLC and sign this verification in that capacity and my individual capacity. I have read the Answers to the UST's Interrogatories. The answers are true and correct to the best of my knowledge, information, and belief."

Elizabeth Carol Freeman

SWORN TO and SUBSCRIBED before me by Elizabeth Carol Freeman on April 9th, 2024.

Notary Public in and for
the State of Texas

NOTARY PUBLIC STATE OF TEXAS
SHERILYN FORD
Notary ID #11628571
My Commission Expires
April 26, 2024

Responses to Interrogatories

Interrogatory Number 1: If your response to Request to Admit Number 10 is anything other than an unqualified admission, state all facts that support your failure to admit that Request in its entirety.

Answer: No response required.

Interrogatory Number 2: If your response to Request to Admit Number 11 is anything other than an unqualified admission, state all facts that support your failure to admit that Request in its entirety.

Answer: No response required.

Interrogatory Number 3: If your response to Request to Admit Number 12 is anything other than an unqualified admission, state all facts that support your failure to admit that Request in its entirety.

Answer: Judge Jones purchased the residence using exclusively his funds in 2017. Freeman is the executor of Judge Jones's will and a beneficiary under his will. As a part of his estate planning, Judge Jones conveyed to Freeman a joint tenancy with right of survivorship in the residence in 2017.

Interrogatory Number 4: If your response to Request to Admit Number 13 is anything other than an unqualified admission, state all facts that support your failure to admit that Request in its entirety.

Answer: No response required.

Interrogatory Number 5: If your response to Request to Admit Number 14 is anything other than an unqualified admission, state all facts that support your failure to admit that Request in its entirety.

Answer: Freeman does not know when her relationship with Judge Jones first became public.

Interrogatory Number 6: If your response to Request to Admit Number 15 is anything other than an unqualified admission, state all facts that support your failure to admit that Request in its entirety.

Answer: No response required.

Interrogatory Number 7: If your response to Request to Admit Number 16 is anything other than an unqualified admission, state all facts that support your failure to admit that Request in its entirety.

Answer: Freeman does not have personal knowledge of Judge Jones' disclosures to the Bankruptcy Court.

Interrogatory Number 8: If your response to Request to Admit Number 17 is anything other than an unqualified admission, state all facts that support your failure to admit that Request in its entirety.

Answer: No response required.

Interrogatory Number 9: If your response to Request to Admit Number 18 is anything other than an unqualified admission, state all facts that support your failure to admit that Request in its entirety.

Answer: Freeman does not have personal knowledge of what Judge Jones disclosed to the other parties to the Mediation.

Interrogatory Number 10: If your response to Request to Admit Number 21 is anything other than an unqualified admission, state all facts that support your failure to admit that Request in its entirety.

Answer: No response required.

Interrogatory Number 11: If your response to Request to Admit Number 22 is anything other than an unqualified admission, state all facts that support your failure to admit that Request in its entirety.

Answer: No response required.

Interrogatory Number 12: If your response to Request to Admit Number 23 is anything other than an unqualified admission, state all facts that support your failure to admit that Request in its entirety.

Answer: No response required.

Interrogatory Number 13: If your response to Request to Admit Number 24 is anything other than an unqualified admission, state all facts that support your failure to admit that Request in its entirety.

Answer: No response required.

Interrogatory Number 14: If your response to Request to Admit Number 25 is anything other than an unqualified admission, state all facts that support your failure to admit that Request in its entirety.

Answer: Freeman does not know whether or not Jackson & Walker took any steps to prevent Judge Jones from acting as the mediator

Interrogatory Number 15: If your response to Request to Admit Number 28 is anything other than an unqualified admission, state all facts that support your failure to admit that Request in its entirety.

Answer: No response required.

Interrogatory Number 16: If your response to Request to Admit Number 29 is anything other than an unqualified admission, state all facts that support your failure to admit that Request in its entirety.

Answer: No response required.

Interrogatory Number 17: If your response to Request to Admit Number 30 is anything other than an unqualified admission, state all facts that support your failure to admit that Request in its entirety.

Answer: No response required.

Interrogatory Number 18: If your response to Request to Admit Number 31 is anything other than an unqualified admission, state all facts that support your failure to admit that Request in its entirety.

Answer: Freeman participated on a limited basis in the IEH Auto Parts mediation. She was not involved in the parties' selection of Judge Jones as the mediator. Freeman does not know if the disclosure of her romantic relationship with Judge Jones would have excluded her from participating in the mediation or in cases over which Judge Jones presided.

Interrogatory Number 19: If your response to Request to Admit Number 32 is anything other than an unqualified admission, state all facts that support your failure to admit that Request in its entirety.

Answer: Objection to the extent that the answer seeks privileged attorney-client communications. Subject to that objection, Mr. Kirkendall recommended to Jackson & Walker that the firm disclose the relationship in cases in which Judge Jones was the judge and Jackson & Walker was representing a party-in-interest.

Interrogatory Number 20: If your response to Request to Admit Number 34 is anything other than an unqualified admission, state all facts that support your failure to admit that Request in its entirety.

Answer: No response required.

Interrogatory Number 21: If your response to Request to Admit Number 35 is anything other than an unqualified admission, state all facts that support your failure to admit that Request in its entirety.

Answer: No response required.

Interrogatory Number 22: If your response to Request to Admit Number 36 is anything other than an unqualified admission, state all facts that support your failure to admit that Request in its entirety.

Answer: Freeman did not conduct such searches in cases in which she was responsible for conducting searches. Freeman does not know if Jackson & Walker conducted such searches in other cases.

Interrogatory Number 23: If your response to Request to Admit Number 37 is anything other than an unqualified admission, state all facts that support your failure to admit that Request in its entirety.

Answer: Objection on the grounds of relevance. Rule 2014 sets forth the requirements for disclosing connections. Moreover, Kirkland & Ellis is not involved in this case or contested matter. Finally, obtaining information necessary to answer the interrogatory would require discovery that is not proportional to the needs of the contested matter considering that the burden and expense of such discovery outweighs its likely benefit. Subject to the foregoing objections, Freeman does not have personal knowledge of what Kirkland & Ellis did or did not do.

Interrogatory Number 24 If your response to Request to Admit Number 38 is anything other than an unqualified admission, state all facts that support your failure to admit that Request in its entirety.

Answer: Objection on the grounds of relevance. Rule 2014 sets forth the requirements for disclosing connections. Moreover, Kirkland & Ellis is not involved in this case or contested matter. Finally, obtaining information necessary to answer the interrogatory would require discovery that is not proportional to the needs of the contested matter considering that the burden and expense of such discovery outweighs its likely benefit. Subject to the foregoing objections, Freeman does not have personal knowledge of what Kirkland & Ellis did or did not do.

Interrogatory Number 25: If your response to Request to Admit Number 39 is anything other than an unqualified admission, state all facts that support your failure to admit that Request in its entirety.

Answer: Objection on the grounds of relevance. Rule 2014 sets forth the requirements for disclosing connections. Moreover, Kirkland & Ellis is not involved in this case or contested matter. Finally, obtaining information necessary to answer the interrogatory would require discovery that is not proportional to the needs of the contested matter considering that the burden and expense of such discovery outweighs its likely benefit. Subject to the foregoing objections, Freeman does not have personal knowledge of what Kirkland & Ellis did or did not do.

