SO ORDERED,

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: August 21, 2020

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

ON-SITE FUEL SERVICE, INC.,	**CASE NO. 18-04196-NPO**
DEBTOR.	**CHAPTER 7**
MANSFIELD OIL COMPANY OF GAINESVILLE, INC.	**PLAINTIFF**
VS.	**ADV. PROC. 19-00059-NPO**
CAPITALA FINANCE CORP., CAPITAL SOUTH PARTNERS FUND II, LP, CAPITAL SOUTH PARTNERS SBIC FUND III, LP, JOHN F. MCGLINN, HARBERT MEZZANINE PARTNERS III SBIC, LP, AND JOHN C. HARRISON	**DEFENDANTS**

CONSOLIDATED UNDER ADV. PROC. 19-00059-NPO WITH:

EILEEN N. SHAFFER, TRUSTEE FOR THE BANKRUPTCY ESTATE OF ON-SITE FUEL SERVICE, INC.	**PLAINTIFF**
VS.	**ADV. PROC. 20-00007-NPO**
DIESEL DIRECT, INC., CAPITALA FINANCE CORP.; CAPITALSOUTH PARTNERS FUND II, L.P.; CAPITALSOUTH PARTNERS SBIC FUND III, L.P.; AND HARBERT MEZZANINE PARTNERS III SBIC, L.P.	**DEFENDANTS**

MEMORANDUM OPINION AND ORDER DENYING TRUSTEE'S MOTION TO DISQUALIFY K&L GATES, LLP AS COUNSEL FOR CAPITALA DEFENDANTS AND DENYING AS MOOT CAPITALA DEFENDANTS' MOTION FOR ADMINISTRATIVE DE-CONSOLIDATION OF THE ADVERSARY PROCEEDINGS

This matter came before the Court for a telephonic hearing on July 15, 2020 (the "Hearing"),[1] on the Trustee's Motion to Disqualify K&L Gates, LLP as Counsel for Capitala Defendants (the "Motion to Disqualify") (M. Adv. Dkt. 190)[2] filed by Eileen N. Shaffer, chapter 7 trustee (the "Trustee") for the debtor, On-Site Fuel Service, Inc. ("On-Site Fuel Service"); the Memorandum in Support of Trustee's Motion to Disqualify K&L Gates, LLP as Counsel for Capitala Defendants (the "Trustee Brief") (M. Adv. Dkt. 191) filed by the Trustee; the Capitala Defendants' Opposition to Trustee's Motion to Disqualify K&L Gates, LLP as Counsel for the Capitala Defendants and, in the Alternative, Motion for Administrative De-Consolidation of the Adversary Proceedings (the "Capitala Response" or the "Motion for De-Consolidation") (M. Adv. Dkt. 272) filed by Capitala Finance Corp. ("Capitala I"), Capital South Partners Fund II, LP ("Capitala II"), Capital South Partners SBIC Fund III, LP ("Capitala III" or collectively with Capitala I and Capitala II, "Capitala"), and John F. McGlinn ("McGlinn" or together with Capitala, the "Capitala Defendants"); the Certification of Robert F. Pawlowski (the "Pawlowski Cert.") (M.

[1] Because of COVID-19-related restrictions on in-person appearances, the Hearing was held telephonically. *See* https://www.mssb.uscourts.gov/special-notices/court-hearings (last visited Aug. 17, 2020).

[2] Citations to the record are as follows: (1) citations to docket entries in the above-referenced bankruptcy case (the "Bankruptcy Case") are cited as "(Bankr. Dkt. __)"; (2) citations to docket entries in the lead adversary proceeding, *Mansfield Oil Company of Gainesville, Inc. v. Capitala Finance Corp., et al.*, Adv. Proc. 19-00059-NPO (the "Mansfield Adversary"), are cited as "(M. Adv. Dkt. __)"; and (3) citations to docket entries in *Shaffer v. Diesel Direct, Inc. et al*., Adv. Proc. 20-00007-NPO (the "Trustee Adversary") before the date of the consolidation of these adversary proceedings on March 4, 2020 are cited as "(Tr. Adv. Dkt. __)". (Tr. Adv. Dkt. 28; M. Adv. Dkt. 105). Together, the Mansfield Adversary and the Trustee Adversary are referred to as the "Consolidated Adversaries."

