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Co-Counsel and Proposed Co-Counsel to the Debtors and Debtors in Possession

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

In re:	)	Chapter 11
ENVIVA INC., *et al*.,	)	Case No. 24-10453 (BFK)
Debtors.[1]	)	(Jointly Administered)

(I) REPLY TO U.S. TRUSTEE OBJECTION AND (II) BRIEF IN SUPPORT OF DEBTORS' APPLICATION FOR ENTRY OF AN ORDER AUTHORIZING THE RETENTION AND EMPLOYMENT OF VINSON & ELKINS L.L.P. AS ATTORNEYS FOR THE DEBTORS AND DEBTORS IN POSSESSION EFFECTIVE AS OF THE PETITION DATE

[1] Due to the large number of Debtors in these jointly administered chapter 11 cases a complete list of the Debtor entities and the last four digits of their federal tax identification numbers is not provided herein. A complete list may be obtained on the website of the Debtors' claims and noticing agent at www.kccllc.net/enviva. The location of the Debtors' corporate headquarters is: 7272 Wisconsin Avenue, Suite 1800, Bethesda, MD 20814.

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The above-captioned debtors and debtors in possession (collectively, the "***Debtors***"), jointly with Vinson & Elkins LLP ("***V&E***")[2] hereby file this (a) Reply to the Objection[3] filed by the Office of the United States Trustee (the "***UST***") and (b) Brief in Support of the V&E Application,[4] as authorized by the Court's Continuance Order.[5] The Debtors and V&E respectfully submit the following:

PRELIMINARY STATEMENT

1. V&E takes its professional and ethical obligations seriously and prides itself on providing its clients with candid, unbiased, and authentic legal advice as they seek to resolve their most complex legal and business issues. V&E represents *only* the Debtors in these chapter 11 cases and does so zealously, just as it has done for almost a *decade*. V&E is undoubtedly highly qualified and satisfies all requirements for retention under Bankruptcy Code § 327. Nevertheless, the Court and UST have raised two potential issues concerning V&E's disinterestedness: (a) V&E's representation of Riverstone in matters that are *unrelated* to the Debtors and these chapter 11 cases and (b) V&E's representation of certain of the Debtors' directors and officers in pending securities and derivative litigation relating to Enviva. The record is clear: these

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2 The Debtors are replying to the UST's Objection, and V&E is authorized under the Court's Continuance Order (defined below) to file a supplemental brief.

3 *U.S. Trustee's Objection to Application to Employ Vinson & Elkins LLP as Debtors' Counsel* [Docket No. 273] (the "***Objection***").

4 *Debtors' Application for Entry of an Order Authorizing the Retention and Employment of Vinson & Elkins L.L.P. as Attorneys for the Debtors and Debtors in Possession Effective as of the Petition Date* [Docket No. 183] (the "***V&E Application***"). Capitalized terms used but not otherwise defined herein retain the meanings given to them in the V&E Application. Attached to the V&E Application are the declaration of David S. Meyer [Docket No. 183 (Exhibit B-1)] (the "***Meyer Declaration***") and the engagement letter between V&E and the Debtors effective January 2, 2024 [Docket No. 183 (Exhibit B-1, Schedule 1)] (the "***Engagement Letter***). V&E also filed a supplemental declaration of David S. Meyer (the "***Supplemental Meyer Declaration***"), contemporaneously herewith, in support of the V&E Application on May 2, 2024.

5 *Order Continuing Hearing on Debtor's Application to Employ Vinson & Elkins, L.L.P. and Setting Briefing Schedule* [Docket No. 224] (the "***Continuance Order***").

representations do not impact V&E's disinterestedness, nor do they require a wall of separateness.[6] There is no evidence of any disqualifying conflict or threat to V&E's disinterestedness, and the following key facts are uncontroverted:

- V&E has immense familiarity with the Debtors and has historically represented the Debtors on a variety of corporate, securities, transactional, and litigation matters since 2015.
- V&E has never represented Riverstone in connection with the Debtors.[7]
- Riverstone is a minority equity holder in Enviva Inc., a public company traded on the NYSE; while two of Enviva Inc.'s 13 directors are affiliated with Riverstone, those directors were nominated by the Nominating and Corporate Governance Committee of the Board (which did not include any Riverstone-affiliated members) and elected by the shareholders in the ordinary course at Enviva Inc.'s annual meeting of shareholders in 2023; Riverstone does not have a contractual right to nominate directors or otherwise control or retain these board seats, nor do the Riverstone-affiliated directors have any special rights as members of the board.[8]
- V&E reports to and takes direction from Enviva's management and board of directors, not Riverstone.
- There is no Riverstone-affiliated person appointed to the Debtors' management team.
- Riverstone has consented to V&E's representation of the Debtors, provided an advanced waiver including as to litigation, and retained its own counsel, Weil, Gotshal & Manges, LLP, in connection with the Debtors' restructuring efforts.

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[6] Although a wall of separateness is not required with respect to Riverstone since the matters are ***unrelated***, V&E has proposed language below to assure the Court that in the event an actual conflict were to arise in the future, V&E would not handle any such matters.

[7] V&E did represent Riverstone in connection with its original investment in the predecessor entity to Enviva Inc. in March 2010. This matter was closed in 2011, and the billing partner on the matter is no longer at V&E.

[8] Enviva Inc. is a public company listed on the NYSE. Enviva is in compliance with NYSE listing requirements and rules mandating that independent directors constitute a majority of the board. *See* Enviva Inc. Proxy Statement for 2023 Annual Meeting of Stockholders held on June 15, 2023, at 23, *available at*: https://www.sec.gov/ix?doc=/Archives/edgar/data/1592057/000110465923053650/tm2311675d4_def14a.htm. Further, Enviva Inc.'s Code of Business Conduct provides that: "Any director or officer having a possible conflict of interest in any proposed transaction or arrangement is not permitted to use his or her personal influence on the matter being considered by the Board or, in the case of a director, to vote on such matter. Any director having a possible conflict of interest is not counted in determining the quorum for consideration of and vote on the particular matter, and any director or officer having a possible conflict of interest must be excused from any meeting of the Board during the discussion of and vote on the particular matter." Enviva Inc. Code of Business Conduct and Ethics, at 5 (Effective Date: Nov. 1, 2023), *available at:* https://s28.q4cdn.com/898203682/files/doc_downloads/governance/2023/11/code-of-business-conduct-and-ethics-approved-11-01-2023.pdf.