Unmarried Partners More Diverse Than 20 Years Ago

Cohabiting Partners Older, More Racially Diverse, More Educated, Higher Earners

EXHIBIT 3

September 23, 2019

Written by: Benjamin Gurrentz

The number of unmarried partners living together in the United States nearly tripled in two decades from 6 million to 17 million, 7% of the total adult population (xls) [https://www2.census.gov/programs-surveys/demo/tables/families/time-series/adults/ad3.xlsx] .

As more unmarried couples opted to live together, their profile changed significantly, according to a new study from the U.S. Census Bureau: "Cohabitation over the Last 20 Years: Measuring and Understanding the Changing Demographics of Unmarried Partners, 1996-2017." [https://www.census.gov/library/working-papers/2019/demo/SEHSD-WP2019-10.html]

Cohabitation has become increasingly accepted by a broad swath of social and demographic groups.

The latest estimates from the Current Population Survey's Annual Social and Economic Supplement (CPS ASEC) show unmarried partners are now older, more racially diverse, more educated and more likely to earn higher wages.

America Counts Story

Where Same-Sex Couples Live

Just over half of same-sex couple households in the United States are female, but male same-sex households are more common in large cities.

[https://www.census.gov/library/stories/2019/09/where-same-sex-couples-live.html]

America Counts Story

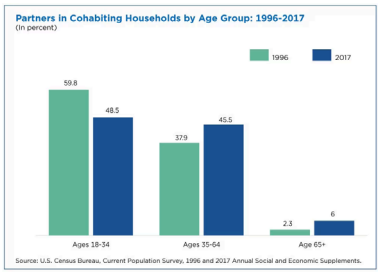
Stepdad or Mom's Boyfriend?

Age

partner-continues-to-rise-especially-among-those-50-and-older/] have also noted a significant jump in cohabitation among older adults, particularly in the last 10 years as divorce rates went up among this group. Divorcees make up a large proportion of older cohabiters.

as the stepfather.

[https://www.census.gov/library/stories/2019/06/stepdad-or-moms-boyfriend.html]



[/content/dam/Census/library/stories/2019/09/unmarried-partners-more-diverse-than-20-years-ago-figure-1.jpg]

America Counts Story

For Young Adults, Cohabitation Is Up, Marriage Is Down

Estimates from the 2018 Current Population Survey show that living together is a more common lifestyle for young adults ages 18 to 24 than marriage.

[https://www.census.gov/library/stories/2018/11/cohabitaiton-is-up-marriage-is-down-for-young-adults.html]

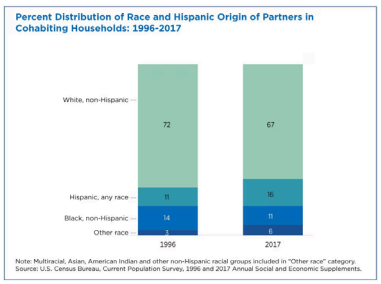
Ethnic and Racial Diversity

A higher proportion of unmarried partners identified as Hispanic in 2017 (16%) than in 1996 (11%).

Partners in interracial relationships increased from 6% to 10% of all cohabiters during this same period.

This may reflect broader population trends toward more racial and ethnic diversity across the nation.

The Hispanic population grew significantly [https://www.pewresearch.org/fact-tank/2015/06/25/u-s-hispanic-population-growth-surge-cools/] and interracial/interethnic relationships became more prevalent [https://www.census.gov/library/stories/2018/07/interracial-marriages.html] between 1996 and 2017.



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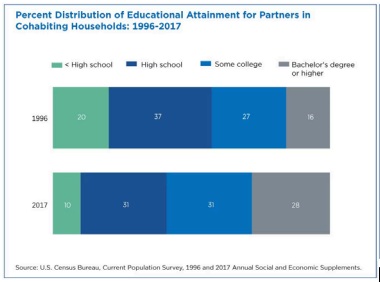
Education and Income

a larger proportion of unmarried partners with higher educations and incomes.

In 1996, 16% of unmarried partners had a bachelor's degree or higher compared to 28% in 2017.

Unmarried partners now also earn more on average. The proportion making less than $30,000 annually (in 2017 dollars) dipped from 64% in 1996 to 53% in 2017.

At the same time, the percentage of those making more than $30,000 rose significantly. This suggests that cohabitation has become increasingly accepted by a broad swath of social and demographic groups.



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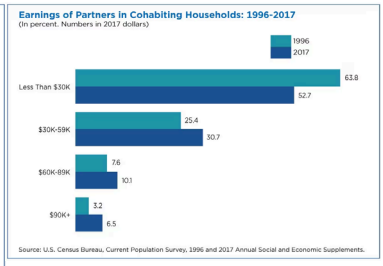

[/content/dam/Census/library/stories/2019/09/unmarried-partners-more-diverse-than-20-years-ago-figure-4.jpg]

How are Unmarried Partners Counted?

Not all unmarried partners were included in this study.

Prior to measurement changes in 2007, only those in relationships with the householder (the person who owns/rents the home) were counted. The CPS ASEC started allowing all respondents to identify a potential partner/boyfriend/girlfriend in the household in 2007.

Unmarried partnerships that do not include the householder tend to be younger and more socioeconomically disadvantaged [https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3496021/], significantly shifting the characteristics of all unmarried partners in ways that make comparisons to 1996 estimates potentially inaccurate. Because of this, partnerships that did not include the householder were excluded from this study.

Benjamin Gurrentz is a Survey Statistician in the Fertility and Family Statistics Branch.

Unmarried and Single Americans Week: September 17-23, 2023

September 17, 2023

In 2022, about 132.3 million or 49.3% of Americans age 15 and over were unmarried, according to the Current Population Survey.

[/newsroom/stories/unmarried-single-americans-week.html]

This article was filed under:

Population [/library/stories.html?tagfilter_List_1688678669=Census:Topic/ThePopulation#List_1688678669]

Page Last Revised - September 15, 2022

Bankruptcy Law
March 26, 2024, 4:00 AM CDT

EXHIBIT
4

Jackson Walker in Legal Hot Seat Following Judge Romance Scandal

By Alex Wolf

Deep Dive

- Firm faces scrutiny over ex-partner's relationship with judge
- Legal probes eye millions in fees, ethical violations

The fallout from the affair involving a Texas bankruptcy judge and a former Jackson Walker LLP partner has put at least $13 million in fees at risk, and bogged the firm down in multiple proceedings that threaten to wreak more damage on its reputation.

Jackson Walker, a more than 500 attorney outfit with six offices across the Lone Star State, already collected the fees across 26 Chapter 11 cases in which the firm didn't disclose that former partner Elizabeth Freeman was romantically involved with now resigned bankruptcy judge David R. Jones.

But Jackson Walker and others in the coming months face more accusations that they harmed creditors and others involved in several cases overseen or mediated by Jones and that they jeopardized the integrity of the nation's bankruptcy system by failing to adhere to legal disclosure requirements.

"I'm not sure the ball has stopped rolling yet," said Northwestern Pritzker School of Law professor and former Nevada bankruptcy judge Bruce Markell. It all turns on "who knew what, when," he said.

A thorough investigation by the US Trustee the Justice Department's bankruptcy oversight program into the firm's decision making and lack of disclosure is still months away. Disciplinary or even criminal proceedings could follow depending on what's found, bankruptcy academics and attorneys say.