Adv. Dkt. 273) filed by the Capitala Defendants; and the Trustee's Reply in Support of Motion to Disqualify K&L Gates, LLP as Counsel for the Capitala Defendants (the "Trustee's Reply") (M. Adv. Dkt. 287) filed by the Trustee in the Consolidated Adversaries.

At the Hearing, William Liston, III ("Liston") and W. Lawrence Deas represented the Trustee; Anthony P. La Rocco ("La Rocco"), James A. Wright, III ("Wright"), Jeffrey R. Blackwood ("Blackwood"), and Clarence Webster, III ("Webster") represented the Capitala Defendants; E. Barney Robinson represented Harbert Mezzanine Partners III, LP, f/k/a Harbert Mezzanine Partners III SBIC, LP ("Harbert") and John C. Harrison ("Harrison" or together with Harbert, the "Harbert Defendants"); and W. Thomas McCraney, III and Douglas C. Noble represented Mansfield Oil Company of Gainesville, Inc. ("Mansfield"). At the end of the Hearing, the Court took the matter under advisement. Later, at a telephonic status conference held on July 22, 2020 (the "Status Conference"), the Court announced its decision on the Motion to Disqualify and informed the parties that a written opinion would follow. This Opinion fulfills the commitment of the Court made at the Status Conference by memorializing and supplementing the Court's ruling.

Jurisdiction

The Court finds that it has jurisdiction over the parties to and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). Notice of the Hearing was proper under the circumstances.

Facts[3]

The primary dispute in the Consolidated Adversaries involves the Strategic Alliance and Acquisition Option Agreement (the "SAA") (M. Adv. Dkt. 77-1, Ex. 1; Tr. Adv. Dkt. 27-3) entered into by On-Site Fuel Service and Mansfield on April 12, 2018 and the Asset Purchase Agreement (the "APA") (Tr. Adv. Dkt. 27-1) entered into by On-Site Fuel Service, On-Site Fuel Service Holdings ("On-Site Fuel Holdings"), and Diesel Direct, Inc. ("Diesel Direct") on October 31, 2018. The claims asserted by Mansfield and the Trustee in the Consolidated Adversaries, however, do not arise from contract law but from tort law and the U.S. Bankruptcy Code. The present matter concerns the disqualification of the attorneys who represent the Capitala Defendants. The Trustee contends that "KLG's participation as counsel in the consolidated adversaries, in which its former and current clients are materially adverse, coupled with the substantial relationship between its prior representation of On-Site and the facts on which the Trustee's claims are based, require the disqualification of KLG's participation in these actions under Rules 1.9 and 1.10 of the Mississippi Rules of Professional Conduct." (M. Adv. Dkt. 191 at 4-5). A summary of the facts surrounding the parties' primary dispute introduces a more detailed discussion of the facts related specifically to the disqualification issue.

A. Background

Capitala and Harbert are private equity firms and together are the majority owners of On-Site Fuel Service, a tank wagon fuel supply business. Mansfield is a nationwide supplier of petroleum products. On April 12, 2018, Mansfield and On-Site Fuel Service entered into the SAA whereby Mansfield would sell petroleum products directly to On-Site Fuel Service's customers,

[3] The following findings of fact and conclusions of law are made pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

and On-Site Fuel Service would focus on the delivery side of its business. On-Site Fuel Service's senior lender, PNC Financial Services Group, Inc. ("PNC Bank"), would not consent to the SAA unless there was an agreement in place for On-Site Fuel Service to pay off PNC Bank's loan. Mansfield agreed to advance On-Site Fuel Service $4.8 million, and on May 12, 2018, Mansfield, On-Site Fuel Service, and PNC Bank entered into the Tri-Party Agreement (the "TPA") (M. Adv. Dkt. 77-3, Ex. 3; Tr. Adv. Dkt. 27-2), at which time the SAA became effective. Pursuant to the TPA, On-Site Fuel Service agreed to repay the debt to Mansfield within 120 days of the effective date of the SAA. (M. Adv. Dkt. 77 ¶ 47).