- V&E's representation of Riverstone in unrelated matters accounted for 0.8% of V&E billings and 1.4% of V&E collections for the fiscal year ended December 31, 2023.[9]
- V&E engaged in robust prepetition negotiations, on behalf of only the Debtors, resulting in two restructuring support agreements (including the RSA), and obtaining the overwhelming support of key stakeholders in the Debtors' capital structure for the Debtors' proposed restructuring. Riverstone consented to the Debtors entering into the RSA and commencing these chapter 11 cases.
- Baker Botts LLP, not V&E, is leading the pending special board committee investigation.
- With respect to the securities and derivative litigation relating to Enviva, V&E, unremarkably, given that their interests are aligned, also represents certain directors and officers. But to the extent any adversity were to develop, the directors and officers have *already consented* in their engagement letters for V&E to withdraw as their counsel and to continue representing only Enviva in that litigation. In any event, such litigation is also largely dormant and stayed due to the pendency of the Debtors' chapter 11 cases, pending motion to dismiss, or agreed stay.

Denying V&E's retention, where V&E has long served loyally as counsel to the Debtors and has *no conflict*, would be *unprecedented*. It would also undermine a fully independent, well-informed public company's judgment as to choice of counsel. Further, approval of debtor representations by large firms in complex cases is commonplace where counsel also represents equity holders and creditors in unrelated matters. It would also be value destructive, not benefit any of the Debtors' stakeholders, deprive the Debtors of almost a decade of institutional knowledge that is not readily replaceable, and create chaos for the Debtors, thereby threatening the Debtors' reorganization. Denying V&E's retention in this case is simply not required under the law and would establish

[9] Courts often look to the percentage of annual revenue a large firm derives from another client involved in the case who the firm represents in unrelated matters to determine whether the firm can be retained under § 327. *See In re Radnor Holdings Corp.*, No. 06-10894 (Bankr. D. Del. Sept. 28, 2006) [Docket No. 298], at 60:19-25; 61:1-3) (explaining that the court considers the percentage of business a firm derives from a client to determine whether to approve retention). Revenues below 1% are generally not found to cause an issue, and courts may still approve retentions where percentages are well above 1%, considering the facts and circumstances of the case. *See, e.g.*, *In re Stearns Holdings, LLC*, No. 19-12226-SCC (Bankr. S.D.N.Y. Aug. 1, 2019), at [Docket No. 232], at 53:1-2 (referencing court's general 1% benchmark); *In re Gymboree Group, Inc.*, Case No. 19-30258 (KLP) (Bankr. E.D. Va. Feb. 18, 2019) [Docket No. 354], at 107:15-18; 109:16-25 (approving retention where firm represented creditors of the debtor in unrelated matters where firm revenues attributable to those clients were 4% and 1%, respectively, and where conflicts counsel could be brought in later in the event an actual conflict were to arise).

unworkable precedent for companies in financial distress. The V&E Application should be approved.

REPLY AND SUPPLEMENTAL BRIEF

A. V&E's Disclosures Were Proper, and V&E Is Fully Cooperating with the UST.

2. Federal Rule of Bankruptcy Procedure 2014 governs professional retention disclosures under Bankruptcy Code § 327(a). "Rule 2014 contains no definition of 'connections,' nor does it explain further the level of detail required in a professional's Rule 2014 disclosures." *Mar-Bow Value Partners, LLC v. McKinsey Recovery & Transformation Servs. US, LLC*, 578 B.R. 325, 333 (E.D. Va. 2017). Disclosures should balance the need to "maintain [the] integrity of the professional appointment process" against a "common sense analysis" of what connections must be disclosed as pertinent to the "ultimate question of disinterestedness." *In re Blue Ridge Limousine and Tour Serv., Inc.*, No. 12-17551(BFK), 2014 WL 4101595, at *5 (Bankr. E.D. Va. Aug. 20, 2014) (internal quotations omitted). Rule 2014 requires an applicant, "to the best of its knowledge," to disclose connections with the Debtors' parties in interest identified in Rule 2014, accompanied by a verified statement of the person to be employed, also setting forth that information. *In re Alpha Nat. Res., Inc.*, 556 B.R. 249, 258 (Bankr. E.D. Va. 2016).

3. V&E has provided extensive detailed disclosures in the V&E Application, the Meyer Declaration, and the Supplemental Meyer Declaration. V&E has also responded to ***51*** separate UST inquiries informally submitted to V&E on four occasions since the filing of the V&E

Application and has agreed to language the UST proposed be included in the V&E retention order,[10] which V&E has incorporated in an amended proposed Order.[11]

4. On April 10, 2024, the UST objected to the V&E Application. While the UST initially argues that the Court should deny V&E's retention "absent additional disclosures" (which V&E subsequently provided), it later argues that V&E's lack of "full disclosures," alone, "warrant[s] denial of its employment." *See* Objection at ¶¶ 27, 34. However, the UST's cited precedent in support of that argument has ***no*** application here. *See In re Lewis Road, LLC*, No. 09-37672 (KRH), 2011 WL 6140747, at *9 (Bankr. E.D. Va. Dec. 9, 2011) (counsel's disclosures were "woefully inadequate" where they included "*connections with a[n unnamed] creditor*," but not with whom counsel had connections or any description thereof, and counsel also failed to file a verified statement in support of retention); *In re Biddle*, 2012 WL 6093926, at *4-5 (Bankr. D.S.C. Dec. 6, 2012) (disclosures were inadequate where debtor's counsel failed to disclose that *she* was a debtor of an insider of the debtors and that another insider of the debtors represented her in her own legal matters, after she already had been ordered to disgorge fees the debtors paid her without court approval, and she failed to comply with that disgorgement order). The egregious facts in these cases are completely distinguishable and of no relevance to V&E's retention.[12]

[10] The UST's Objection acknowledges that V&E has been cooperative toward resolving its concerns and narrowing any remaining issues.

[11] The Debtors have filed a notice of revised proposed order (the "***Order***") contemporaneously herewith, with a redline to the original proposed order.