Meanwhile, the calls for Jackson Walker to disgorge fees is being handled across multiple courtrooms, with some venues still being decided.

"The condition is sad, sad, sad and it's not being made any better by these delays and complexities that have arisen," said Clifford White, former director of the US Trustee Program. "One would have hoped this would have been handled in a far more efficient process."

Five months after the relationship came to light, pending legal actions threaten the reputation of the firm's booming corporate bankruptcy practice. Additionally, Jackson Walker and others engulfed in the scandal are battling civil lawsuits alleging fraud and obstruction of justice.

Bankruptcy attorneys and academics expect more details about the concealment of a potential conflict of interest to be revealed as the proceedings play out.

Civil Suits

A pair of lawsuits against Jones, Freeman, and the law firms that allegedly knew about the relationship aim to hold them accountable for, in the plaintiffs' view, illicitly profiting off its concealment.

"In my world, this is an unimaginably bad scandal," said Nancy Rapoport, a University of Nevada, Las Vegas law professor who has written about the defendants' duties to disclose.

The firm moved to dismiss one of the suits on March 22, shortly after it hired renowned Houston attorney Rusty Hardin to wage its defense.

"They've found exceptionally talented lawyers with an expertise in high profile criminal and civil trials, so it's clear they're taking it seriously, as they should," said Rapoport.

The legal firestorm began with a lawsuit filed in early October by an aggrieved former shareholder of McDermott International Inc. Plaintiff Michael Van Deelen alleged that the judge's neutrality was compromised by his undisclosed relationship, which Van Deelen discovered after an anonymous letter led him to records showing the pair owned property together.

Days after the suit was filed, Jones admitted in an interview with the Wall Street Journal that he and Freeman had been in a multiyear relationship and shared a home together. The bombshell revelation quickly led to a misconduct inquiry by the US Court of Appeals for the Fifth Circuit, and Jones' decision on Oct. 15 to resign from the bench.

The inquiry ended with no action from the Fifth Circuit, but since then, legal challenges have arisen in cases overseen or mediated by Jones in which Jackson Walker served as counsel for corporate debtors.

Before he resigned, David R. Jones was one of the busiest bankruptcy judges in the country.
Photographer: Brett Coomer/Houston Chronicle via Getty Images

Once Jones acknowledged that the relationship rumor was true, "you couldn't go back and unscramble the egg," Markell said.

Van Deelen later expanded the scope of his suit to bring claims for civil racketeering and fraud against Jones, Freeman, Jackson Walker, and Kirkland & Ellis LLP which served as lead counsel in the McDermott case.

The defendants were hit with a similar complaint last month by the former CEO of Bouchard Transportation Co., who said the petroleum barge company's Chapter 11 case also steered by the same law firms was mismanaged and derailed due in large part to the undisclosed relationship.

The suits face stiff opposition from the defendants and have prompted some finger pointing among the key players themselves. Jones has said he should be protected from the litigation by judicial immunity, while Kirkland has said it "was lied to about the existence and extent of the improper relationship." Freeman has argued that the failure to disclose the relationship which she said was in part Jones' decision had no bearing on the course of McDermott's bankruptcy reorganization.

Jackson Walker has accused Freeman of lying to the firm about the nature of her relationship with Jones.

Government Watchdog Actions

While the civil complaints seek redress from multiple parties, the US Trustee has kept a sharp focus on Jackson Walker. It's filed numerous bankruptcy court requests to disgorge fees that the firm earned in dozens of cases presided over by Jones from 2018 to 2022 while Freeman was an attorney at the firm. But the process is convoluted and remains in the early stages.

In some instances, trials are set. Judge Marvin Isgur of the US Bankruptcy Court for the Southern District of Texas in August will hear Jackson Walker fee disputes in the cases of Neiman Marcus, Seadrill Partners, and Strike LLC.

But many others remain in flux. The fact that several months have passed and it's still undetermined which court will be handling certain matters "is most unfortunate for those who care about the public confidence in the bankruptcy process and the bankruptcy system," said White.

Jackson Walker violated multiple legal requirements and compromised the integrity of the bankruptcy system by failing to disclose the relationship, the US Trustee argued.

In some instances, the government is seeking a court order to reopen cases that have been closed for months, or even years. The administrative burden of reviving bankruptcies that, in some cases, were long ago completed, has even caused confusion for Judge Christopher Lopez, who is tasked with overseeing some of the US Trustee's fee disgorgement requests.

"I didn't know these cases were closed," Lopez said at a March 21 bankruptcy court hearing regarding a subset of the cases assigned to him months ago.

Chief Bankruptcy Judge Eduardo V. Rodriguez, who leads the Houston bankruptcy court, was tapped to handle the complicated discovery and pretrial issues that have arisen from the fee disgorgement proceedings. Those matters were consolidated under a single court docket with the aim of efficiently wrangling issues such as scheduling, noticing, disputes, and conferences. Discovery is scheduled to begin on May 15.

As part of that proceeding, Rodriguez has heard, and recommended against, arguments that the fee issues be sent out of bankruptcy court and handled instead by a district court. But the ultimate decision about whether any of the fee matters will be moved will be made by US District Court for the Southern District of Texas Chief Judge Randy Crane. The timing of any such decision is unclear.

From an appearance perspective, it's disconcerting that a bankruptcy judge from the same court where Jones sat is still presiding over the proceedings, White said.

Additional Fallout

Despite procedural hurdles, probes into what was known about the relationship will eventually take place and additional facts will likely come out, said Markell.

"We don't even know the other shoes that are going to drop," Rapoport said. "Depending on what facts get found, there may be bar complaints, too."

Law firms are obligated to ensure their people operate within ethical guardrails, Rapoport said. On top of potential consequences for violating bankruptcy rules, the parties could be subject to disciplinary action by the Texas bar.

There could also be a criminal referral depending on what additional information comes out as the lawsuits and fee disgorgement motions move forward, both Rapoport and Markell said.

In his days as a bankruptcy judge, Markell regularly reported possible violations of bankruptcy crimes to the US Attorney and requested that they perform a statutory follow up, he said.

"Is Judge Jones going to be prosecuted criminally?" he asked. "If he's prosecuted, there's going to be a lot of aiders and abettors."

An attorney for Jones didn't respond to a request for comment. Freeman and Jackson Walker declined to comment.

James Nani contributed reporting.

