Docket #1272 Date Filed: 08/12/2024

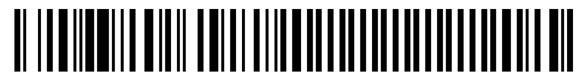
IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	)	Chapter 11
	)	
STAGE STORES, INC., *et al.*,[1]	)	Case No. 20-32564 (CML)
	)	
Reorganized Debtors.	)	(Jointly Administered)

JACKSON WALKER LLP'S SUR-REPLY IN SUPPORT OF ITS OPPOSITION TO THE U.S. TRUSTEE'S AMENDED AND SUPPLEMENTAL MOTION FOR (1) RELIEF UNDER 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 Dkt. Nos. 1258 & 1261]

[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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Jackson Walker LLP ("JW") files this sur-reply in support of JW's *Response in Opposition to the U.S. 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* [Dkt. No. 1258] (the "Response")[2] and in response to the U.S. Trustee's reply [Dkt No. 1261] (the "Reply") seeking to vacate JW's retention and fee orders in these chapter 11 cases and to return fees awarded to JW by the Court and other related relief. In support of its sur-reply, JW respectfully states as follows:

I. PRELIMINARY STATEMENT

1. The U.S. Trustee's Reply evokes the trial lawyer's adage: "If the facts are on your side, pound the facts. If the law is on your side, pound the law. If neither is on your side, pound the table." Seventy-five pages of "table pounding" later, the U.S. Trustee's Reply fails to cure the defects in his Motion (including the U.S. Trustee's ever-changing legal theories) that were identified in the Response.[3]

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[2] Unless otherwise stated, all capitalized terms not otherwise defined in this sur-reply shall have the meanings ascribed to such terms in the Response.

[3] Perhaps realizing that the "table pounding" is not working, the U.S. Trustee has taken to a wide ranging fishing expedition in discovery in an attempt to find a needle in a haystack. For example, the U.S. Trustee has insisted that a picture of a man waterskiing in an elf suit is former Judge Jones when sworn testimony from Ms. Freeman and her ex-spouse unambiguously identify the person is her brother. Virtually every deponent to date has been interrogated about this picture to attempt to elicit some testimony that the "elf" is former Judge Jones. Tens of thousands of dollars and countless hours later, the picture is still not former Judge Jones. Additionally, the U.S. Trustee has spent an enormous amount of time and resources questioning witnesses about former Judge Jones' dogs for reasons yet unknown. And the U.S. Trustee has deposed both former spouses of Ms. Freeman and former Judge Jones, who were divorced long before Ms. Freeman joined JW, as well as a former maid of Judge Jones who never set foot in the Rolla house. Even more, less than two weeks before Ms. Freeman and Judge Jones were scheduled to be deposed, a different branch of the Department of Justice, on information and belief, sent a letter to the United States District Court for the Southern District of Texas demanding that the Court retain documents related to Ms. Freeman and former Judge Jones. That letter apparently referenced a criminal investigation and was somehow leaked to the Wall Street Journal. *See* Alexander Gladstone and Andrew Scurria, *Former Bankruptcy Judge David R. Jones Under Criminal Investigation Over Relationship With Lawyer*, THE WALL STREET JOURNAL, July 15, 2024 (available at https://www.wsj.com/articles/former-bankruptcy-judge-david-r-jones-under-criminal-investigation-over-relationship-with-lawyer-830a0ddf) (last visited Aug. 12, 2024; full text behind paywall). This leak prevented Ms. Freeman, and potentially others, from providing sworn testimony that would presumably support JW's position.

2. Neither the U.S. Trustee's frustration nor another 100 pages of dueling briefs will change what the law does, or does not, say. Faced with a heavy burden and little support for his novel use of bankruptcy and nonbankruptcy law, the U.S. Trustee instead invents new theories for why Rule 60(b) relief and the imposition of tens of millions of dollars in sanctions (*i.e.*, a return of all fees awarded) against JW is appropriate in the challenged cases. These inventions include an "imputation" argument that is contrary to law, as well as inappropriately adding "equitable estoppel" and "unclean hands" doctrines for the first time in the Reply.[4]

3. Moreover, the U.S. Trustee continues to rely on general legal principles untethered to the plain language of the Bankruptcy Code, Bankruptcy Rules, and other purportedly applicable authorities. First in his Motion and now his Reply, he continues to conflate facts (*e.g.*, insisting without reason that JW's alleged knowledge in one case should apply in every case across a six-year period, or that Ms. Freeman's partial admission of a past, secret intimate relationship was sufficient to charge JW with actual knowledge of ***all*** facts) to try to convince the Court to embrace his own hindsight bias by focusing on sensationalized alleged facts that almost nobody knew and were intentionally hidden from this Court, the public, and JW.

4. In the end, however, JW's position that the Court's orders approving JW's retention and compensation should not be disturbed is grounded in a plain-reading of the applicable legal text and caselaw. It is not JW's burden to explain how the U.S. Trustee might make ***his case***; it is ***his burden*** to demonstrate to the Court that he is entitled to the requested relief. As discussed herein and at length in JW's Response, because the U.S. Trustee's position is based on a deeply flawed interpretation of the relevant facts and law, he has failed to carry his burden.

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[4] *See Jones v. Cain*, 600 F.3d 527, 541 (5th Cir. 2010) (finding that "[a]rguments raised for the first time in a reply brief are generally waived"); *Petty v. Portofino Council of Coowners, Inc.*, 702 F. Supp. 2d 721, 729 n.3 (S.D. Tex. 2010) (noting that "the scope of the reply brief must be limited to addressing the arguments raised" in the response or memorandum in opposition").

5. Nearly all of the U.S. Trustee's factual allegations concern the alleged conduct of two people who are not parties in the challenged cases—former Judge Jones and Elizabeth Freeman. The U.S. Trustee apparently determined that former Judge Jones and Ms. Freeman were beyond his reach, so he set his sights on JW. The U.S. Trustee's requested relief and arguments have been evolving since his first Rule 60(b) motion was filed last year. We started with the U.S. Trustee seeking only a "redo" of JW's final fee application process in his initial motion, which then morphed into an assertion that all of JW's fees and compensation should be disgorged. When faced with standing issues, the U.S. Trustee then restyled his disgorgement request as one for sanctions. Now, in the Reply, he suggests that he has additional, yet-unasserted "remedies" up his sleeve. But through it all, the U.S. Trustee's motivating thesis has never changed: somehow, someway, this is JW's fault. The U.S. Trustee fills this void not with facts, but with a narrative woven from sweeping generalizations, conclusory allegations, and a misconstruction of the applicable law and rules through a patchwork of *dicta* and otherwise inapposite authority. None of which satisfy the U.S. Trustee's heavy burden to demonstrate that the Jones-Freeman scandal rendered the substance of any orders approving JW's retention and fee applications "manifestly unjust."

6. Indeed, missing from both the U.S. Trustee's Motion and Reply are critical facts that when properly considered show that granting the draconian relief the U.S. Trustee now seeks against JW would itself be manifestly unjust. In the Pre-March 2022 Cases, JW simply could not have disclosed what it did not know. Nevertheless, the firm took reasonable steps to address what was then viewed by all (including this Court, the District Court, and presumably, the U.S. Trustee) as a frivolous "character assassination": an accusation of an existing romantic relationship between

a sitting federal judge and a well-respected colleague by a *pro se* litigant with a documented history of erratic behavior and fabricating evidence.

7. When JW initially confronted Ms. Freeman, she revealed only that she once had an intimate relationship with Judge Jones, but that it ended before she was hired by the firm and that such relationship was not ongoing. JW reasonably relied on her track record of integrity and her duties as a partner of the firm to disclose information that may bear on ***her*** responsibilities. Ms. Freeman's decision to conceal her relationship when she joined the firm is not a license to punish JW. Yet the U.S. Trustee argues, in hindsight and contrary to his own cited authority, that all other facts are irrelevant and JW must return ***all*** of its compensation and reimbursements, which were indisputably reasonable, necessary, and benefited the estates.