[12] The UST argues that V&E's initial disclosures were insufficient regarding (1) V&E's representation of (a) Riverstone in unrelated matters and (b) certain of the Debtors' directors and officers in securities and derivative litigation relating to Enviva and (2) the Debtors' prepetition payments to V&E. While V&E disagrees with the UST's position, V&E has voluntarily supplemented its initial disclosures in the Supplemental Meyer Declaration, in response to the UST's inquiries.

5. It is common for Rule 2014 initial disclosures to trigger informal UST inquiries and requests for further information,[13] and V&E has cooperated fully with the UST in that regard. In a case with fewer disclosures than V&E's here, where disclosures failed to identify *names* of potential connections or a *general description of the connection* with or work for such parties, the UST requested additional disclosures be provided, which ultimately satisfied Rule 2014. *See Mar-Bow Value Partners, LLC*, 578 B.R. at 333-341. V&E's extensive and fulsome disclosures satisfy Rule 2014 as they have been "explicit enough for the court and other parties to gauge whether the person to be employed is not disinterested or holds an adverse interest." *In re Lewis Road, LLC*, 2011 WL 6140747, at *9; *see also In re Alpha Nat. Res., Inc.*, 556 B.R. at 258-59.

B. V&E's Representation of Riverstone in Unrelated Matters Does Not Create Any Disqualifying Interest.

6. Importantly, and as V&E has disclosed, V&E's representation of Riverstone is—and has always been—in matters ***unrelated*** to the Debtors and these chapter 11 cases. To be clear, *no adversity—or even potential adversity*—to the Debtors or their estates has been alleged relating to such unrelated representations. There are no facts in the record suggesting any of this work somehow compromises V&E's historical representation of the Debtors or should hinder the Debtors' ability to choose and retain V&E in these chapter 11 cases. Denying V&E's retention under these circumstances would be contrary to the facts and inconsistent with the law.

7. The Debtors are entitled to retain, with the Court's approval, counsel that: "(1) do[es] not hold or represent an interest adverse to the estate" and (2) is "disinterested." *See*

[13] *See* Clifford J. White, Letter from the Office of the Director, U.S. Department of Justice, Executive Office for the UST, addressed to USTs, entitled *Principles to Guide USTP Enforcement of the Duty of Professionals to Disclosed Connections to a Bankruptcy Case Under 11 U.S.C. §§ 327 and 1103 and Fed. R. Bankr. P. 2014* (Dec. 4, 2019), *available at*: https://www.justice.gov/ust/file/generalprinciplesdisclosureconflicts.pdf/dl (explaining that the UST may "make[] inquiries or file objections" to retention applications to assist the court in determining whether a professional firm should be employed and acknowledging the UST's "discretion to request additional information necessary for the review of a particular application").

11 U.S.C. § 327(a); *Harold & Williams Dev. Co. v. U.S. Trustee (In re Harold & Williams Dev. Co.)*, 977 F.2d 906, 909 (4th Cir. 1992); *Johnson v. Richter, Miller & Finn (In re Johnson)*, 312 B.R. 810, 819 (E.D. Va. 2004). A "disinterested person" is defined by the Bankruptcy Code as a person who "does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason." 11 U.S.C. § 101(14)(C). The phrase "interest adverse to the estate" is not defined in the Bankruptcy Code; however, "bankruptcy courts have widely held that an adverse interest means either (1) the possession or assertion of any economic interest that would tend to lessen the value of the bankruptcy estate or create an actual or potential dispute with the estate as a rival claimant, or (2) a predisposition of bias against the estate." *In re Alpha Nat. Res., Inc.*, 556 B.R. at 258. Where "there is only a potential for conflict," courts have wide discretion to approve retentions under Bankruptcy Code § 327(a): "'[W]here the possibility that the potential conflict will become actual is remote, and the reasons for employing the professional in question are particularly compelling,'" a bankruptcy court may approve the professional's employment under § 327(a). *In Matter of 22 Acquisition Corp.*, 2004 WL 870813, at *3 (E.D. Pa. Mar. 23, 2004) (quoting *In re BH & P, Inc.*, 949 F.2d 1300, 1316 (3d Cir. 1991)).[14] A court in this Circuit has overruled objections to retention based on potential conflicts where alleged disinterestedness failures were "contingent upon future events that seem—at best—unlikely to ripen into reality." *In re James F. Humphreys & Assocs, L.C.*, 547 B.R. 190, 194 (Bankr. S.D. W.Va. 2016). Further, this "test [for the presence of adverse

[14] *See also In re Vascular Access Ctrs., L.P.*, 613 B.R. 613, 624 (Bankr. E.D. Pa. 2020) ("A court may approve employment of a professional with a potential conflict 'where the possibility that the potential conflict will become actual is remote.'") (quoting *BH & P*, 949 F.2d at 1316); *In re Jade Mgmt. Servs.*, 386 Fed. Appx. 145, 149 (3d Cir. 2010) (bankruptcy court did not abuse its discretion in approving retention where counsel represented debtor and its sole shareholder who guaranteed debtor's secured debt as any potential conflict was "remote").

interests] is not retrospective; courts only examine present interests when determining whether a party has an adverse interest." *Id.* (internal citations omitted; brackets in original).[15]

8. "Because the few absolute disqualifications Congress has established are carefully delineated and narrowly tailored, the courts must take care not to fashion *absolute* prohibitions beyond those legislatively mandated without some measure of assurance that the purposes of the Bankruptcy Code *always* will be served thereby." *Harold & Williams Dev. Co.*, 977 F.2d at 909-10. As such, a court "must not abdicate the equitable discretion granted to it by establishing rules of broad application [regarding disqualification] which fail to take into account the facts of a particular case and the overall objectives of the bankruptcy system." *Id.* (citing, *inter alia*, *In re BH & P, Inc.*, 949 F.2d at 1315) ("[C]ourts have generally declined to formulate bright-line rules concerning the criteria for disqualification but have favored instead an approach which gives the bankruptcy court discretion to evaluate each case on the facts, taking all circumstances into account."). *See also David v. King*, 653 B.R. 833, 839 (E.D. Va. 2023) (the "decision under § 327 rests with the discretion of the bankruptcy court"); *In re Ballard*, 2013 WL 5924984, at *1 (Bankr. E.D.N.C. Nov. 5, 2013) (this discretion must be exercised "in a way that best serves the objectives of the bankruptcy system" and "the bankruptcy court must consider the 'protection of the interests of the bankruptcy estate and its creditors, and the efficient, expeditious, and economical resolution of the bankruptcy proceeding.") (citing *Harold & Williams Dev. Co.*, 977 F.2d at 910). Here, "[t]he burden is on the objecting party to prove that proposed counsel holds such an adverse interest and that such interest is actual rather than speculative and is material enough to give rise to a bias