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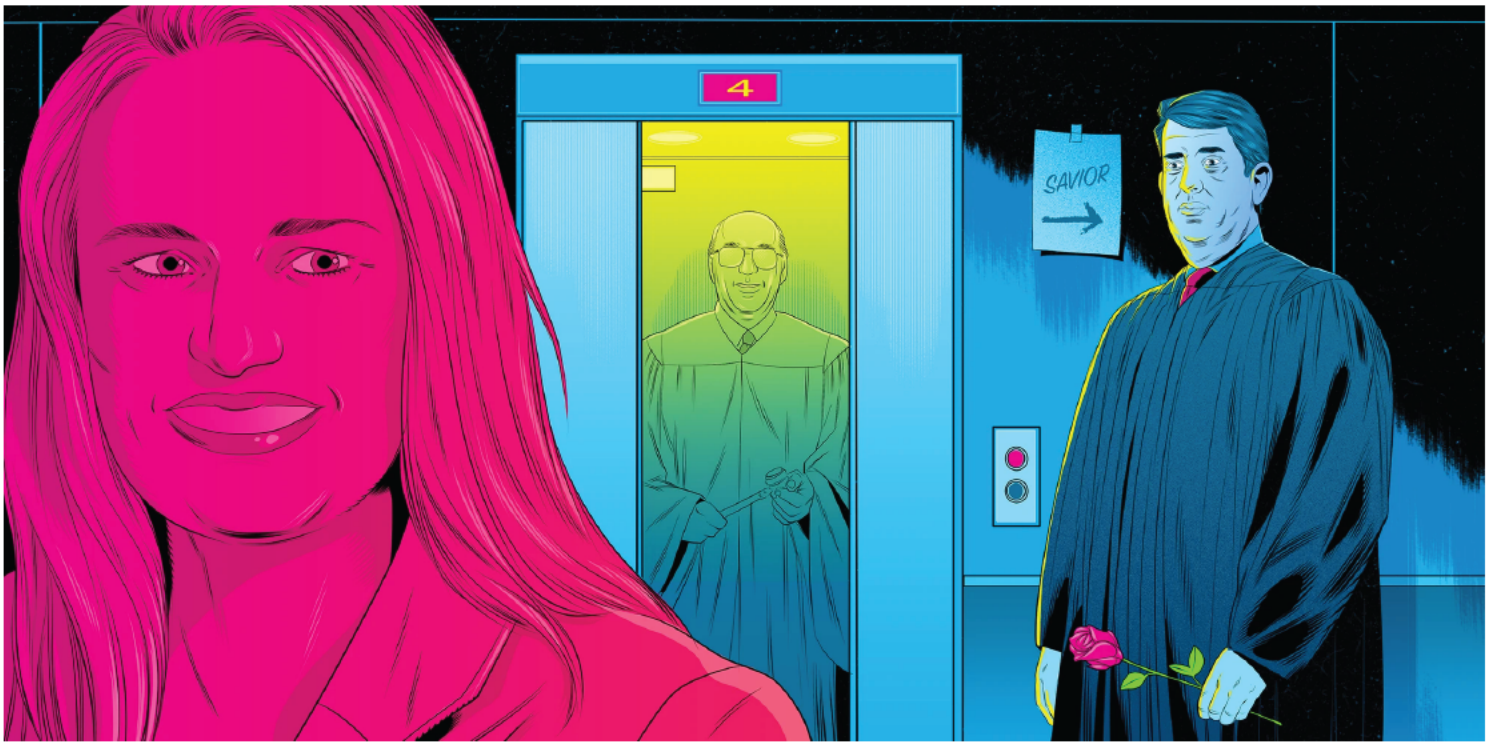
EXHIBIT 5

FINANCE

The incredible oblivion of Judge Marvin Isgur

Inside the tight-knit circle of attorneys and judges that fueled the meteoric rise of the Southern District of Texas bankruptcy court — and its spectacular fall.



Dominic Bugatto for Business Insider

On a mild Houston day in March 2021, Judge Marvin Isgur prepared to oversee the only case on his docket that morning. It was a motion to recuse his longtime colleague on the bench, David Jones, from a case involving a bankrupt engineering company.

Motions are the bread and butter of the US court system, and litigants use recusal motions to request a new judge if they have concerns about a conflict of interest or bias. An independent judge hears the arguments and decides if there

is enough evidence to grant the motion, requiring the assigned judge to step aside.

On this day, the circumstances were anything but usual. The motion, filed months earlier, had just been updated with a shocking allegation: Jones was in a "romantic relationship" with attorney Elizabeth Freeman, his former clerk and then a lawyer at Jackson Walker, a Texas firm that often appeared before Jones and Isgur in the Southern District of Texas bankruptcy court, where the pair of judges handled the most high-profile cases.

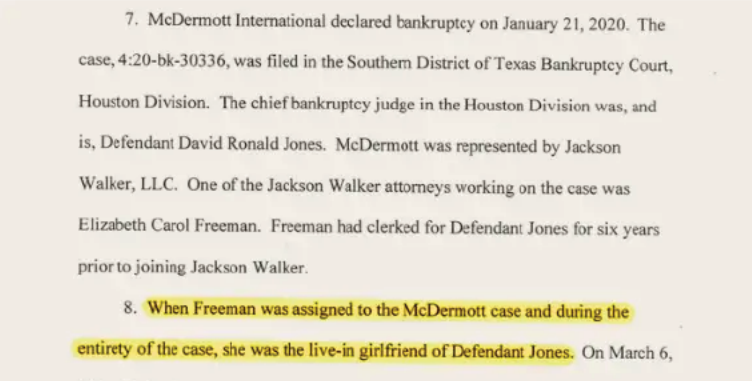
Michael Van Deelen, the plaintiff in a shareholder case against executives of the engineering company McDermott International, wrote that he'd received a document in the mail alleging the relationship. The note went further, saying that Freeman was the "strategic link" between Jackson Walker attorneys, including Matthew Cavenaugh, and cases handled by Jones.

Freeman and Cavenaugh were both well known to Isgur. Freeman had clerked for Jones for six years, and later joined a special committee the two judges created as they centralized large bankruptcy cases under their control. Cavenaugh was a former Isgur clerk. And yet Isgur had chosen himself when Jones asked him to assign a judge to decide the recusal.

His choice wasn't all that surprising given their 30-year relationship. As law partners, Isgur and Jones had formed a lifelong bond, and as bankruptcy judges, they had created an ambitious, if controversial, machine for attracting cases to the Southern District.

"It's a very special and close relationship that came from being a mentor to a best friend to a colleague," a member of

the Houston bar said at a December 2023 hearing, "and created something very big and special in this district."



7. McDermott International declared bankruptcy on January 21, 2020. The case, 4:20-bk-30336, was filed in the Southern District of Texas Bankruptcy Court, Houston Division. The chief bankruptcy judge in the Houston Division was, and is, Defendant David Ronald Jones. McDermott was represented by Jackson Walker, LLC. One of the Jackson Walker attorneys working on the case was Elizabeth Carol Freeman. Freeman had clerked for Defendant Jones for six years prior to joining Jackson Walker.

8. When Freeman was assigned to the McDermott case and during the entirety of the case, she was the live-in girlfriend of Defendant Jones. On March 6,

An excerpt from an October 2023 lawsuit that would set off a crisis in the Southern District of Texas bankruptcy court. Courtesy of Michael Van Deelen

Van Deelen's motion threatened to unravel it all, exposing grave conflicts of interest and a tight network of informal communications that allowed lawyers, including Freeman, to leverage their access to bring in more cases, building their firm's clout and revenue. "Judge Jones's secret relationship with Ms. Freeman," the US Trustee wrote in a November filing, "created an unlevel 'playing field' for every party in interest in every case Jackson Walker had before Judge Jones."

Several Houston attorneys said they considered Isgur a brilliant judge whose response to the recusal motion was out of character. Over nearly 20 years on the bench, during which he had overseen thousands of cases, he developed a history for being a stickler on questions of ethics.

In 2014, he issued an order removing an attorney who'd worked at his former firm, W. Steve Smith, from his duties overseeing a bankruptcy estate after Smith had sought reimbursement from the estate for around $3,500 for a three-day personal stay prior to an oral argument in New Orleans.