8. In the Post-March 2022 Cases, while Ms. Freeman eventually admitted that she was in a renewed romantic relationship with former Judge Jones, she did not disclose her living situation and co-ownership of property to JW. This thrust JW into an unprecedented situation, forcing JW to juggle sensitive personal information with potentially exposing private details of a sexual relationship with a sitting federal bankruptcy judge who himself refused to disclose those details because he had determined that he had no duty to do so as Ms. Freeman's lawyer testified in his deposition and as former Judge Jones told the Wall Street Journal in October 2023. JW believes it acted reasonably and responsibly to navigate this unprecedented, complex, and sensitive situation, including through its decision to exit Ms. Freeman from the firm. But the U.S. Trustee, relying entirely on non-binding caselaw, insists that JW must not be allowed to keep a dime for its efforts on behalf of its clients in the challenged cases. Fifth Circuit law does not mandate disgorgement of all fees earned by a professional no matter how many times the U.S. Trustee insists otherwise.

9. The U.S. Trustee, in the Reply, relies on the same tortured reading of the Bankruptcy Code, Bankruptcy Rules, and other law to claim that, in each challenged case, JW violated its disclosure obligations and the rules of professional conduct by not disclosing the secret relationship. But the plain language of the Bankruptcy Rules do not mandate disclosure of connections to judges, let alone connections of any kind that a firm does not know exist.[5] The U.S. Trustee attempts to circumvent this unambiguous language by "imputing" to JW Ms. Freeman's knowledge of her secret relationship with former Judge Jones, as well as Ms. Freeman's alleged lack of disinterest. Not a single case cited by the U.S. Trustee supports that theory—including his new agency and statutory arguments first asserted in the Reply.[6]

10. The only harm the U.S. Trustee claims in his Motion is a perceived injury to the public's perception of the bankruptcy system. Assuming, *arguendo*, that the U.S. Trustee's allegations are true, that harm was principally caused by former Judge Jones and his refusal to disclose or recuse, not by JW.[7] But, the message that the U.S. Trustee ostensibly seeks to deliver—that a judge involved in an intimate relationship with a member of a law firm with whom he lives with or co-owns property may not preside over cases and mediate disputes in which a party is represented by that same firm—has been well delivered by Fifth Circuit Chief Judge Richman. It resulted in former Judge Jones's resignation, and has generated substantial attention from all

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[5] *See* FED. R. BANKR. P. 2014(a) ("The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, ***to the best of the applicant's knowledge***, all of the person's ***connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee***.") (emphasis added).

[6] *See, supra*, n.4.

[7] For instance, had former Judge Jones merely recused himself from cases involving Ms. Freeman or JW—without a need to reveal the reason behind his recusal or any intimate personal details of his relationship with Ms. Freeman—there is no question that JW's retention would be appropriate in ***all*** of the challenged cases under the Bankruptcy Code.

corners of the legal industry. Still, through his Motion and Reply, the U.S. Trustee wrongly seeks to have this Court lay the lion's share of the blame on JW. Yet, if this relationship was so well known as the U.S. Trustee alleges (and seeks to apparently establish in discovery), why didn't the U.S. Trustee file an ethics complaint against former Judge Jones years ago?

11. JW's dispute with the U.S. Trustee has never been about avoiding accountability for its actions. But JW should not be held accountable for the conduct (let alone alleged misconduct) of others. The U.S. Trustee and others have recourse available to them to appropriately address the scandal, it just does not lie with JW.

12. In light of the above, the parties' filings with the Court to date, and all known facts and circumstances, JW respectfully requests that the Court deny the Motion.

II. SUR-REPLY

A. The U.S. Trustee—not JW—bears the burden of proving that Rule 60(b)(6) relief is appropriate, but cannot meet his burden under his own evolving theories of liability.[8]

13. Lost in the U.S. Trustee's latest filing are two threshold issues: what is the applicable legal standard, and who has the burden to meet it. Rule 60 and the standard applied by the Fifth Circuit are unambiguous. But based on the U.S. Trustee's Reply, it is critical that the relief he is actually asking for remain front of mind: the U.S. Trustee wants this Court to vacate final, non-appealable orders approving JW's retention and fee applications in dozens of chapter 11 cases that have long-since been resolved (whether through a final decree, the debtor's emergence from bankruptcy, or plan confirmation).[9] The U.S. Trustee argues that relief is appropriate merely

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[8] Because there have been no final fee orders entered in either the *HONX* (Case No. 22-90035) or *GWG* (Case No. 22-90032) cases, the U.S. Trustee does not rely on Rule 60 with respect to his challenge to JW's retention or fee applications in those cases; however, all other arguments raised by the U.S. Trustee are substantively the same.

[9] Notably, the U.S. Trustee has not asked the Court to vacate ***all*** of the orders former Judge Jones entered in cases allegedly "tainted" by the Jones-Freeman relationship, targeting instead a handful of "tainted" orders in each case that concern only JW's retention and compensation. *See* Motion ¶ 100 (arguing that the Jones-Freeman relationship and alleged nondisclosures, among other things, "tainted this case"). Despite the U.S. Trustee's sensational allegations and arguments, the narrow scope of his requested relief betrays a mission concerned more with ensuring that JW—

because it was prompted by the "undoubtedly exceptional and unforeseen"[10] Jones-Freeman scandal. But the inquiry is not so facile; the search for "extraordinary circumstances" that justify Rule 60(b) relief is not satisfied by salacious allegations alone. The Fifth Circuit requires more.

14. The Fifth Circuit has observed that vacatur for failure to recuse can be "draconian"[11] and further has "narrowly circumscribed its availability" under Rule 60(b)(6).[12] As a result, courts in the Fifth Circuit are directed not to simplistically observe whether the alleged circumstances are "extraordinary," but to probe whether those circumstances undermine the targeted judgment's ***merits*** and render it "manifestly unjust"[13] or, as the case may be, whether the alleged violation is mere "harmless error."[14] The burden to show both extraordinary circumstances and manifest injustice is a heavy one, and rests entirely on the U.S. Trustee's shoulders. That means the U.S. Trustee must demonstrate with convincing evidence that each of the retention and fee orders he wants vacated was manifestly unjust on the merits, or whether the alleged failure to recuse harmless error, in light of the specific facts in each case when the orders were entered.

15. Among the U.S. Trustee's initial (but still-evolving) theories is that JW's retention and fee orders must be vacated, and sanctions must be imposed against JW, because it failed to

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and JW alone—takes the fall for the conduct of Ms. Freeman and former Judge Jones. Moreover, given the long-passed reorganization and/or liquidation efforts in each challenged case, the U.S. Trustee cannot establish the *Liljeberg* factors, or any other equities, necessary to establish reversible error and uproot every order entered by former Judge Jones in cases for which he failed to recuse.

[10] Reply, ¶ 85.

[11] *See Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 862 (1988) ("There need not be a draconian remedy for every violation of § 455(a).").

[12] *Batts v. Tow-Motor Forklift Co*., 66 F.3d 743, 747 (5th Cir. 1995).

[13] *Edward H. Bohlin Co. v. Banning Co.*, 6 F.3d 350, 357 (5th Cir. 1993) ("As for a motion under clause (6), ***the movant must show 'the initial judgment to have been manifestly unjust***.' Clause (6) is a residual or catch-all provision to cover unforeseen contingencies—a means to accomplish justice under exceptional circumstances.") (emphasis added).

[14] *Roberts v. Wal-Mart Louisiana, L.L.C.*, 54 F.4th 852, 854 (5th Cir. 2022) ("We have instead evaluated failures to recuse under §§ 455(a) and (b) by determining whether or not the error was 'harmless' through the lens of the *Liljeberg factors.*").

disclose a "disqualifying interest" under the Bankruptcy Code. The U.S. Trustee has not identified a single disclosure rule or statute that JW itself violated,[15] but even if he had, he cannot demonstrate ***in any challenged case that JW ever held or represented an adverse interest to the estate*** under Fifth Circuit law.[16] Consequently, the Reply sought to bolster the U.S. Trustee's Motion first, by revising his imputation theory and, second, through droning new conflict-of-interest language. Both aspects of the Reply highlight the U.S. Trustee's self-serving construction of law and that the relief sought in the Motion is inappropriate under the totality of the circumstances in each challenged case.