[15] *See also Bank Brussels Lambert v. Coan (In re AroChem Corp.)*, 176 F.3d 610, 623 (2d Cir. 1999) (§ 327(a) "is phrased in the present tense," and "'Congress' use of a verb tense is significant in construing statutes.'") (quoting *U.S. v. Wilson*, 503 U.S. 329, 333 (1992)).

against the debtor or an economic interest that jeopardizes the professional's loyalty." *In re BF Chinatown LLC*, No. 22-11143(KHK), 2022 WL 17861775, at *2 (Bankr. E.D. Va. Dec. 22, 2022).

9. In complex chapter 11 cases of companies in which large firms represent the debtors and also their private equity owners or related portfolio companies in *unrelated* matters, courts have found such representations not to be disqualifying. Given that the Debtors are a public (as opposed to private) company, the logic of these precedent cases is even more compelling.

10. For example, in *In re Caesars Entmt. Operating Co., Inc.*, 561 B.R. 420 (Bankr. N.D. Ill. 2015), the court approved the retention of Kirkland & Ellis LLP as debtors' counsel and found no disqualifying bias in favor of its private equity owners, where counsel also represented portfolio companies of the owners (TPG and Apollo) in unrelated matters. Where the committee had argued that K&E had a "demonstrable and disqualifying bias in favor of Apollo and TPG as well as the debtors' non-debtor affiliates" that would lead to K&E placing "the interests of those entities above the interests of the debtors and their estates," the court determined that the committee's evidence was "thin at best," and the companies could not, without evidence, be treated as "a single enterprise doing Apollo and TPG's bidding." *Id.* at 429-433. Thus, the court found K&E's relationships were too remote to disqualify the firm. *Id.* at 433.

11. In *In re Stearns*, the UST objected to Skadden's retention on grounds that its representation of a private equity fund in unrelated matters was disqualifying and the court similarly approved Skadden's retention given that the UST's objections were unfounded and based on groundless insinuations of bias or some imagined sweetheart deal. *See In re Stearns Holdings, LLC*, No. 19-12226-SCC (Bankr. S.D.N.Y. Aug. 1, 2019) [Docket No. 232]. At the retention hearing, Judge Chapman observed on the record: "[T]his configuration of a law firm representing a private equity firm and becoming involved in various of their portfolio companies, is indeed,

widespread." *Id.* at 65:16-18. The judge found the UST's allegations were "completely made up" and had "no basis in fact." *Id.* at 60:1-5. Where "the papers . . . rais[ed] the specter or an implication of impropriety, which there is no factual basis for," the court approved the Skadden retention, explaining that the UST's "advocating for a per se bar to a law firm – professional firm serving as debtor's counsel, when the law firm has previously represented the private equity sponsor of the debtors" would "hobble debtors and prevent them from retaining counsel who are best suited to serve them." *Id.* at 77:19-21; 84:11-18. It would also be value-destructive, increase the expense of chapter 11 cases, and deprive debtors of institutional knowledge that is not readily replaceable. *Id.* at 85:3-14.

12. In *In re New Cotai Holdings, LLC*, No. 19-22911 (Bankr. S.D.N.Y. Jun. 14, 2019) [Docket No. 111], at 31:14-19; 32:19; 45:19-21, the UST and other creditors asserted that Skadden should be disqualified as debtors' counsel because the debtors may have claims against Silver Point Capital, L.P. ("***Silver Point***"), and Skadden could not be relied upon to fairly investigate or pursue such claims because Silver Point is also a Skadden client whom Skadden also represented with respect to its investment relating to a debtor. The debtors argued that such representation was not "adverse": "To argue otherwise is . . . to advocate adoption of a *per se* rule barring any law firm from ever serving as chapter 11 counsel to a portfolio company if the firm also represents the sponsor or other affiliates of that portfolio company. That respectfully is not the law." [Docket No. 87], at 6-7.[16] The court approved Skadden's retention, [Docket No. 107], and explained that:

[16] The brief cited the following cases in support of this point: *In re Caesars Entm't Operating Co., Inc.*, 561 B.R. 420 (approving the retention of debtor's counsel who also represented numerous portfolio companies owned by debtor's owners in unrelated matters); *In re Boot Hill Biofuels, LLC*, 2009 WL 982192 (Bankr. D. Kan. Mar. 27, 2009) (approving the retention of debtor's counsel who also represented ***controlling*** shareholder in unrelated matters); *Matter of Nephi Rubber Prod. Corp.*, 120 B.R. 477, 483 (Bankr. N.D. Ind. 1990) (denying motion to disqualify debtor's counsel on the grounds that it represented a ***controlling*** shareholder in unrelated matters); *In re Tiffany Square Assocs., Ltd.*, 103 B.R. 337, 339 (Bankr. N.D. Ga. 1988) (approving retention of debtor's counsel who also represented debtor's ultimate parent in unrelated matters); *In re Wash. Mut., Inc.*, 442 B.R. 314

"as far as conflicts are concerned, the fact that the debtors are in large measure staffed and controlled by their largest shareholder and individually largest creditor shouldn't . . . affect[] the . . . 327(a) analysis. . . . [I]f that were the case, then every counsel for a company like that, and there are many of them, would get the company all ready for a filing and then have to resign and you'd bring in a brand new counsel who never met anybody." *Id.* at [Docket No. 111], at 40:13-21. The court found that the amount of work Skadden did for the equity owner was "way below the economic threshold that courts have found to create an economic interest in not being adverse, generally, to a client that a firm represents in other matters." *Id.* at 45:10-12. Even though Skadden represented certain equity holders in unrelated matters, and also represented affiliates of Silver Point with respect to its investment in projects involving the debtors, where it was "uncontested that in each of those matters, the debtors were largely agnostic . . . [and] were not across the table in an adverse position" from Silver Point, the court found no conflict. *Id.* at 46:2-5; 47:19-20. The court also explained that where Skadden "offered to step aside and have independent counsel be retained" in the event of an actual conflict, "that offer cures the issue," and there is no "basis to disqualify the firm from being retained." *Id.* at 47:5-11.[17]

13. Courts, including *this court*, have "held that an attorney's representation of a corporate debtor and its stockholder does not by itself constitute a conflict of interest." *In re D C,*

(Bankr. D. Del. 2011) (finding settlement negotiated by debtor's counsel who also represented the purchaser of substantially all of the debtors' assets in unrelated matters was not tainted by a conflict).