In 2015, Isgur joined another judge to initiate an investigation into another trustee for what they considered improprieties surrounding a creditor payment plan — even though a former chief judge had described the approach as a longstanding practice. In at least two other cases, Isgur has personally questioned witnesses he called himself — including, once, Jones, while he was appearing before Isgur as an attorney.

Bankruptcy judges have broad discretion, what the author Michael Lewis has called "sensational powers," to decide what evidence to allow in a case. And yet in the Jones recusal case, the aggressive Isgur was nowhere to be seen.

First, he ordered the motion and the anonymously authored document sealed. Then, over the course of the roughly 40-minute long hearing, he refused to admit the anonymous note into evidence. He did not call to the stand either Freeman or Cavenaugh, though he knew them both well. And when Van Deelen asked for time to depose witnesses about the allegations, Isgur shut that down, his tone giving off a sense of frustration.

"No, your motion for a continuance is denied," according to audio of the judge's remarks. "I'm not going to let you take a deposition about the contents of an anonymous letter. That would be totally outrageous." Minutes later, Isgur denied the motion for recusal. A US district court judge later denied Van Deelen's appeal, agreeing that the note had no evidentiary value.

The matter may have been largely forgotten, one of any number of denials handed down every day throughout the United States court system.

But the anonymous note resurfaced two and a half years later when Van Deelen filed a lawsuit against Jones, alleging retaliation, this time relying on evidence that Jones and Freeman owned a home together, as Business Insider was the first to report. (Jones has filed a motion to dismiss in that case, which remains pending.)

Over the next 10 days, Jones admitted he and Freeman were in a romantic relationship, earned a rare public rebuke from the Fifth Circuit Court of Appeals, and resigned.

It was as if a meteor had hit one of the country's most influential bankruptcy courts. His resignation led 3,500 cases to be reassigned and sparked the Department of Justice to demand Jackson Walker give back nearly $23 million in fees it had earned in cases that Jones had overseen. The Southern District juggernaut, which had pulled in scores of massive cases and enriched the Houston bankruptcy bar, was over.

But Isgur remained unscathed. In her written rebuke of Jones, the Fifth Circuit chief judge took care to note that "on information and belief, the judge who ruled on the motion to recuse was unaware" that Jones and Freeman were romantic partners. But an extensive document trail, social media posts, and nearly a dozen sources inside Houston's legal community suggest that narrative is implausible.

Freeman's attorney, Tom Kirkendall, declined to comment on her behalf. Isgur did not respond to requests for comment sent through his staff. Jones' attorney, Gary Cruciani, did not respond to requests for comment.

In October 2023, the Fifth Circuit Court rebuked Judge David Jones but said that his longtime colleague, Judge Marvin Isgur, had been "unaware" of Jones' inappropriate relationship. Fifth Circuit Court of Appeals

"Typically, best friends know the identities of their friends' long-term romantic partners," Nancy Rapoport, an influential legal ethicist and professor at the University of Nevada Las Vegas William S. Boyd School of Law, wrote in a paper about the ethical questions surrounding Jones' relationship. "But only Judge Isgur knows what he knew or didn't know about the relationship."

In fact, the rise of the Southern District was inseparable from the close relationships between Jones and Isgur, Jones and Freeman, and the firm where Freeman was a partner, Jackson Walker. The Fifth Circuit found that "substantial" money was involved.

'I love him like a father'

Isgur and Jones first began working together in 1993, when Isgur and Kirkendall, then his law partner, hired Jones out of the University of Houston law school as an associate, Jones said in a February 2022 interview for an American Bankruptcy Institute podcast. Jones was being pursued by a much larger firm, he told someone at the time, when Isgur and Kirkendall persuaded him to join their small litigation boutique. Both men spoke at Jones' wedding reception at Brennan's, the venerable Houston restaurant, according to someone who attended.

It would prove to be his most influential professional relationship. "They took me in, taught me how to think, how to write, and how to be a lawyer," Jones said of Isgur and Kirkendall in March 2023 when he accepted a lifetime achievement award from Emory Law School. Isgur was chosen to introduce him.

For years, Isgur and Jones lived a short distance away from each other in a wealthy enclave on Houston's west side. Jones would go sailing on Galveston Bay with Isgur on his boat. The two men often ate together at hole-in-the-wall restaurants, according to two people familiar with their habits. One of the sources said they were frequently joined at these dinners by their wives.

By some measures, the two men made an odd pair. The elder judge was a Houston native, a member of the influential Winograd real estate family, and a nondrinker. He wore his receding hair cropped close and wire-rimmed glasses that gave him the authority of a man steeped in the law. Behind the bench, he was always in control. Jones, on the other hand, was voluble and audacious. A North Carolina native estranged from his father, Jones liked sharing a drink with members of the Houston bar. As a judge, he would sometimes berate litigants and attorneys in his court, and he liked to boast about how, as an attorney, he had pushed the boundaries of the law.

Yet over the years, their relationship blossomed into something almost familial. "I love him like a father," Jones once said of Isgur. In introducing Jones at the Emory event, Isgur called him his "stubborn adopted son."

"There is no better feeling than when a parent watches his child surpass him in capability and achievement," Isgur said. "I am so proud."

Isgur's only actual child, Sarah, is a conservative lawyer known for her close relationships with Supreme Court justices and her three years in the Trump administration. Most recently, she's made a name hosting a must-listen legal podcast, Advisory Opinions, in which she has repeatedly explored questions of judicial ethics.

When Jones appeared on the podcast in 2020, their dynamic was warm. Sarah called him a "family friend," and Jones congratulated Isgur on her pregnancy. Several years earlier, when Sarah got married in the federal courthouse, her father officiated and Jones and his then wife were in attendance, according to one wedding guest.

After Isgur became a bankruptcy judge, appointed by the Fifth Circuit Court of Appeals in 2004, Jones joined Porter Hedges, a Houston law firm whose 1981 founding made it a relative newcomer to the city's legal scene. Porter Hedges' scrappy status gave Jones the freedom to further develop into an aggressive litigator, making his name representing trustees charged with selling off assets in Chapter 7 bankruptcies.

Legal records suggest that Jones may have first crossed paths with Freeman in 2002, when he was still in private practice with Isgur; that year, she represented a creditor and Jones a trustee in the same bankruptcy case. Over four days in March 2008, each attorney was assigned to a case the other had already been working on for months. By the following year, Freeman had joined Porter Hedges as a

partner to work with Jones in the bankruptcy practice, according to a person who knew them at the time. Her husband had recently joined Porter Hedges, too.

At Porter Hedges, Jones and Freeman worked closely together. In several pleadings from that time, they appear on the same signature block, indicating that they were jointly handling a case.

A 2022 tamale party was attended by Jones (in the gray cap) and his former clerk — and secret romantic partner — Elizabeth Freeman (in the Keystone T-shirt at left). Facebook

It's unclear when Jones and Freeman first became romantically involved, but Porter Hedges appeared to take a more liberal stance on interoffice romance than many Big Law firms did at the time. John Higgins, a senior partner, started dating Whitney Ables when they worked together at Porter; they were later married in a ceremony Jones officiated. Josh Wolfshohl also met his wife Amy Lucas while they were working together there; both remain at the firm. And Porter hired Freeman even though her husband was already a partner there.