16. To carry his burden, the U.S. Trustee must identify the specific relief he wants in each case, and demonstrate that he is entitled to that relief under the law. But the U.S. Trustee has failed to do so. Speculation and conjecture supported by bits and pieces of inapposite decisions, statutes, and rules are not enough. Through the Motion and the Reply, the U.S. Trustee has yet to put forth a cohesive legal theory or factual basis for connecting Ms. Freeman's and Judge Jones's alleged secret affair to the propriety of JW's retention or the value of the work JW performed for its clients or the applicable estates in each of the challenged cases. It is neither JW's nor this Court's role to sort through a jumble of shifting arguments and general authorities to figure out whether the requested relief is even plausible.[17]

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[15] *See* Response, ¶¶ 101-47.

[16] *See* Response, ¶¶ 177-82.

[17] *MY. P.I.I. LLC v. H&R Marine Eng'g, Inc.*, 544 F. Supp. 3d 1334 (S.D. Fla. 2021) ("Lawyers must present their clients' cases with argument and citation; they may not fling whatever arguments they might conjure—however far-fetched or frivolous—at judge in hopes that judge and his law clerk might find the one case that stands in support of their proposition.").

i. Neither Texas common law nor the Partnership Act impute Ms. Freeman's "knowledge" or conduct to JW in the challenged cases.

17. No point better illustrates the U.S. Trustee's tortured theory of liability than his effort to put JW at the center of this scandal and lay Ms. Freeman's and Judge Jones's conduct at JW's door.

18. In his first Rule 60 motions, the U.S. Trustee simply ignored the issue, opting instead to craft a narrative that, among other things, conflated JW with Ms. Freeman.[18] Months later, in his amended Rule 60 motions, the U.S. Trustee stuck with a narrative-driven approach that largely ignored any distinction between JW and Ms. Freeman, but for the first time relied on the erroneous assertion that "Texas law imputes one attorney's knowledge to all those in the firm."[19] As explained in JW's Response, the U.S. Trustee borrowed and repurposed that proposition from Texas court decisions construing inapplicable disciplinary rules cabined to ***individual attorneys*** and governing the protection of confidential information and client confidences. Then, in the Reply, the U.S. Trustee added a fresh take on the issue, now arguing that Ms. Freeman's knowledge is imputed to JW as a matter of both Texas common law and the Texas Revised Partnership Act (the "Partnership Act").[20] But the U.S. Trustee is still wrong.

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[18] *See, e.g., United States Trustee's Motion for Relief from Judgment or Order Pursuant to Federal Rule of Civil Procedure 60(b)(6) and Federal Rule of Bankruptcy Procedure 9024 Approving any Jackson Walker Applications for Compensation and Reimbursement of Expenses*, Case No. 18-35672 at Dkt. No. 3360 (the "Westmoreland First Rule 60 Motion").

[19] Motion, ¶ 79. The U.S. Trustee also argued that an attorney's "disinterestedness" should be imputed to her firm under the applicable Bankruptcy Code and Rule provisions, which this Court considered in its *Cygnus* and *McDermott* rulings. *See id.*, at ¶¶ 110-14.

[20] *See* Reply, ¶¶ 44-49 (arguing that "[i]t 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") (quoting *In re Anderson*, 330 B.R. 180, 187 (Bankr. S.D. Tex. 2005)).

19. Like the U.S. Trustee's other theories, these new imputation arguments are crafted from general statements plucked from inapposite statutes and decisions.[21] While the Court is not obligated to consider the U.S. Trustee's new imputation argument at this stage, if it does, JW submits that it cannot withstand even the slightest scrutiny, and wither after even a cursory examination of applicable law. As discussed herein, the applicable provisions of the Bankruptcy Code and Rules control and do not impute knowledge or prohibited interests to JW, and even if state law imputation rules were relevant, they do not apply to impute Ms. Freeman's knowledge in the challenged cases.

(a) The U.S. Trustee's "revised" imputation arguments still fail under the plain language of the Bankruptcy Code and Rules.

20. It is hornbook law not only that JW and Ms. Freeman are separate entities, but that JW cannot be made responsible for Ms. Freeman's thoughts or deeds unless applicable law permits that result. As mentioned in JW's Response, the requirements for the retention and compensation of professionals in a chapter 11 case are governed by applicable provisions in the Bankruptcy Code

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[21] The U.S. Trustee cites three cases in support: *Anderson*, 330 B.R. 180; *Elbar Inv., Inc. v. Okedokun (In re Okedokun)*, 593 B.R. 469 (Bankr. S.D. Tex. 2018); and *Schmidt v. Nordlicht (In re Black Elk Energy Offshore Operations), LLC*, 649 B.R. 249 (Bankr. S.D. Tex. 2023). None of these cases support the U.S. Trustee's position. First, the *Okedokun* decision in fact explains that, under Texas law, a principal is ***not liable*** when an agent acts ***outside*** the scope of her authority. In that case, ***the court found that a creditor-principal was not liable for the misconduct and criminal activity of its attorney agent***. *See* 593 B.R. at 535-38. Second, the *Anderson* court merely found that, under agency law, an attorney had sufficient notice of a hearing when the hearing notice was sent to his colleague "who works in the same office." 330 B.R. at 187. And third, the *Black Elk* court analyzed whether a subagent's knowledge could be imputed to fund investor-defendants for purposes of the good-faith defense under Bankruptcy Code section 548(c). There, a litigation trustee sued to avoid fraudulent transfers related to the redemption of certain securities, certain proceeds of which were eventually paid to the defendants. The fraudulent transfers and subsequent transfers occurred ***at the direction*** of the defendants' subagent, who also served as the principal of the entity that managed the investment fund. The subagent was later convicted of securities fraud and other crimes. The *Black Elk* court, however, rejected the defendants' argument that the adverse-interest exception should apply. The court noted that, while criminal behavior typically is not imputed to an agent's principal, in *Black Elk* the subagent was "***not*** attempting to defraud or steal from" the defendants, rather, he was "trying to ***obtain returns for the defendants*** on their [fund] investments." 659 B.R. at 261-62 (emphasis added). Thus, the subagent in *Black Elk* acted ***as an agent for the principals' benefit***. The *Black Elk* facts, therefore, are the opposite of those at issue in the challenged cases, where Ms. Freeman's relationship with former Judge Jones was concealed from JW, which created substantial risk for JW. No benefit was either intended or realized by JW.

and Rules.[22] Part of the U.S. Trustee's burden is to demonstrate that JW's retention and compensation under the Bankruptcy Code and Rules was manifestly unjust when each approval order was entered. In each challenged case, JW—not Ms. Freeman—was the "applicant" for employment and compensation under the Bankruptcy Code and Rules, and JW—not Ms. Freeman—was the "professional" employed pursuant to the Bankruptcy Code and Rules. JW already explained in the Response that, under the plain language of the applicable provisions of the Bankruptcy Code and Rules, neither Ms. Freeman's "knowledge" nor her alleged lack of disinterestedness are imputed to JW. No authority in the Reply provides otherwise.

21. Bankruptcy Rule 2014 required disclosure of certain connections to the ***best of JW's—not Ms. Freeman's—knowledge***,[23] which, like every other disclosure rule the U.S. Trustee cites in the Motion, contemplates that JW have ***actual knowledge*** of a disclosable connection or matter, not constructive or imputed knowledge.[24] The Bankruptcy Code also required that ***JW—not Ms. Freeman***—be a "disinterested person" both when retained[25] and during the case, a standard that implicates ***personal interests of JW***, not individual attorneys. As this Court has observed, Congress knows how to impute one person's prohibited interest to another, noting that certain Bankruptcy Rules do so, while such requirements are "'noticeabl[y] absent elsewhere in the Bankruptcy Code or Rules."[26] The U.S. Trustee cannot use Texas common law or the Partnership Act to override Congressional intent and re-draft unambiguous language in the

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[22] Response, ¶¶ 99-102.