[17] *See also In re Rockall Energy Holdings, LLC*, No. 22-90000 (Bankr. N.D. Tex., May 9, 2022). In *Rockall*, the UST and committee objected to V&E's retention due its representation of a private equity owner and a creditor, in unrelated matters. V&E had disclosed, among other things, that it represented the sponsor in ***unrelated*** matters. The court approved the retention over the objections on V&E's showing that it was disinterested and had no adverse interest. *Id.* at [Docket No. 350]. The court observed that the issue of disqualifying interest as to V&E's representation of a creditor was resolved by V&E "day-one" where V&E had "fully disclosed up-front" that its work for the creditor was unrelated to the case, which was "not unusual" for a large firm to disclose in a case like this. *Id.* at [Docket No. 422], 56:4-11. On the record at the V&E retention hearing, the judge considered evidence that V&E's work for the sponsor and the creditor was "unrelated to this Chapter 11 case" and determined that V&E was "put . . . to the test" and "passed that test overwhelmingly." *Id.* at 44:10-13; 58:13-15.

Inc. of Va., No. 02-65000 (DOT), 2003 WL 24108194, at *3 (Bankr. E.D. Va. July 16, 2003) (citing *In re U.S. Jet, Inc.*, 127 B.R. 11, 14 (Bankr. E.D. Va. 1991)). *See also Condominium Servs., Inc. v. Sells (In re Gordon Props. LLC)*, 504 B.R. 807, 811 (Bankr. E.D. Va. 2013). Courts in this Circuit also have approved debtors' counsel retentions where counsel also represents the equity owner in unrelated matters.[18] *See, e.g.*, *In re Atlantic Facilities, L.L.C.*, 2010 WL 1780299, at *1-2 (Bankr. E.D.N.C. Apr. 30, 2010) (where debtors' counsel represented "the principal of the debtor" on "matters unrelated to the debtor" and where the principal was also a guarantor of the debtors' debts and the parties were aligned, the court found no conflict).[19] Specifically, in *this Court*, in *In re Chinos Holdings, Inc.*, Case No. 20-32181 (KLP) (Bankr. E.D. Va. June 1, 2020) [Docket No. 417], the UST informally requested that Weil provide additional disclosures with respect to its retention as debtors' counsel, and Weil responded in a supplemental declaration that it did not represent certain current or former clients (TPG and LGP) in connection with their acquisition of the debtors and that the firm "has obtained waivers from both TPG and LGP, such that it can be adverse to both parties in these chapter 11 cases." At the retention hearing, counsel confirmed that the UST's informal questions were addressed by Weil's supplemental declaration

[18] The facts regarding V&E's retention are wholly distinguishable from cases in which debtors' counsel has been disqualified for representing both equity owners and debtors. *See, e.g.*, *In re Biddle*, 2012 WL 6093926, at *5 (counsel had disqualifying interest where it failed to disclose significant connections and facts indicated concern that counsel may place insider interests over estate's, and that counsel represented the debtor in exchange for the debtor's son representing her in a recent legal matter or in exchange for other acts by insiders (and there was no retainer paid)); *In re Bryant*, 2011 WL 5909552, at *3 (Bankr. E.D.N.C. Jun. 15, 2011) (disqualifying counsel for the debtor where counsel also represented equity holder in his own chapter 11 case, under examination of case-specific facts, where the equity owner was the *100% shareholder, a creditor, and a co-debtor* on a majority of the debtor's obligations, and where the debtor and equity owner had claims against each other, including regarding the owner using monies owed to the debtor to pay personal debts during the bankruptcy case); *In re Wynne Res. Asset Mgmt., LLC*, 2009 WL 5169371, at *4-5 (Bankr. W.D.N.C. Dec. 18, 2009) (debtor's counsel disqualified where it also represented *sole* member/manager of debtor who was also a *co-debtor* by guaranty on debtor's debts); *In re Envirodyne Indus., Inc.*, 150 B.R. 1008, 1016 (Bankr. N.D. Ill. 1993) (debtor's counsel disqualified where it represented equity owner/creditor in matters *related to* the debtors' bankruptcy case).

[19] *See also In re Boot Hill Biofuels, LLC*, 2009 WL 982192, at *10-11 (approving retention of debtor's counsel under § 327(a) where counsel also represented an equity security holder on unrelated matters who was the managing entity of the debtor and who controlled the debtor's board, leaving open the possibility of revisiting in the event an actual conflict were to arise in the future).

and proposed order, and the court approved Weil's uncontested retention. *Id.* at [Docket No. 445], at 5:25-6:15.[20]

14. Here, the Debtors chose to retain V&E based on their (a) longstanding representation of the Debtors, (b) restructuring expertise and financing familiarity, and (c) institutional knowledge of Debtors' capital structure and business operations. V&E has also provided fulsome disclosures indicating it has no disqualifying interest or conflict.[21] The Debtors' choice of counsel should be respected.