Related stories


Judge Aileen Cannon just handed Donald Trump another legal win


Trump may blow off a pre-sentence probation interview at his own risk

Isgur, during his time on the bench, had encouraged Jones to consider becoming a bankruptcy judge. When Judge Wesley Steen retired from the Southern District of Texas bankruptcy court in 2011, Jones got his chance, and applied to the Fifth Circuit — whose judges appoint bankruptcy judges in the circuit — to fill Steen's seat. Jones would again become a close colleague of his mentor.

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Isgur moved quickly to get Jones hearing cases, swearing him in at a private ceremony in advance of the official investiture, a small gathering he hosted in his courtroom on the fourth floor of Houston's federal courthouse. About two dozen people were there, according to two people who attended, including Freeman. She was tasked with taking pictures, and at one point, her emotions overcame her and she teared up, according to one of the attendees.

By then, Freeman had already decided to leave her job at Porter Hedges, where she was poised to earn handsomely by taking over casework from Jones. That year, partners at Houston's law firms earned on average nearly $800,000, according to one compensation survey. Instead, she took up a position as Jones' permanent clerk, likely making closer to $100,000 in a role she would hold for the next six years. The following year, her husband moved to dissolve their marriage, according to Harris County records.

"When I heard she went and became his law clerk, I thought that's a surprise. I would not have expected that to be a typical career path for Liz," said a former colleague of theirs at Porter Hedges. "When I heard that they were eventually found to be cohabitating, it didn't surprise me."

Just months after Freeman began her clerkship, Jones too got divorced.

"I probably should have talked with, at that time, my wife — now my ex-wife — about that decision, because that's obviously a huge change," Jones told Reuters in 2020. "I just decided that it was something that I was going to do and if I was going to do it, I was going to devote the same energy into being a judge that I did into being a lawyer." He suggested in another interview that the couple experienced tension over the decrease in his pay.

Jones kept the house he had shared with his wife, and sometime later, Freeman moved in with him, according to one person aware of the arrangement. The real estate photos Jones used later to sell the home showed what looked like a boy's bedroom, even though Freeman was the only one in the couple with kids, and a closet that held women's clothing.

In 2017, Jones purchased a house in a gentrifying neighborhood in northwest Houston, not far from his previous home. He and Freeman toured the home together, and Jones ultimately paid $985,000 in cash, Bloomberg reported in April. Real estate records show that they came to jointly own it.

Whether Isgur visited Jones at the homes he shared with Freeman is unclear, but the elder judge would have witnessed the dynamic between the pair over the six years they all worked closely together at the Houston courthouse.

"They set up the special panel because they are great judges, and they are great arbiters of the law, and then to say they don't have the same sensibility with the people they have lunch with beggars disbelief," said Bruce Markell, a former federal bankruptcy judge in Nevada who now teaches law at Northwestern's Pritzker School of Law. "It's not like Isgur

didn't know her. Whether he knew about the relationship or not I don't know, but it would be difficult for me to think that Isgur was taken completely by surprise by the allegations."

A plan to grow the Houston court

When Jones joined the bankruptcy court for the Southern District of Texas, Delaware and New York dominated as the venue of choice for major corporate bankruptcies. But Jones and Isgur came up with a plan to make Houston a magnet.

Corporate bankruptcies are big business. For decades, the process has been used by companies with too much debt and not enough cash to find fresh footing — and over time, it's become one of the most lucrative areas of law. Top attorneys can make up to $2,500 an hour in bankruptcy cases, the kind of money that can warp a system. In recent decades, bankruptcy forum shopping has become rampant, with firms filing in whatever federal district they like, just by showing a local address there. Sometimes a PO Box is enough. So lawyers tend to congregate where they find corporate-friendly judges who have a reputation for quickly moving companies through the process and signing off on lawyers' fees.

While Delaware and New York dominated as the venues of choice for major bankruptcies, millions of dollars flowed into the coffers of local law firms. The judges became their own power centers, with every decision affecting the paychecks of local lawyers and the fortunes of their firms: Decide against the debtor and their law firm might seek a different venue for their next client.

Houston judges had tried to break into the upper ranks before, without success. Judge William Greendyke promised attorneys in 2000 that the judges' "war on fees is over,"

according to Lynn LoPucki's book *Courting Failure*. A year later, Houston-based Enron still chose New York for its spectacular bankruptcy.

Diagram: Business Insider; photos: Reuters; LinkedIn; Facebook

In 2016, Jones and Isgur began to hatch a more ambitious plan to make Houston welcoming. Success would mean more money for the men and women of the local bankruptcy bar, and more power and prestige for the Southern District of Texas. They created a special panel for complex cases, changing Southern District rules so extremely large or complex Chapter 11 bankruptcies — including, now, those involving at least $200 million in debt — would get an unusual degree of predictability. Even though the Judicial Conference, which sets policy for the federal courts, had long supported the random assignment of federal judges in order to deter judge-shopping, the new Southern District scheme would assign every complex case to just one of two judges: Jones or Isgur.

"Overnight, bankruptcy lawyers that typically worked on large, complex cases before any one of 3 or 4 sitting bankruptcy judges," Jackson Walker wrote in a court filing last month, "now would be practicing almost exclusively (and routinely) before 1 of 2 bankruptcy judges."

It was an effort, the firm said, to "make procedures more transparent and predictable."

In fact, the two men sought to achieve an extraordinary degree of consistency across their two dockets and would often discuss each other's cases, according to someone who heard it directly from Jones. The two men would walk back and forth to each other's chambers on the courthouse's fourth floor. "We talk every day, multiple times, whether he wants to or not," Jones said in his remarks last year at Emory. "I can't imagine him not being right down the hall."

The judges threw open the doors to the bankruptcy bar, creating a committee of bankruptcy attorneys to advise the judges on industry best practices. Among the founding members were Patricia Tomasco, then a partner at Jackson Walker; Christopher Lopez, an attorney at Weil, Gotshal & Manges who would go on to become a Southern District judge; and Greendyke, who had by then retired as a judge.

Another reform was to promise attorneys for major corporations concierge access to court officials to expedite scheduling and process matters. Jones assigned his case manager, Albert Alonzo, a government-issued cell phone and told him to answer it whenever it rang. Jones would call him in the middle of the night to test his resolve and Alonzo always answered, the judge told Reuters in 2020.

"He is the public's way to talk with me," Jones told the Texas Lawbook in 2020. "He has tremendous scheduling authority. He's great at customer service."

As they worked together, the two men grew close. Jones said he spent time with Alonzo's family during the holidays and at least once he and Freeman attended Alonzo's annual tamale-making party together, according to a social media post.

A close circle of lawyers around Jones

Isgur was known to avoid spending time with Houston's bankruptcy bar outside of the courthouse or official conferences. But just down the hall, Jones routinely blurred the boundaries between his professional and personal lives, becoming friends with a group of attorneys who often appeared before him.

Jones had issued an order in 2016 arguing against "unspoken practices, or disparate treatment" even as he was offering special access, in a variety of ways, for this small network of lawyers.

According to two attorneys close to Jones' circle, a small group of lawyers would often hang around Jones' chambers, which he decorated with framed news articles about him. One, a 2020 Houston Chronicle profile, was headlined: "Meet the judge who saved the Texas bankruptcy practice." (After that article came out, someone taped up a piece of paper outside the fourth floor elevators with the word "savior" and an arrow pointing to Jones' courtroom, a third attorney recalls.)

The locked entrance to his chambers became such a revolving door that when Van Deelen pressed the buzzer in October 2023, intending to hand his retaliation lawsuit to Jones, he was let in with no questions asked, he said. Alonzo once posted that a lawyer close to Jones, Susan Tran Adams, stopped by with coffee and empanadas.