[23] *See* FED. R. BANKR. P. 2014(a).

[24] *See* Response, ¶¶ 114-18 (arguing that, even if Bankruptcy Rule 2014 applied to judges or mediators, JW disclosed all covered connections), ¶ 133 ("The Rules explain that the terms '*Knowingly*,' '*Known*,' or '*Knows*' refer to ***actual knowledge*** of the fact in question. Actual knowledge means 'something other than constructive or imputed knowledge.'") (quoting *Attorney U v. The Mississippi Bar*, 678 So. 2d 963, 970 (Miss. S. Ct. 1996)).

[25] Except where JW was retained by an official committee pursuant to Bankruptcy Code section 1103.

[26] *In re Cygnus Oil & Gas Corp.*, No. 07-32417, 2007 WL 1580111, at *2 (Bankr. S.D. Tex. May 29, 2007) (citing *In re Timber Creek*, 187 B.R. 240, 243 (Bankr. W.D. Tenn. 1995)).

Bankruptcy Code and Rules that limits the inquiry to ***JW's knowledge*** or ***JW's disinterestedness***. Applying general agency principles or the Partnership Act in the manner that the U.S. Trustee proposes would make compliance with disclosure, retention, and compensation requirements under the Bankruptcy Code and Rules impossible.

22. If agency law applied in the manner the U.S. Trustee suggests, a given professional could have many agents, even agents that are not professionals let alone partners in a firm. If every bit of information in an agent's head were deemed to be a ***firm's actual knowledge*** under the Bankruptcy Code and Rules, then firms like JW (and the many far larger firms frequently retained in large chapter 11 cases) could ***never*** disclose connections "to the best of [their] knowledge." If the Partnership Act applied, the situation would be the same. The U.S. Trustee cites section 151.003 entitled "***Notice*** of Fact."[27] "Notice" is a broad term that implies a lower degree of awareness than "knowledge."[28] Again, all of the disclosure rules the U.S. Trustee cited expressly require knowledge, not mere notice. Not surprisingly, the few cases cited in the Reply do not support any argument that common law imputation, or state statutes governing "notice" of facts, should apply to the applicable Bankruptcy Code provisions or Bankruptcy Rule 2014.

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[27] TEX. BUS. ORGS. CODE § 151.003 (emphasis added).

[28] Section 151.003 itself distinguishes between "knowledge" and "notice" in several provisions, even making clear that a person could have "notice" without "actually [having] knowledge of the fact." *Id.* at § 151.003(b). Indeed, the Partnership Act includes a separate provision, which the U.S. Trustee conveniently omitted from the Reply, entitled "***Knowledge*** of Fact." *Id.* at § 151.002 ("For purposes of this title, ***a person has knowledge of a fact only if the person has actual knowledge of the fact***.") (emphasis added). *See also* "Notice" definitions, BLACK'S LAW DICTIONARY (12th ed. 2024) (defining "notice," (a) as a noun, to mean "1. Legal notification required by law or agreement, or imparted by operation of law as a result of some fact (such as the recording of an instrument); definite legal cognizance, actual or constructive, of an existing right or title <under the lease, the tenant must give the landlord written notice 30 days before vacating the premises>. • A person has notice of a fact or condition if that person (1) has actual knowledge of it; (2) has received information about it; (3) has reason to know about it; (4) knows about a related fact; or (5) is considered as having been able to ascertain it by checking an official filing or recording. 2. The condition of being so notified, whether or not actual awareness exists <all prospective buyers were on notice of the judgment lien>. 3. A written or printed announcement <the notice of sale was posted on the courthouse bulletin board>" and (b) as a verb, to mean "1. To give legal notice to or of <the plaintiff's lawyer noticed depositions of all the experts that the defendant listed>. 2. To realize or give attention to <the lawyer noticed that the witness was leaving>.") (internal citations omitted).

23. Ms. Freeman did not report to JW any ongoing intimate relationship with Judge Jones, or any other aspect of her relationship with him. Rather, Ms. Freeman hid her relationship with former Judge Jones when she joined the firm, and she continued to hide that relationship while at JW. Not until March 2022 did she disclose to JW management that her relationship with Judge Jones had once again turned romantic, and she still did not tell JW about her shared property or cohabitation with Judge Jones. JW learned about those facts when the rest of the public did in October 2023.

24. Simply put, nothing in the Reply demonstrates that Texas common law or the Partnership Act apply to the U.S. Trustee's requested relief.

(b) Even if Texas agency law and the Partnership Act controlled in the challenged cases, Ms. Freeman's knowledge cannot be imputed to JW.

25. Nevertheless, even assuming, *arguendo*, that the applicable provisions of the Bankruptcy Code and Rules did incorporate imputation principles under Texas agency law or the Partnership Act, Ms. Freeman's knowledge would still not be imputed to JW for several reasons.

26. First, per the U.S. Trustee's cited authority, he bears the burden of proving that Ms. Freeman was an "agent" of JW in respect of the alleged violations in the challenged cases.[29] The U.S. Trustee's conclusory allegations and references to the Partnership Act alone are not enough to satisfy his burden in all of the challenged cases.

27. Second, imputation principles under Texas agency law generally apply as part of an affirmative defense or otherwise to protect innocent third parties from harm caused to them by the subject agent (*e.g.*, in tort claims, certain affirmative defenses, *respondeat superior*, and related

[29] *Elbar Inv., Inc. v. Okedokun (In re Okedokun)*, 593 B.R. 469, 533 (Bankr. S.D. Tex. 2018) ("The party asserting the agency relationship has the burden of proof."), *subsequently aff'd and remanded sub nom.*, 968 F.3d 378 (5th Cir. 2020) (citing *McGowan & Co., Inc. v. Bogan,* No. H-12-1716, 2015 WL 3422366, at *8 n.13 (S.D. Tex. May 27, 2015)).

doctrines).[30] The U.S. Trustee's Motion, however, seeks no such relief. Ms. Freeman did not appear in cases presided over by former Judge Jones or file disclosures while she was employed by JW in any of the challenged cases; thus, no third party (including the U.S. Trustee) could have relied on any alleged action, omission, or representation by Ms. Freeman in the challenged cases (whether authorized or not). The agency principles and authorities cited generally do not hold a principal liable for an agent's knowledge or conduct that was not involved in the subject transaction. Moreover, the U.S. Trustee's imputation arguments are particularly unique because he is purportedly acting in his "watch dog" role to "enforce applicable law and impose sanctions for JW's failure to comply with the Bankruptcy Code, Bankruptcy Rules, and Disciplinary Rules,"[31] and purportedly is ***not*** asserting a claim or cause of action in tort or otherwise.

28. As discussed in JW's Response, the U.S. Trustee is neither an injured party nor the authorized representative of any estate, creditor, or economic stakeholder. The law directs the U.S. Trustee to do many things, but it does not grant unlimited standing and authority to prosecute any matter or action, or excuse him from the heavy burden required to vacate orders and seek sanctions totaling 100% of all fees earned and reimbursements received under Rule 60(b) in the challenged cases (many of which have long since closed or are post-effective date).[32] That is particularly true given the U.S. Trustee's allegations, which largely sound in "breach of fiduciary

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[30] *See, e.g., In re Sunpoint Securities, Inc.*, 377 B.R. 513, 563 (Bankr. E. D. Tex. 2007) (noting that the imputation rule under Texas law is meant to protect innocent third parties); *F.D.I.C. v. Shrader & York*, 991 F.2d 216, 226 (5th Cir. 1993) (same); *see also Merrimack College v. KPMG LLP,* 480 Mass. 614 (2018) (noting that imputation rules are designed to protect innocent third parties, typically when a principal is sued by such protected parties); *GTE Prods. Corp. v. Broadway Elec. Supply Co*., 42 Mass. App. Ct. 293, 300 (1997) ("The rationale for imputing an agent's knowledge to his principal . . . [is] to do justice to an innocent third party. . . ."); RESTATEMENT (THIRD) OF AGENCY § 5.04, cmt. b (stating that "imputation protects innocent third parties").