15. In addition to the undisputed facts recited at the outset that clearly show V&E is disinterested, V&E is also unquestionably loyal to the Debtors. V&E has vigorously represented advancement in these cases, and propelled meaningful progress toward a comprehensive

[20] This court has previously found the rules of ethical conduct relating to the practice of law in Virginia as relevant to whether proposed debtor's counsel satisfies Bankruptcy Code § 327(a). *See, e.g., In re BF Chinatown LLC*, 2022 WL 17861775, at *2-3. To the extent that the court here may consider the pertinent Virginia Rules of Professional Conduct ("***VA ROPC***"), Rule 1.7 of the VA ROPC, would support approving V&E's retention. Rule 1.7(a) of the VA ROPC provides that a "lawyer shall not represent a client if the representation involves a concurrent conflict of interest," which exists if "(1) the representation of one client will be directly adverse to another client" or "(2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." VA ROPC 1.7. Under either 1.7(a)(1) or 1.7(a)(2), V&E's retention is entirely appropriate. Under section (a)(1), Riverstone and the Debtors have not taken positions directly adverse to each other in this matter. Under section (a)(2), as discussed above, there is simply no reason to believe that V&E's relationship with Riverstone in unrelated matters would cause the firm to pull its punches on behalf of the Debtors here – to the contrary, the record is clear that it has not. Moreover, Riverstone is represented by other counsel in this matter, and both clients have provided consent to V&E's representation of the Debtors. Finally, as already noted, if Riverstone and the Debtors were to become actually adverse to each other in this matter, V&E would step out of that dispute and leave it to conflicts counsel. Rule 1.7(b) of the VA ROPC also provides that clients may waive conflicts of interest if each affected client consents after consultation, and (1) the lawyer believes it "will be able to provide competent and diligent representation to each affected client"; (2) "the representation is not prohibited by law"; (3) the representation does not "involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal"; and (4) "the consent from the client is memorialized in writing." *Id. See* Bankruptcy Engagement Letter, at pp. 3-4. V&E's representation of the Debtors fully complies with Rule 1.7 of the VA ROPC.

[21] Making every effort to be responsive to the UST and the issue as raised by the Court, V&E has supplemented its disclosures and provided all requested information to the UST with regard to V&E's Riverstone representations. In addition, V&E has not implemented a wall of separation internally precisely because V&E's work for the Debtors and Riverstone are unrelated: there is no confidential information in the Riverstone files that would be pertinent to the lawyers working on the Debtors' matter, or vice versa. Moreover, the Debtors are controlled by their full board (not Riverstone), and Riverstone has its own counsel in this matter. To the extent any actual conflict between the Debtors and Riverstone were to arise in the future in this matter, Debtors' other counsel, Kutak Rock, can handle such work.

restructuring. Baker Botts LLP is leading the special board committee investigation, and Kutak Rock has no connections to Riverstone and can address any actual conflicts with respect to Riverstone that may arise in these cases. Given the facts here and the commercial realities of large firms frequently representing equity owners and affiliates in unrelated matters and courts finding such representations not disqualifying, V&E's representation of Riverstone in unrelated matters poses no conflict and does not affect V&E's disinterestedness.

16. Although V&E representing Riverstone in unrelated matters does not impact its disinterestedness, V&E has voluntarily revised its proposed retention order to provide as follows:

> To the extent an actual conflict with Riverstone were to arise in the future as a result of V&E's representation of the Debtors in these chapter 11 cases, any matters subject to such conflict shall be handled by Kutak Rock LLP.[22]

C. V&E's Representation of Directors and Officers in the Securities and Derivative Litigation Does Not Create Any Disqualifying Interest.

17. The directors and officers V&E represents in certain securities and derivative litigation are creditors of the Debtors because they are owed indemnity on account of claims brought in the securities and derivative litigation. As such, the less stringent retention standard in Bankruptcy Code § 327(c) applies: an *actual conflict* is required in order for counsel to be disqualified on account of representing a creditor.[23] "Something more than the mere fact of dual

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[22] Objections to large law firms' retention are often overcome by retention of conflicts counsel or the imposition of an internal ethical wall of separateness to be imposed *in the event an actual conflict arises at a later time. See, e.g.*, *In re Stearns Holdings, LLC*, No. 19-12226-SCC (Bankr. S.D.N.Y. July 17, 2019) [Docket No. 122], at ¶ 36 (Skadden retention application proposing to "arrange for an 'ethical wall'" or "arrange for representation by any conflicts counsel for the Debtors" in the future with respect to any actual conflict that may arise); *In re New Cotai Holdings, LLC*, No. 19-22911 (Bankr. S.D.N.Y. Jun. 11, 2019) [Docket No. 62], at ¶ 7 (counsel supplemental disclosure indicating "there is not, nor has there been, a need for an ethical wall to be in place" because Skadden "never represented any party-in-interest in a matter that was adverse to the Debtors"); [Docket No. 111], at 47:9-11 (court explained that offer to engage conflicts counsel if needed in the event an actual conflict were to arise in the future was curative); *In re Caesars Entmt. Operating Co., Inc.*, 561 B.R. at 428, 435 (explaining that DLA Piper being engaged with respect to transactions identified to be challenged by special governance committee investigation was a solution to K&E's alleged conflict).

[23] *See* 11 U.S.C. § 327(c) ("In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove

representation must be demonstrated if there is to be disapproval of the engagement." 3 Collier on Bankruptcy, at ¶ 327.04[7][a]; *see also In re Harold & Williams Dev. Co.*, 977 F.2d 906, n.2 (explaining that under § 327(c) legislative history, counsel is not disqualified for representing a creditor); *In re Johnson*, 312 B.R. at 822 (counsel may be retained under § 327(c) even if there is a potential conflict or appearance of conflict that could be disqualifying under § 327(a); no actual conflict found where parties were both interested in enlarging the estate); *In re Schafer v. Maerlender (In re Maerlender)*, 2006 WL 996556, at *4 (Bankr. M.D.N.C. Apr. 14, 2006) (explaining that § 327(c) creates an exception to § 327(a) and finding that counsel's simultaneous representation of debtor's largest creditor created no actual conflict where interests were aligned in maximizing value for the estate); *In re Gymboree Grp., Inc.*, Case No. 19-30258 (KLP) (Bankr. E.D. Va. Feb. 18, 2019) at [Docket No. 354], at 109:2-6 (approving retention of Milbank over UST objection where Milbank also represented creditors in unrelated matters, debtors would not be adverse to creditors, and their interests were aligned to "achieve the same objective as far as the successful outcome of this case is concerned"); *see also id.* at [Docket No. 389] (order).