On his frequent visits to Jones' chambers, Isgur likely saw the crowd, which often included Freeman. Two attorneys specifically recall Isgur entering Jones' chambers while other lawyers were present.

Jones said he and some of the lawyers formed a cooking team that would enter local barbecue and chili competitions, and several in the group recently started a nonprofit together. Social media posts over the years of informal gatherings show Jones, Freeman, and Alonzo hamming it up with other lawyers.

The following year, a Houston bankruptcy attorney invited a group of lawyers, including Jackson Walker attorneys Matt Cavenaugh, Veronica Polnick, and Genevieve Graham, as well as Freeman, then running her own practice, to a party for Jones, according to someone who was told about the party.

An October 2022 cookout featured multiple members of the Houston bar, including Jones (back row, gray hair) and Jackson Walker attorneys Veronica Polnick (back row, sunglasses on forehead), Genevieve Graham (squatting center with red cup), and Freeman (sitting center with red sneakers). Facebook

At the root of many of these friendships was a drop-in evidence class Jones began to lead for Houston lawyers soon after he joined the bench. The free class started small and invite-only, but after several years grew to number 40 or 50 students, according to someone who attended.

Regulars included attorneys who worked at, or would later join, Jackson Walker, according to emails, such as Polnick, Graham, and Cavenaugh. According to a recent Jackson Walker legal filing, "other bankruptcy judges and prominent local practitioners attended the classes" as well.

"They were well attended," said another Houston bankruptcy attorney. "I attended a couple, and you could really see the young attorneys clicking."

Jones clicked with them, too. "There are several young lawyers that are present tonight that I first met in a weekly class that I teach in my courtroom on most Wednesdays," Jones said in his prepared remarks for the Emory event last year. "It also turned out that the class was as much of a learning session for me as it was a teaching session. Not only did we become better professionals together, we became friends."

Jones officiated the marriages of at least two lawyers who attended those classes: Tran and Graham.

The class was effectively yet another Jones strategy for attracting bankruptcy filings to the Southern District — and a way for members of the Houston bar to explore tactics they might later deploy in Jones' court.

The classes were sometimes also a ticket to career advancement. At least one young law graduate, Christina Morrison, used the classes to successfully audition for a clerkship with Jones.

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Isgur was well aware of the tight legal community around Jones' evidence class. He told the assembled crowd at Emory how "young lawyers show up weekly — dozens of them — to learn trial tactics and bankruptcy from David."

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After I tried and failed to find an opportunity to introduce myself to Isgur at the courthouse, I visited Isgur's home in April, hoping to find out how the judge was currently feeling

about his adopted son and to ask when he first became aware of Jones' relationship with Freeman.

A woman who appeared to be his wife answered, keeping the door closed and speaking through a side window of the stately brick home. "Get the hell away from us," she said, after I identified myself as a journalist. When I turned to leave, the woman noticed that my hair was pulled back in a ponytail. She commented on the style, and when I turned back to face her, she began to mock me, moving her hips in a side-to-side dance. "Do you want to wear a skirt or earrings? Are you trans?"

As her voice rose, she hurled an expletive and screamed, "Get off the property!"

Rumors of a romantic relationship

Jones and Isgur's efforts soon began to attract hundreds of filings to the district. Big names showed up: Neiman Marcus and J.C. Penney, then Chesapeake Energy.

Tomasco, the Jackson Walker partner who was a member of the complex cases committee, had already been doing her part to build up the court and drum up business for her firm by flying to New York in a campaign to convince the Big Law bankruptcy attorneys to bring their cases south. But the flow of cases only escalated after Freeman left her clerkship, in May 2018, and joined the firm.

Freeman quickly became known as someone who bristled over complying with protocols and failed to loop her colleagues in on critical communications.

She and Cavenaugh set up a business agreement that, according to two of their professional contacts, appeared to be premised on Freeman's tight relationship with Jones

paying off. Though Freeman hadn't worked at a law firm in six years, Cavenaugh and Freeman agreed to split the origination income they got for bringing in new cases, according to the two sources, who were told about the arrangement. Like anyone exiting public service, Freeman hadn't done marketing in years. If she hadn't delivered, it could have meant a substantial compensation loss for Cavenaugh. Instead, according to a November Jackson Walker filing, Freeman enjoyed "quick and substantial success."

"Sharing origination fees is common in the industry, and it is well known that sharing is part of our culture at Jackson Walker," firm spokesperson Jim Wilkinson said by email. "We quite often share origination fees among attorneys irrespective of location and there is nothing out of the ordinary with our compensation practices."

Already, the rumors about Jones and Freeman's romantic relationship were frequent enough that at least one attorney confronted Jones about it; Jones responded by denying the relationship.

"I would see them going to lunch together," said the former colleague from Porter Hedges. "It's not unusual for judges and their clerks to go to lunch together but we typically think of a federal judge's law clerk in bankruptcy or district court as a substantially younger person relatively recently out of school. The optics were different."

Now, Jackson Walker had a partner with a direct line to the leading judge of the Southern District of Texas bankruptcy court. Business boomed. During Jones' career on the bench, two firms, Kirkland & Ellis and Jackson Walker, represented the most debtors with confirmed Chapter 11 plans, according to data provider Lex Machina. And Kirkland & Ellis — whose attorneys were invited to Jones' evidence

class as special guests at least twice, according to emails — often relied on Jackson Walker as its local counsel.

Between 2012 and 2017, before Freeman left for Jackson Walker, just 27 companies with liabilities of $100 million or more filed their bankruptcy in the Southern District of Texas, according to BankruptcyData. From 2018 through 2023 that number more than quadrupled to 148. During the three years ending in 2023, Jones and Isgur together handled nearly a third of all bankruptcy cases with liabilities over $1 billion.

Jackson Walker was involved in a large number of them, with Freeman, as the US Trustee said, creating an "unlevel 'playing field.'"

The Trustee Program has filed several motions to force the law firm to disgorge a total of nearly $23 million in what it called "tainted" fees collected in cases involving Jackson Walker that were heard by Jones as far back as 2018. More than $2 million of those fees were personally collected by Freeman.

As a clerk, Freeman was present while Jones and Isgur were concocting the idea of the complex cases committee. As a Jackson Walker attorney, she became a formal member. But Freeman continued to act as if she were an insider. When Tomasco, for example, asked the committee members in a December 27, 2021, email if the court's hybrid hearing schedule would change, Freeman responded, according to correspondence BI obtained through a public records request. "It will continue until further notice," she wrote from her Jackson Walker address.

By this point, Isgur had become one of the busiest bankruptcy judges in the country. Jackson Walker attorneys

including Cavenaugh and Freeman were frequently appearing in front of him.

And companies were now aggressively venue shopping in the Southern District of Texas.

Bankruptcy rules require a company to be based in the district for 180 days. But court filings in the 2023 bankruptcy of the biopharmaceutical company Sorrento show that Jackson Walker attorney Veronica Polnick — another former Jones clerk — visited a UPS Store on the outskirts of Houston to open a mailbox less than 10 hours before the company filed for bankruptcy.

That UPS store soon became the principal place of business for other Jackson Walker clients, according to legal filings: medical technology firm Surgalign Spine Technologies, sweet treat subscription company Candy Club LLC, and industrial food startup AppHarvest Products, all with mailboxes registered by Polnick — in one instance for a case filed by Cavenaugh.