[31] *See* Reply, ¶ 71.

[32] *See* 28 U.S.C. § 586.

duty" by JW,[33] a class of claim that the U.S. Trustee has no authority to pursue[34] and that generally eschews the legal fiction of imputation because a breach of duty often requires the subject party to have ***actual knowledge***; constructive or imputed knowledge is insufficient.[35] Accordingly, JW submits that the U.S. Trustee's use of Texas imputation rules and doctrines in the challenged cases in fact defies basic tenets of agency law.

29. Third, Texas law and the Partnership Act both place clear limits on when and what kind of knowledge will be imputed to a principal or partnership and, further, ***protects principals*** from the knowledge and actions of their unscrupulous agents and partners.[36] As one Texas bankruptcy court observed, "[t]he imputation of knowledge of a corporate representative or agent to a corporation is not absolute."[37] Under both common law and the Partnership Act, a person's status as an agent or partner, her power to bind the principal or partnership, and her receipt of notice or knowledge are subject to well-defined limitations related to the ***scope of an agent's***

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[33] *See* Reply, ¶ 35.

[34] *See* Response, ¶¶ 80-87, 131-33.

[35] *See LMP Austin Eng. Aire, LLC v. Lafayette Eng. Apartments, LP*, 654 S.W.3d 265, 290 (Tex. App. 2022), review granted, judgment vacated, and remanded by agreement, No. 22-0995, 2024 WL 2871287 (Tex. June 7, 2024) ("Consistent with this authority, we have stated that '[a] cause of action premised on contribution to a breach of a fiduciary duty . . . must involve the knowing participation in such a breach.' Accordingly, ***'imputed knowledge is insufficient to find knowing participation in a breach of fiduciary duty***.'") (internal citations omitted) (emphasis added). *Cf. Rotstain v. Trustmark Nat'l Bank*, Civil Action No. 3:09-CV-2384-N, 2022 WL 179609, at *12 (N.D. Tex. Jan. 20, 2022) (noting that for claims of knowing participation, "[c]ourts have made clear that a less culpable mental state, such as constructive knowledge, will not suffice"); *Franklin D. Azar & Assocs., P.C. v. Bryant*, Case No. 4:17-cv-00418-ALM-KPJ, 2019 WL 5390172, at *3 (E.D. Tex. June 30, 2019) (concluding that knowing participation claim under Texas law requires actual knowledge, not constructive knowledge).

[36] *See Askanase v. Fatjo*, 828 F.Supp. 465, 470 (S.D. Tex. 1993) (noting that a long line of federal and Texas cases reject the notion that an agent's knowledge is always attributable to her principal); *see also, e.g., Holmes v. Uvalde Nat. Bank*, 222 S.W. 640, 642 (Tex. App. 1920) (noting that the imputation of knowledge rests on presumption concerning agent's communication of knowledge to principal); *Combined Am. Ins. Co. v. Blanton*, 353 S.W.2d 847, 849 (Tex. 1962) (noting that "presumption is not evidence and is not to be weighed or treated as evidence"); DAVID A. SCHLUETER & JONATHAN D. SCHLUETER, TEXAS RULES OF EVIDENCE MANUAL § 301.01[2] (10th ed. 2015).

[37] *Sunpoint*, 377 B.R. at 563.

authority[38] and/or the ***ordinary course of partnership business***.[39] Moreover, both bodies of law protect principals from agents' and partners' actions and knowledge outside the boundaries of the agent's authority and the principal-agent relationship.[40] Yet the U.S. Trustee ignores that applicable Texas law ***protects principals from dishonest agents***, offering only a superficial analysis of one of those protections, commonly called the "adverse interest" exception.[41]

30. Under Texas law, "[i]f the agent is acting adversely to the corporation, the corporation may not be bound by the agent's activity or knowledge."[42] Imputation is founded on the presumption that an agent will communicate her knowledge to her principal and, since the rule rests on this legal fiction, when the facts indicate that the agent's interests and the principal's interests are not identical "the reason for the rule ceases and the rule should fail."[43] Under the

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[38] To determine whether an agent's acts fall within acted within the scope of her employment, a plaintiff must show that the act was: (i) within the general authority given to the agent; (ii) in furtherance of the principal's business; and (iii) for the accomplishment of the object for which the employee was employed. *See Ross v. Marshall*, 426 F.3d 745, 763 (5th Cir. 2005); *see also Schrum v. Lan*d, 12 F.Supp.2d 576, 582 (S.D. Tex. 1997) ("In determining the principal's vicarious liability, the proper question is not whether the principal authorized the specific wrongful act, but whether the agent was acting within the *scope* of the agency at the time of committing the act.") (emphasis in the original).

[39] In the Reply, the U.S. Trustee largely confines to parentheticals and otherwise ignores these limitations. *See* Reply, ¶ 49; *see also, e.g.,* TEX. BUS. ORGS. CODE §§ 152.301 (providing that a partner is an agent "***for the purpose of [the partnership's] business***") (emphasis added); *id.* at 152.302(a) (providing that a partner can bind the partnership "***in the ordinary course [ ] the partnership business; or [ ] business of [that] kind . . . .***") (emphasis added); *see also, e.g., id.* at § 152.302(b) ("An act of a partner that is ***not*** apparently for carrying on in the ordinary course a business described by Subsection (a) binds the partnership ***only*** if authorized by the other partners.") (emphasis added); *id.* at § 152.303(a) ("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: (1) in the ordinary course of business of the partnership; or (2) with the authority of the partnership***.") (emphasis added).

[40] *See, e.g.,* RESTATEMENT (SECOND) OF AGENCY § 280 (1958) ("If an agent has done an unauthorized act or intends to do one, the principal is not affected by the agent's knowledge that he has done or intends to do the act."); *see also, e.g., id.* at § 275 (providing that "the principal is affected by the knowledge which an agent has a duty to disclose to the principal or to another agent of the principal to the same extent as if the principal had the information," unless "the agent is acting adversely to the principal or where knowledge as distinguished from reason to know is important."); *id.* at § 279 ("The principal is not affected by the knowledge of an agent as to matters involved in a transaction in which the agent deals with the principal or another agent of the principal as, or on account of, an adverse party.").

[41] Reply, ¶¶ 42-49.

[42] *See FDIC v. Ernst & Young*, 967 F.2d 166, 171 (5th Cir. 1992).

[43] RESTATEMENT (THIRD) OF AGENCY § 5.04 (2006) ("For purposes of determining a principal's legal relations with a third party, notice of a fact that an agent knows or has reason to know is not imputed to the principal if the agent acts adversely to the principal in a transaction or matter, intending to act solely for the agent's own purposes or those of another person."); *see Martin Marietta Corp. v. Gould, Inc.*, 70 F.3d 768 , 773 (4th Cir. 1995) (noting that the "[f]iction

adverse-interest exception, a principal is ***not*** charged with the agent's knowledge in transactions between the principal and the agent or the principal and a third party where "the interest of the agent is of such a character that it may rationally and naturally be inferred that he will conceal his knowledge."[44] The Partnership Act contains a similar exception for imputing "notice of a fact" to a partnership.[45]

31. Here, even if the U.S. Trustee's new theories apply, his own allegations ***prohibit imputation*** in the challenged cases. There is no reasonable argument that Ms. Freeman was acting within the scope of her authority or in the ordinary course of JW's business, or that she created or delivered any benefit to JW, while ***continuing to conceal*** a secret affair and live-in relationship with Judge Jones.[46] Ms. Freeman's romantic relationships promote her own interests and her companion's interests and are wholly distinct from her work at JW and JW's business. Not a

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upon which imputation of knowledge from agent to principal rests is that, when agent acts within scope of agency relationship, there is identity of interest between principal and agent; presumption upon which imputation rests is that agent will perform his duty and communicate to his principal the facts that the agent acquires while acting in the scope of the agency relationship.").