18. In *In re Aearo Technologies LLC*, No. 22-02890 (Bankr. S.D. Ind. Nov. 17, 2022), the court approved K&E's retention over objections by the UST and certain creditors [Docket Nos. 795, 804]. K&E also served as counsel to the debtors' parent (3M) with respect to a prepetition funding agreement, and served as lead litigation counsel to 3M and several non-debtor affiliates in multi-district tort litigation, which allegedly created unaligned interests with the debtors. *See id.* at [Docket No. 795], at 7:1-23. The court found that the objectors "were unsuccessful in rebutting the [debtors'] prima facie case." *Id.* at 9:17-19. The court also found that the debtors' and its

such employment if there is an actual conflict of interest."). A "dormant" conflict is not "actual." *In re Ryan-Jones*, 561 B.R. 380, 382 (Bankr. E.D. Va. 2016) (citing *In re Johnson*, 312 B.R. at 822).

parent's interests are aligned in the tort litigation, as of the date of the hearing, thus, K&E was disinterested. *Id.* at 12:19-22. The court considered, among other things, that the parent and debtors "are not in active litigation against each other," and that they have been represented by the same counsel, taking the same positions. *Id.* at 19:9-14. The parties also had a similar interest in their common goals, and they were alleged to have joint and several liability. *Id.* at 19:15-21. Thus, the court found K&E had no material adverse interest. *Id.* at 20:1-3.

19. V&E's representation of certain of its directors and officers in the securities and derivative cases is not disqualifying because all of its clients' interests in that litigation are aligned. Moreover, the litigation is currently dormant, and to the extent the defendants are collectively successful, claims against the estate (both direct and as a result of the Debtors' indemnification obligations to directors and officers) will be reduced. V&E's engagement letters with Enviva Inc. and certain directors and officers relating to the securities and derivative litigation, which are discussed in the Meyer Supplemental Declaration, each provide that in the event any conflicts were to develop in the future between or among the jointly-represented clients, V&E can withdraw as counsel as to the director and officer defendants and, due to V&E's longstanding relationship with Enviva Inc., continue to represent only Enviva Inc. in such litigation.[24] Thus, V&E has no actual conflict from this dual representation, and to the extent one were to arise, V&E can withdraw as counsel to the directors and officers in the litigation, and they could then retain separate counsel. Accordingly, V&E's representation of certain directors and officers in the securities and derivative cases poses no disqualifying conflict, and V&E's retention should be approved.

[24] *See, e.g., in re Alta Mesa Res., Inc.*, No. 19-35133 (MI) (Bankr. S.D. Tex. Nov. 5, 2019) [Docket Nos. 456, 469] (Latham & Watkins LLP's second supplemental declaration in support of its retention as debtors' counsel disclosed that L&W withdrew approximately two months after the petition date from its representation of certain non-debtor affiliates where debtor intended to assert that ongoing negotiations between non-debtor affiliates and certain creditors were relevant to an adversary proceeding, and the court approved L&W's retention).

20. Although representing the directors and officers is not disqualifying, V&E has revised its proposed retention order to provide as follows:

> In the event an actual conflict of interest were to arise in the future among the jointly-represented clients in the Securities Cases and/or the Derivative Case, V&E will withdraw from the representations of one or more of the individual defendants as may be necessary to address such actual conflict of interest, consistent with the terms of the applicable engagement letters. In furtherance of the foregoing, if the special board committee were to recommend that the Debtors should pursue litigation against one or more of the individual defendants or that such individual defendants should be excluded from any proposed Debtor releases, V&E will withdraw from representing such individual defendant(s) consistent with the terms of the applicable engagement letters.

D. V&E Is Not a Creditor of the Debtors and So Cannot Be Disqualified On That Basis.

21. The UST sought additional detailed information as to whether any of the Debtors' payments to V&E could be avoided as preferences pursuant to Bankruptcy Code § 547 in order to determine whether V&E is not disinterested. V&E has provided such information, including a *Pillowtex* chart,[25] which makes clear that following the entry into, and consistent with, the Engagement Letter, the Debtors paid V&E an advance payment retainer in connection with the representation and, to that end, made an initial retainer payment and several subsequent replenishment retainer payments.[26] Each retainer payment was requested and made *in advance of* both each V&E invoice to the Debtors and each subsequent draw down of the retainer to pay each such invoice in this engagement, and no draw down exceeded the retainer balance. As the UST in *Pillowtex* acknowledged, if debtors' counsel had obtained a retainer with frequent draw-downs, it could have avoided raising the issue of whether it received avoidable preferences. *Pillowtex*, 304 F.3d at 255.

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[25] The *Pillowtex* chart contains the prepetition advanced payment retainer payments and invoices between V&E and the Debtors in the preference period for purposes of considering whether any payments could be subject to avoidance and recovery as a preferential payment under 11 U.S.C. § 547. *See In re Pillowtex, Inc.*, 304 F.3d 246 (3d Cir. 2002).

[26] The total retainer payments are disclosed in the V&E Application and the Supplemental Meyer Declaration.

22. In addition, as documented in V&E's additional disclosures, payments to V&E within the 90-day preference period that occurred prior to entry into the Engagement Letter were each made (a) on account of debt incurred (in the form V&E's legal services being provided and invoices being sent and received) consistent with the ordinary course of the Debtors' and V&E's businesses, respectively,[27] and (b) consistent with the parties' respective businesses (given that payments were made consistent with the parties' historical cadence),[28] and according to ordinary business terms, all in satisfaction of the preference defense in Bankruptcy Code § 547(c)(2). Such payments to V&E were also made in exchange for subsequent new value in the form of necessary and valuable legal services V&E continued to provide across all matters, including during a critical phase for the Debtors as they assessed financing alternatives and capital structure solutions, in satisfaction of the preference defense in Bankruptcy Code § 547(c)(4).[29] Thus, V&E did not

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[27] *See* 11 U.S.C. § 547(c)(2). The *debt* must have been incurred by the debtor within the ordinary course or financial affairs of both parties "as opposed to *between* the debtor and the transferee-[law firm]." 5 Collier on Bankruptcy, at ¶ 547.04[2][a][i]. This element "requires the court to examine the normality of such incurrences in each party's business operations generally" and considers whether the debt was incurred in the "routine operations" of each of the parties. *Id.* (quotations omitted). The creditor must show "that the incurring of the debt would be a 'logical and ordinary action for these parties.'" *In re E-Z Serve Convenience Stores, Inc.*, 377 B.R. 491, 499 (Bankr. M.D.N.C. 2007) (quoting *In re Gem Const. Corp. of Va.*, 262 B.R. 638, 655 (Bankr. E.D. Va. 2000)).