So much bankruptcy business was coming into Houston that attorneys there were getting bold.

In April 2022, the bankruptcy bar met for a conference at the Omni Hotel in Corpus Christi, a chance for attorneys to get continuing education credits — and face time with judges. A panel titled "Judges Panel — Ask Anything You Want!" at the end of the three-day event gave attorneys an open forum to ask questions of Jones, Isgur, and the other bankruptcy judges of the Southern District of Texas.

As Cavenaugh roamed the room with the mic, one attorney spoke up, saying clients had reported that other attorneys were suggesting they had a special connection with the judges of the Southern District. The attorney asked the judges how lawyers should respond the next time they heard something about these attorneys' special status, according to someone in attendance.

Jones, in prefacing a noncommittal answer, suggested that the question was likely directed at him, the source recalled.

By then, Cavenaugh and Jackson Walker were aware of the allegations of a Jones-Freeman relationship, according to documents the firm later filed in court. Van Deelen had received the explosive anonymous note 13 months before, and an email he sent to Cavenaugh right after receiving it had sparked an apparently cursory internal Jackson Walker investigation.

Freeman admitted that she and Jones had been in a relationship, but said it had ended, according to a draft letter the firm's then-general counsel wrote in August 2021 to an outside ethics consultant. "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 letter also described Freeman's critical role bringing in new business to the firm since she had joined in 2018. "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."

The letter said Jackson Walker had requested that Freeman stop working on cases once they'd been filed with Jones for a two-year cooling off period from the date Freeman claimed their romance had ended. While the firm understood "that a close personal relationship remains" between Freeman and Jones, the letter said, "no further details were sought at that time."

Jackson Walker later learned Freeman hadn't been truthful. The firm's counsel at Norton Rose Fulbright — Greendyke, the former bankruptcy judge — said in a November pleading that in 2022 Jackson Walker had "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."

When Freeman retained counsel, she chose someone with close ties to her romantic partner: Tom Kirkendall, Jones' first boss in the legal profession and someone who described Isgur to Business Insider as "a wonderful law partner of mine for over 10 years" and "a dear friend." (Kirkendall declined to comment on other aspects of this story.)

Later that year, Jones called Cavenaugh to his chambers after a hearing and "insinuated" that he was "unhappy" with the firm's push to disclose the relationship, the firm said in another filing. Instead, Jackson Walker said, Jones handed Cavenaugh a piece of paper with a proposed disclosure that listed a "close personal relationship" with Freeman sandwiched between references to a "social friendship" with Polnick and with Graham. Jackson Walker, Jones insisted, "needs to make this happen," instructing the firm to file the disclosure in all future cases before him, according to the filing.

Finding the language "potentially misleading or untruthful," Jackson Walker said it negotiated Freeman's departure instead; she left the firm in December 2022 to set up her own practice.

But Jackson Walker appeared to keep knowledge of the relationship to itself. The firm's attorneys continued to recommend Freeman for legal work on cases before the Southern District.

"Jackson Walker has a strong and proven culture of ethics and integrity, and when we learned about this issue, we acted responsibly," Wilkinson, a spokesperson for the firm, said by email. "Our firm has been transparent, and our fulsome public filings speak for themselves."

Conflicts of interest appeared immediately. Within weeks, Freeman, serving as contract attorney to bond issuer GWG Holdings Inc., whose bankruptcy case was being handled by Jackson Walker, told Judge Isgur she took "some comfort" knowing that Jones was serving as mediator in the case, according to a December 16, 2022, transcript. During the mediation, in which Freeman participated, Jones suggested naming an independent trustee, according to public remarks by Mike Warner, a lawyer involved in the case.

Freeman was ultimately chosen by the creditors to oversee the wind-down trust in that case, a role expected to earn her $100,000 a month. Neither Jones, nor Jackson Walker, nor Freeman disclosed the relationship.

Containing the fallout

After the romantic relationship became public last October and Jones resigned, Isgur found himself once again at the center of a recusal matter. The estate of a creditor in 4E Brands, a manufacturer of hand sanitizer, whose bankruptcy case was transferred from Jones to Isgur, argued in October that Isgur was too close to Jones to rule on the case independently. The US Trustee, which oversees federal bankruptcy cases, supported the motion, arguing the case should never have been heard by Jones in the first place.

Yet in an apparent attempt to contain the fallout from Jones' ethics implosion, the Southern District's chief bankruptcy judge, Eduardo Rodriguez, ruled against the creditor. Isgur can continue to hear the case, he ruled, writing in the December 2023 opinion that lawyers for the creditor "failed to demonstrate much other than that former Judge Jones and Judge Isgur are close friends." (The creditor has filed an appeal.)

Rodriguez wrote that the estate had provided no evidence Isgur had "extrajudicial knowledge" of Jones' relationship or showed a "high degree of antagonism" in denying Van Deelen's March 2021 recusal motion — despite the magnitude of Isgur's missed opportunity.

In the Sorrento case, a litigant filed in February to remove the case from the Southern District of Texas. Again, the US Trustee lent its support, calling Sorrento's PO Box maneuver "a case of forum shopping and venue manipulation taken to a new and unprecedented extreme." Again, a Southern

District judge shut it down. This time, Judge Lopez — a member of the complex cases committee turned judge — denied the motion. (Lopez had replaced Isgur when Isgur stepped down from the complex cases panel at the end of 2022; Isgur returned to the panel as Lopez's partner after Jones resigned in disgrace.)

The Southern District has stuck to the model Jones created, of sending every complex case to a panel of two judges, flouting new guidance issued by the Judicial Conference of the US in March that further promotes random case assignment to limit "the ability of litigants to effectively choose judges in certain cases by where they file a lawsuit."

Effectively choosing judges, and knowing with a high degree of clarity how those judges would rule, was the very essence of the Jones machine.

Meanwhile, the US Trustee's motions seeking to disgorge nearly $23 million in fees Jackson Walker collected in 33 cases in front of Jones has been bottled up. Those cases have been combined into a single proceeding, overseen at this stage by Rodriguez. That consolidation delays or even prevents what many would like: an impartial judge from outside the district hearing the cases and putting key players in the machine under oath.

The US Trustee began taking discovery on May 15, according to a scheduling order, but a settlement could halt that process and eliminate the risk that Cavenaugh, Freeman, Jones, or even Isgur would have to testify.

That might be fine with the Fifth Circuit.

Earlier this year, the circuit judges chose Alfredo Perez, a retired Weil, Gotshal & Manges bankruptcy attorney, to replace Jones. The pick was widely interpreted as a sign that the Fifth Circuit had come to enjoy Houston's recent success and didn't want it to end with Jones' career. Isgur told Bloomberg recently that he plans to give up handling complex cases, which would clear the way for Perez to take over. Former chief Southern District judge Richard Schmidt told Bloomberg that Perez's experience handling large cases would be a "godsend" for the district. "I can't imagine a better selection given the circumstances," he said.

Meanwhile, according to Debtwire, the Southern District of Texas' popularity has plunged. Through May 4, only 10% of the large Chapter 11 bankruptcy filings this year tracked by the data provider have been filed in the district, less than half what it was last year.

That's well short of Delaware's current share — 39%.

Additional reporting: Jack Newsham.

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