[44] *Colonial Building & Loan Ass'n v. Boden,* 182 A. 665, 667 (Md. 1936) (citations omitted); *Mylander v. Chesapeake Bank*, 159 A. 770, 774 (Md. 1932); *Winchester v. The Baltimore & Susquehanna R. R. Co.*, 4 Md. 231, 239-40 (1853); *In re L. Van Bokkelen*, 7 F. Supp. 639, 643-44 (D. Md. 1934). Moreover, some commentators have recognized that an agent's motive or intent bears on the adverse-interest analysis, finding that a principal should not be held responsible where an agent intended to act solely for the agent's own purposes or those of another person. *See* RESTATEMENT (THIRD) OF AGENCY § 5.04.

[45] Under the Partnership Act, notice received by a partner is effective against the partnership "***unless fraud against the partnership is committed by . . . [such] partner***." TEX. BUS. ORGS. CODE § 151.003(d) (emphasis added). Although not clearly stated in the Reply, to the extent that the Partnership Act applies in any of the challenged cases, its provisions control although common law may apply where the statute is silent. *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***.") (emphasis added).

[46] The Restatement (Third) of Agency provides:

> An employee acts ***within*** the ***scope of employment*** when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control. An employee's act is not ***within*** *the* ***scope of employment*** when it occurs ***within*** an independent course of conduct not intended by the employee to ***serve*** any ***purpose*** of the employer.

RESTATEMENT (THIRD) OF AGENCY § 7.07 (2006) (emphasis added).

single fact suggests otherwise. Rather, the basic facts betray the JW-centered conspiracy that underpins all relief sought in the U.S. Trustee's Motion.

32. Judge Jones and Ms. Freeman kept the true nature of their relationship a secret throughout the applicable time period. While an affair between a sitting federal judge and a prominent member of the Houston bar shocked the legal community, at its core, the story is not uncommon: a secret romance between coworkers that would, in time, upend the lives and affairs of the couple's former spouses, their families, and their colleagues. But that is not the story that the U.S. Trustee wants to tell, and it is not the story that drives his fluid legal positions, animates the bluster in his Reply, or justifies his requested relief.

33. In the U.S. Trustee's telling, the secret relationship between Ms. Freeman and former Judge Jones is transformed from an industry scandal into a conspiracy among Judge Jones, Ms. Freeman, and JW to ensure that JW would have "a favorable judge approve its" retention and fee applications. Based on information currently available to both the U.S. Trustee and JW, Judge Jones and Ms. Freeman's intimate relationship was not about professional ambition or personal financial gain, let alone a scheme cooked up to generate law-firm revenue that might someday contribute some value toward shared living expenses.[47] And under applicable law, as well as the U.S. Trustee's cited authority, that Ms. Freeman later joined JW as a non-equity partner, and became an equity partner years after, did not change the intimate, personal, and secret nature of their relationship, or draw the relationship within the scope of her authority or JW's business.[48]

[47] Again, after JW learned about Ms. Freeman's ***past relationship*** with Judge Jones in March 2021, JW took steps to eliminate whatever speculative, indirect financial interest Ms. Freeman or other persons residing in their home had in JW's revenue. *See* Response, ¶¶ 28, 37-39.

[48] *See, e.g., D.C. v. Hasratian*, 304 F. Supp.3d 1132 (D. Utah 2016) (holding that, where a 39-year-old female restaurant manager knowingly gave alcohol to 16-year-old dishwasher at no charge, and engaged in illegal sexual activity with him, such conduct was clearly outside scope of her agency relationship with the principal-restaurant such that it could not be held liable for her misconduct); *Iverson v. NPC Intern., Inc.*, 801 N.W.2d 275 (S.D. 2011) (finding

34. Long before Ms. Freeman joined the firm, JW had been a top-tier law firm, and the largest firm in Texas, with roots dating to W.J.J. Smith's Dallas law practice established in the 1880s. As of early 2018, JW's "Bankruptcy, Restructuring, & Recovery" group was thriving, and even growing, given its deep experience. JW had already cultivated strong relationships with many premier restructuring practices, often played a prominent role in any significant chapter 11 filing in Houston, and was poised for future success. When Ms. Freeman was hired later that year, nothing changed. JW expected Ms. Freeman to deliver value to the firm through her legal skill, her work ethic, and her team-first attitude, and she did so.

35. As noted above, under common law and the Partnership Act, an agent owes a number of duties to her principal or partner, including a fiduciary duty of loyalty[49] and a duty to disclose and provide information.[50] Ms. Freeman never told JW the truth, and she failed to honor any duties she might have had to JW. Although the U.S. Trustee fairly characterizes the Jones-Freeman scandal as "undoubtedly exceptional and unforeseen," he ignores that—under Texas law and his own cited authority—JW cannot be liable for Ms. Freeman's "intentional and malicious actions that are unforeseeable considering the agent's duties."[51] Ms. Freeman is, therefore, the paradigmatic example of an agent acting adversely to her principal.[52]

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that, under applicable agency law, restaurant was not responsible for employee's assault of customer during work hours).

[49] *See* RESTATEMENT (THIRD) OF AGENCY § 8.01 ("An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship.").

[50] *See id.* at § 8.11 ("An agent has a duty to use reasonable effort to provide the principal with facts that the agent knows, has reason to know, or should know when--(1) subject to any manifestation by the principal, the agent knows or has reason to know that the principal would wish to have the facts or the facts are material to the agent's duties to the principal; and (2) the facts can be provided to the principal without violating a superior duty owed by the agent to another person.").

[51] *Okedokun*, 593 B.R. at 535. Indeed, as the *Okedokun* court found, a principal "simply cannot be held liable for [its agent's] unforeseeable serious and egregious criminal activity." *Id.* at 537; *see*, *supra*, n.3.

[52] *See, e.g., Standard Sav. & Loan Ass'n v. Fitts*, 39 S.W.2d 25, 26 (Tex. 1931) (finding that agent's knowledge obtained in scheme to defraud principal should not be imputed to principal); *Askanase v. Fatjo*, 828 F.Supp. 465 (S.D. Tex. 1993) ("An agent's knowledge is not imputed to his principal if he acts entirely for his own or another's

36. Viewed in the proper context, the U.S. Trustee's argument that Ms. Freeman's secret relationship fell within the scope of her authority, or was "in furtherance of [JW's] interests, allowing them to be retained in cases and benefit financially from those representations" cannot be taken seriously.[53] In all but one of the challenged cases, JW was retained by the applicable debtors ***before*** bankruptcy. When JW's clients then filed for bankruptcy relief, their respective cases were randomly assigned to a bankruptcy judge, and no law or rule precluded their retention in those cases whether the relationship was a secret or not (as explained in JW's Response, if former Judge Jones recused, a different bankruptcy judge would have been assigned and likely would have entered without substantive change all of the orders that the U.S. Trustee now seeks to vacate).

37. Ms. Freeman's knowing, unauthorized conduct not only violated any independent duties she had to JW, it created a grave risk of harm to JW—both financial and reputational. That risk has now been realized in the form of the U.S. Trustee's effort to sanction JW for more than $18 million in earned fees and reimbursements, as well as his baseless and sensational allegations aimed at establishing a JW-Freeman-Jones "conspiracy" in 33 chapter 11 cases.[54] In reality, JW

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purpose.") (citing *FDIC v. Shrader & York*, 991 F.2d 216, 223 (5th Cir. 1993)); *see also* RESTATEMENT (THIRD) OF AGENCY § 5.04 (2006) (stating that an agent's actions are not imputed to the principal if the agent acts adversely to the principal in a transaction or matter, intending to act solely for the agent's own purposes or those of another person).

[53] *See* Reply, ¶ 46 n.5. Indeed, the U.S. Trustee's arguments find little support in fact or law. The U.S. Trustee's attempt to re-write history and insert JW into an affair that was actively concealed from it does not hold water. As for the law, under any applicable rule, statute, or doctrine, Ms. Freeman's knowledge and conduct is her own and cannot be attributed to JW. In addition, as discussed herein and in JW's Response, even if one of the U.S. Trustee's imputation theories were to succeed, JW never had the kind of adverse interest that would have disqualified the firm under the Bankruptcy Code and Rules; although Judge Jones may have been required to recuse, JW's retention and fee applications could have been approved by another bankruptcy judge, and likely would have been.