[28] *See* 11 U.S.C. § 547(c)(2) (containing alternative subjective and objective tests). Regarding the subjective requirement in § 547(c)(2)(A), courts consider many factors, including the length, regularity of amount and manner of payment, or any unusual debt collection practices. 5 Collier on Bankruptcy, at ¶ 547.04[2][a][ii]. Even if the payments were "irregular," they may still be ordinary if they were "consistent with the course of dealing between the particular parties." *Id.* Further, "[a] payment that is made beyond invoice or contract terms may still be considered in the ordinary course for purposes of [this subparagraph (A)] if late payments were the standard course of dealing between the parties." *Id. See also In re Mastercraft Interiors, Ltd.*, 2009 WL 5219724, at *2 (Bankr. D. Md. Dec. 31, 2009) ("The purpose of the [ordinary course] exception is to . . . provide a safe haven for those who conduct business on normal terms.") (citing *Advo-Sys., Inc. v. Maxway Corp.*, 37 F.3d 1044, 1047 (4th Cir. 1994)). The terms need not be "commonplace"; they need only be ordinary. *In re Jeffrey Bigelow Design Grp., Inc.*, 956 F.2d 479, 488 (4th Cir. 1992).

[29] *See* 11 U.S.C. § 547(c)(4). "[A] transfer to or for the benefit of a creditor may not be avoided to the extent that, "after such transfer, such creditor gave new value to or for the benefit of the debtor—(A) not secured by an otherwise unavoidable security interest; and (B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor." 5 Collier on Bankruptcy, at ¶ 547.04[4]. *See also In re Graves*, 2012 WL 4026811, at *2 (Bankr. M.D.N.C. Sept. 12, 2012). If "new value" is paid with a transfer that is also subject to avoidance (or would be subject to avoidance but for a defense), it still qualifies as "new value." 5 Collier on Bankruptcy, at ¶ 547.04[4][e]. *See also In re JKJ Chevrolet, Inc.*, 412 F.3d 545, 552 (4th Cir. 2005). "[N]ew value may include services provided by an attorney or other creditor" prepetition. *In re Graves*, 2012 WL 4026811, at *2. "[S]ection 547(c)(4) permits creditors to reduce their preference exposure by

receive any avoidable preferences and is not a creditor of the Debtors and cannot be rendered not disinterested on either of these grounds. Although the fee payments in question would not qualify as preferences, V&E has agreed to waive any prepetition claims it may hold regarding any successful avoidance of an asserted preference, which renders V&E not a creditor,[30] and it has revised its proposed retention order to provide as follows:

> Entry of this Order and any finding in this Order that V&E is a "disinterested person" shall not constitute a defense to any preference claims that may be asserted against V&E in these chapter 11 cases on account of any payments made prior to the Petition Date, and V&E has agreed to waive any resulting claims under 11 U.S.C. §502(h) it may have against the Debtors' estates in the event any such preference claims are successfully asserted against it.

CONCLUSION

The Debtors and V&E request that the Court enter the amended Order approving V&E's retention, and grant them such other and further relief to which they may be justly entitled.

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essentially subtracting the value of the [services provided] subsequent to receipt of the preferential transfers but prior to the petition date from the aggregate preference demand amount." *In re Circuit City Stores, Inc.*, No. 08-35653 (KRH), 2010 WL 4956022, at *5 (Bankr. E.D. Va. Dec. 1, 2010) (quotations omitted).

[30] Many courts find that professionals waiving prepetition claims (including those assertable under § 502(h) relating to potential preference claims) cures retention issues relating thereto. *See, e.g.*, *In re SAS* AB, 645 B.R. 37, 48 (Bankr. S.D.N.Y. 2022); *In re Springfield Med. Care Sys., Inc.*, 2019 WL 6273385, at *2-3 (Bankr. D. Vt. Nov. 22, 2019); *In re SBMC Healthcare, LLC*, 473 B.R. 871, 883 (Bankr. S.D. Tex. 2012); *In re The Brown Publishing Co.*, 2011 WL 13502824, at *1 (Bankr. E.D.N.Y. Mar. 11, 2011) (approving retention of K&L Gates as debtors' counsel and ordering that its disinterestedness findings "shall not constitute a defense to any preference claim that may be asserted against K&L Gates in these cases and K&L Gates has agreed to waive any resulting claim it may have against the Debtors' estates in the event any preference claim is successfully asserted against it"); *In re Boot Hill Biofuels, LLC*, 2009 WL 982192, at *12; *In re 7677 E. Berry Ave. Assocs., L.P.*, 419 B.R. 833, 853, n. 92 (Bankr. D. Colo. 2009) ("[I]n many cases, a professional seeking to be employed under § 327(a) is ordered, or voluntarily agrees, to waive any prepetition claim against the debtor") (citing cases); *In re Am. Home Mort. Holdings, Inc.*, 411 B.R. 169, 172, 176 (Bankr. D. Del. 2008) (court approved retention of professional that agreed, at UST urging, in supplemental affidavit, to waive prepetition fees, and explaining that "to become disinterested, professionals need to waive their rights to any pre-petition claims they might have against the Debtor"); *In re Princeton Med. Mgmt. Inc.*, 249 B.R. 813, 816 (Bankr. M.D. Fla. 2000); *In re Fulgham Enters., Inc.*, 181 B.R. 139, 142 (Bankr. N.D. Ala. 1995); *In re E. Charter Tours, Inc.*, 167 B.R. 995, 996, 998 (Bankr. M.D. Ga. 1994). *But see In re Hanckel*, 517 B.R. 609, 614 (Bankr. D.S.C. 2014) (stating that the Third Circuit in *Pillowtex* found Jones Day could not be retained where it had received potentially preferential payments and "did not waive its claim *prior to* applying for employment"). However, the Third Circuit said waiver should occur prior to *approval of retention*, not prior to *applying for employment*. *See In re Pillowtex, Inc.*, 304 F.3d at 253 (Jones Day's *prospective* waiver *after retention* as to potential preference claims was insufficient. and in cases where disinterestedness was cured, "the professional waived its fees *prior to being approved* for retention under section 327(a)."") (emphasis added).

Richmond, Virginia
Dated: May 2, 2024

/s/ *Jeremy S. Williams*

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