[54] Although there is little caselaw interpreting section 151.003(d) of the Partnership Act, Ms. Freeman's conduct is exactly the kind of conduct that her former partners should be protected from under the Partnership Act's fraud exception.

is only the latest bystander in the Jones-Freeman saga to become collateral damage of their conduct.

38. Thus, in light of all relevant circumstances, Ms. Freeman's "knowledge" of her secret romantic relationships simply cannot be imputed to JW under Texas common law or the Partnership Act.

ii. JW did not have or represent an "adverse interest" in any case, at any time.

39. The U.S. Trustee seems to argue that JW labored under a "conflict of interest" of some kind in each challenged case, repeating the phrase in the Reply *ad nauseum* (approximately 22 times, compared with approximately five times in the Motion, all of which were in quotations or parentheticals from inapplicable decisions and rules). Yet, after months of litigation and hundreds of pages of briefing, the only purported conflict of interest raised by the U.S. Trustee is JW's "obvious interest" in having a favorable judge or mediator and, apparently, avoiding an objection to its fee applications.[55] Those arguments, however, do not even suggest that there was ever a conflict—or even a real risk that a conflict would arise—between JW, on the one hand, and its clients or the estates, on the other hand. Not to mention that the U.S. Trustee's office had every opportunity to review and object to JW's fees in each challenged case if they had any concern that

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[55] The U.S. Trustee's Reply was substantially identical in each of the challenged cases, although there are slight differences between the Replies filed in "mediation cases" (*i.e.*, challenged cases where former Judge Jones was selected by the parties and approved by the Court to serve as a mediator) versus those filed in "presiding cases" (*i.e.*, challenged cases where former Judge Jones was randomly assigned to preside over the administration of the case). For ease of reference, the following cites are made to the Replies filed in *Strike LLC* (a presiding case) and *Auto Plus Auto Sales, LLC* (a mediation case). *See, e.g., Strike* Reply, ¶ 29 (arguing, in a presiding-judge case, that "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."); *AutoPlus* Reply, ¶ 29 (arguing, in a mediation case, that "[d]isclosure was contrary to Jackson Walker's interests because it could not only lead to a less favorable mediator, but could lead parties to challenge Jackson Walker's fees, as has happened.").

the requested fees and expenses were unwarranted, inflated, unreasonable, or in any way inappropriate—but they never did.

40. Although the phrase is not defined under the Bankruptcy Code or Rules, commentators have observed that: "A conflict of interest is involved if there is [i] a ***substantial risk*** that the [ii] ***lawyer's representation of the client*** would be [iii] ***materially*** and [iv] ***adversely affected*** by [v] ***the lawyer's own interests*** or by ***the lawyer's duties*** to another current client, a former client, or a third person."[56] Never mind that, if a firm's desire to generate revenue and avoid fee litigation were a real "conflict of interest" nearly all for-profit professionals would be disqualified from being retained in any bankruptcy case, nothing asserted in the Reply satisfies any of those requirements in any of the challenged cases. The U.S. Trustee's unsupported speculation about, among other things, Ms. Freeman's household costs simply does not rise to the level of a conflict of interest, let alone a ***material adverse interest*** under the Bankruptcy Code or applicable law.

41. The authorities cited in the U.S. Trustee's Motion and Reply, as well as JW's Response and this Sur-Reply, simply do not support the relevant relief: caselaw explains that the Bankruptcy Code and Rules themselves are rooted in—but not augmented by—a professional's fiduciary duties,[57] and that those statutes and rules are the mechanism for ensuring that estate

[56] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 (2000) (emphasis added).

[57] *See* Response, ¶¶ 99-101. Like the Second Circuit's *Futuronics* decision, the Tenth Circuit's decision in *In re Stewart* concerned an attorney's failure to disclose fee-sharing arrangements as required under Bankruptcy Code section 329(a) and Bankruptcy Rule 2016 (the successors to the disclosure rules at issue in *Futuronics*), analyzed the requirements imposed under those provisions. Like the *Futuronics* decision, the Tenth Circuit discussed the reasons why fee-sharing arrangements are harmful to estate interests, but did ***not*** recognize or address whether any fiduciary duty imposes disclosure or retention requirements beyond the applicable text. *See SE Property Holdings, LLC v. Stewart (In re Stewart)*, 970 F.3d 1255, 1263-68 (10th Cir. 2020). These cases not only militate against the U.S. Trustee's interpretation of the Bankruptcy Code and Rules, but, at the very least, his insistence that the Court should reject a plain-reading of the Bankruptcy Code and Rules raises significant due process concerns. *See In re Fibermark, Inc.*, No. 04-10463, 2006 WL 723495, at *11 (Bankr. D. Vt. Mar. 11, 2006) ("In the absence of any proof that the interpretation being pressed by the UST has been imposed in other chapter 11 cases, or that the professionals in this case, . . .[were] on notice that failure to comply with this very high level of disclosure could result in sanctions, the

professionals do not have the kind of material, adverse economic interests that the Fifth Circuit forbids such professionals from having, or representing, in a chapter 11 case.

B. The doctrines of "equitable estoppel" and "unclean hands" should not be applied to preclude JW's objections to the Motion.

42. Among the new material in the U.S. Trustee's Reply are his arguments that the doctrines of "equitable estoppel" and "unclean hands" should preclude JW from challenging the U.S. Trustee's Motion on the ground that the requested relief is barred in certain of the challenged cases by exculpation and/or release provisions in the relevant plans and confirmation orders.[58] Like the new imputation arguments addressed above, applying equitable estoppel or unclean hands to shut down JW's legal defenses would be inconsistent with, if not contrary to, the doctrines' underlying policies, their typical purposes, and, in some cases, applicable prerequisites to their application.

43. First, the U.S. Trustee's argument that the Court should disregard JW's defenses pursuant to equitable estoppel is unfounded.[59] The doctrine is not ordinarily applied to defeat a party's defenses, aside from some limited situations when it may preclude a limitations defense.[60]

Court finds the imposition of drastic reductions based upon this newly announced deficiency would be a violation of due process principles. This determination is not tantamount to a finding that the disclosure was adequate or that the UST position is unwarranted, either in general or in this case. It is, rather, a determination that due process rights are paramount and that sanctions will not be imposed for a rule violation against a party who did not have notice of the rule's requirements. Sanctions imposed by that sort of ambush serve no legitimate purpose.").

[58] *See* Reply, ¶¶ 159-68.

[59] It is not clear whether the U.S. Trustee argues that equitable estoppel should preclude all of "[JW's] defenses" or just JW's assertion that, in the applicable challenged cases, the U.S. Trustee's claims and other relief are foreclosed by Court-approved release and/or exculpation provisions. *See* Reply, ¶ 161 (stating that the doctrine applies to "[JW's] defenses" but specifically arguing that JW "is equitably estopped from relying on exculpations and releases that it obtained through materially deficient disclosures and misleading representations about conflicts and disinterestedness"). In either case, as explained herein, JW submits that the U.S. Trustee's equitable-estoppel arguments are inappropriate under the circumstances.

[60] *See Reynoso v. Wells Fargo Bank, N.A.*, Case No. 4:16-CV-01059, 2017 WL 4270718, at *4 (S.D. Tex. Sept. 26, 2017) ("In the present case, Defendant is not asserting a statute-of-limitations defense. As such, Plaintiff's estoppel claim fails to state a claim for relief."); *Joe v. Two Thirty Nine J.V.*, 145 S.W.3d 150, 156 n.1 (Tex. 2004) (recognizing that equitable estoppel may be asserted as a defensive plea to bar a defendant from raising a limitations defense).

Indeed, courts have stated that equitable estoppel is an affirmative defense and should not be raised as an affirmative claim.[61] Accordingly, JW submits that applying equitable estoppel's "affirmative" use should be confined to situations that involve limitations-period defenses rather than otherwise valid substantive defenses that concern the court's subject matter jurisdiction to entertain the U.S. Trustee's requested relief (*e.g.*, JW's challenge to the U.S. Trustee's standing or JW's reliance on releases and exculpations in confirmed chapter 11 plans).[62] Nevertheless, even if the U.S. Trustee is permitted to assert equitable estoppel here, his own allegations are insufficient to demonstrate that the elements of equitable estoppel are satisfied in the challenged cases.

44. A party asserting an equitable estoppel claim must show: "(1) a false representation or concealment of material facts made with knowledge (actual or constructive) of those facts, (2) with intention that it should be acted on, (3) to a party without knowledge, or means of knowledge of those facts, (4) who detrimentally relied upon those representations."[63]

45. As explained above and in the Response, JW submits that the U.S. Trustee cannot establish that JW itself misrepresented Ms. Freeman's relationship with Judge Jones, or otherwise knowingly concealed those facts. In addition, with respect to the "intent" element, courts require that the subject misrepresentation be directed to a party that the party making such

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Indeed, the U.S. Trustee relied on section 894 of the Restatement of Torts (1979) when describing equitable estoppel, but left out the section's title, *i.e.*, "Equitable Estoppel ***as a Defense***." *Id.* (emphasis added).

[61] *See Knapik v. BAC Home Loans Servicing, LP*, 825 F. Supp. 2d 869, 871-72 (S.D. Tex. 2011) ("Generally, equitable estoppel is an affirmative defense, not an affirmative claim for relief"); *Kelly v. Rio Grande Computerland Grp.*, 128 S.W.3d 759, 768-69 (Tex. App.—El Paso 2004, no pet.) ("equitable estoppel does not lend itself to an offensive posture."); *Watson v. Nortex Wholesale Nursery, Inc.*, 830 S.W.2d 747, 750 (Tex. App.—Tyler 1992, writ denied) ("equitable estoppel is defensive in character. . . . It must be used as a shield and not as a sword.").

[62] *See Larson v. Foster (In re Foster)*, 516 B.R. 537, 544-45 (B.A.P. 8th Cir. 2014) (holding that the theory of equitable estoppel does not apply to the plaintiff's challenge to the defendant's lack of derivative standing to sue because standing is a component of subject matter jurisdiction that may be challenged at any time during the proceeding).

[63] *U.S. v. Veritas Supply, Inc.*, No. 4:15-CV-771, 2016 WL 320769, at *6 (S.D. Tex. Jan. 27, 2016) (quoting *In re Oparaji*, No. 10-30968, 2013 WL 889481, at *4 (Bankr. S.D. Tex. Mar. 8, 2013)).

misrepresentation intended to induce to act, or not act.[64] The U.S. Trustee, however, has not alleged that JW directed any misrepresentation at the U.S. Trustee in order to cause him to act, or refrain from acting. Finally, the U.S. Trustee cannot demonstrate the kind of "reliance" that equitable estoppel requires. Fundamentally, the doctrine of equitable estoppel is designed to prevent unfairness between parties that arises when a misrepresentation by one causes the other to detrimentally change its position.[65] Thus, in order to equitably estop JW from asserting its defenses, the U.S. Trustee must have actually relied on the subject misrepresentation in choosing to act, or not act, and was harmed as a result. That means that, for the U.S. Trustee's equitable-estoppel argument to succeed, he must have actually relied on JW's alleged concealment of the Jones-Freeman relationship when he chose to forgo his objections to the applicable release and exculpation provisions.[66] He cannot make this showing. It is common knowledge in the bankruptcy community that the U.S. Trustee's policy of challenging releases and exculpations chapter 11 long predates the challenged cases. In any event, he objected to the release and exculpation provisions in several of the challenged cases, was overruled (or in some instances resolved his objections) but chose not to appeal. And even if those dots could be connected, the U.S. Trustee has not alleged, let alone demonstrated, that his purported "detrimental reliance" caused him to suffer any harm or prejudice ***independent of the harm*** to the bankruptcy estates, if

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[64] *See id.* ("As described above in subsection (5), Plaintiff does not state that ***Kiewit made the alleged misrepresentation with the intent that Plaintiff would act on it***, nor does Plaintiff allege that the speaker knew the statement was false at the time. Furthermore, Plaintiff does not allege that Travelers made any misrepresentation.") (emphasis added); *Mickey's Enters. v. Saturday Sales (In re Michey's Enters.)*, 165 B.R. 188, 194-95 (Bankr. W.D. Tex. 1994) (debtor had intentionally concealed in its disclosure statement its intention to pursue post-confirmation preference claims against its sole supplier of gasoline, in other words it "lay behind the log waiting for the right moment to spring its trap.").

[65] *See Affordable Care, L.L.C. v. JNM Off. Prop., L.L.C.*, 2024 U.S.App. LEXIS 6933, at * 15 (5th Cir. Mar. 22, 2024); 28 Am. Jur. 2d Estoppel and Waiver § 33 (2024).

[66] *See Hill v. Engel,* 89 S.W.2d 219, 221 (Tex. Civ. App.—Waco 1935, writ ref'd) ("Since appellant failed to offer any evidence to prove that he actually relied on the representations contained in said mechanic's lien contract and in the deed of trust above referred to, he wholly failed to establish his plea of estoppel.") (collecting cases).

any. Which brings the U.S. Trustee back to square one: the U.S. Trustee does not have standing to assert estate claims and causes of action disguised as a request for sanctions, as explained in JW's Response.

46. The U.S. Trustee's invocation of the "unclean hands" doctrine fares no better. Relying on general descriptions of yet another equitable doctrine he has chosen to lob at JW with the hope that it sticks, the U.S. Trustee (once again) fails to wrestle with its application to the present circumstances. "Unclean hands" is an affirmative defense designed to ensure that a party seeking relief from the court has not committed an unconscionable act with respect to matters at issue in the litigation.[67] The Fifth Circuit has long held that the "maxim of unclean hands is not applied where plaintiff's misconduct is not directly related to the merits of the controversy between the parties, but only where the wrongful acts in some measure affect the equitable relations between the parties in respect of something brought before the court for adjudication."[68] In other words, its application is limited to situations "immediately related to the plaintiff's claim"[69] and where "the defendant can show that he has personally been injured by the plaintiff's conduct."[70] The U.S. Trustee cannot make this showing either. He does not claim that JW negotiated a release and/or exculpation in any challenged case to shield itself from the accusations of misconduct made

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[67] *See Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 244 (1933).

[68] *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852, 863 (5th Cir. 1979) (reversing the district court's application of the unclean hands defense because the plaintiff could not show a personal injury to itself rather than the public at large); *see also In re Jim Walter Homes*, 207 S.W.3d 888, 899 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (unclean hands applies "only to one whose own conduct in connection with the same matter or transaction has been unconscientious, unjust, or marked by a want of good faith, or one who has violated the principles of equity and righteous dealing.").

[69] *Dahl v. Pinter*, 787 F.2d 985, 988 (5th Cir. 1986), *vacated on other grounds*, 486 U.S. 622, 108 S. Ct. 2063, 100 L. Ed. 2d 658 (1988).

[70] *Mitchell Bros. Film Group*, 604 F.2d at 863; *see also Malibu Media, LLC v. Martin*, 2019 U.S. Dist. LEXIS 136191, at *3 (S.D. Tex. Aug. 13, 2019) (striking affirmative defense of unclean hands because the defendant had failed to demonstrate that the plaintiff's conduct had caused a personal injury to the defendant); *accord Dunnagan v. Watson*, 204 S.W.3d 30, 41 (Tex. App.—Fort Worth 2006, pet. denied) (declining to apply the clean hands doctrine because the plaintiff failed to show that he had been personally harmed).

by the U.S. Trustee here, not does he attempt to claim a personalized injury by JW's alleged non-disclosure of the Freeman-Jones relationship (nor could he for the reasons set out in JW's Response).[71]

III. CONCLUSION

WHEREFORE, for the reasons set forth herein and in the Response, JW respectfully requests that the Motion be denied.

[*Remainder of page intentionally left blank.*]

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[71] *See* Response.

Dated: August 12, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2024, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

/s/ Jason L. Boland
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