On October 23, 2018, On-Site Fuel Service ceased operations, and Mansfield filed a chapter 7 involuntary petition (the "Involuntary Petition") (Bankr. Dkt. 1) against On-Site Fuel Service on October 30, 2018. The next day, On-Site Fuel Service sold its operating assets to Diesel Direct pursuant to the APA.[4] The Involuntary Petition was contested and litigated for several months concluding in a three-day trial in March 2019 and closing arguments on April 3, 2019 (the "Involuntary Proceeding"). On May 24, 2019, the Court entered an Order for Relief in an Involuntary Proceeding (the "Order for Relief") (Bankr. Dkt. 161) granting the Involuntary Petition. Thereafter, Mansfield sued the Capitala Defendants and the Harbert Defendants, and the Trustee sued Capitala, Harbert, and Diesel Direct, in separate adversary proceedings that the Court consolidated and set for trial on December 1-4, 7-11, 15-18, and 21, 2020. (M. Adv. Dkt. 105; Tr. Adv. Dkt. 28).

[4] In an involuntary case, an alleged debtor may dispose of its property as if no involuntary petition had been filed until the bankruptcy court orders otherwise or enters an order for relief. 11 U.S.C. § 303(f).

B. Retention of Counsel

1. Capitala

Capitala is a longstanding client of the law firm of K&L Gates, LLP ("K&L Gates"). (McGlinn Dep. at 127, Cap. Ex. B, M. Adv. Dkt. 273-2).[5] Until February of 2019, Charles A. Dale, III ("Dale") was the primary restructuring and insolvency partner at K&L Gates who represented Capitala regarding its interest in On-Site Fuel Holdings and On-Site Fuel Service. (Wright Dec. ¶ 4, M. Adv. Dkt. 272-2). When Dale left K&L Gates in February of 2019, Wright, a lawyer affiliated with K&L Gates in Boston, Massachusetts, became Capitala's primary counsel. (*Id*.). On December 27, 2019, Wright was admitted *pro hac vice* as counsel for the Capitala Defendants in the Mansfield Adversary. (M. Adv. Dkt. 56); *see* MISS. BANKR. L.R. 9010-1(b)(1). That same day, La Rocco and Robert F. Pawlowski ("Pawlowski"), lawyers affiliated with K&L Gates in Newark, New Jersey, also were admitted *pro hac vice*. (M. Adv. Dkt. 54-55). Additionally, Blackwood and Webster with the law firm of Bradley Arant Boult Cummings, LLP in Jackson, Mississippi, appeared as local counsel representing the Capitala Defendants.

In the Bankruptcy Case, Wright was admitted *pro hac vice* as counsel for Capitala on June 20, 2019. (Bankr. Dkt. 209). J. Walter Newman, IV ("Newman") appeared as local counsel for Capitala on June 11, 2019. (Bankr. Dkt. 196).

2. On-Site Fuel Service

J. Robert Walker ("Walker") at the law firm of Baker Donelson LLP ("Baker Donelson") in Memphis, Tennessee, has long served On-Site Fuel Service as its primary outside counsel. (French Dep. at 322, Cap. Ex. C, M. Adv. Dkt. 273-3; McGlinn Dep. at 60, 137, Cap. Ex. B, M. Adv. Dkt. 273-2). On-Site Fuel Service retained Kristina M. Johnson ("Johnson") with the law

[5] Citations to deposition transcripts are to the original pagination.

firm of Jones Walker LLP ("Jones Walker") in Jackson, Mississippi as its counsel in the Involuntary Proceeding. (Bankr. Dkt. 7).

The Trustee does not dispute that the Baker Donelson and Jones Walker law firms provided legal services to On-Site Fuel Service. She contends, however, that K&L Gates also represented On-Site Fuel Service, both pre-Involuntary Petition and during the "gap period" between the filing date of the Involuntary Petition on October 30, 2018 and the entry of the Order for Relief on May 24, 2019 (the "Gap Period"). The Trustee contends that K&L Gates provided legal advice to On-Site Fuel Service regarding the same transactions at issue in the Consolidated Adversaries and that K&L Gates continued to represent On-Site Fuel Service after Mansfield's initiation of the Involuntary Proceeding until the entry of the Order for Relief. K&L Gates contends that with respect to these matters, its client was solely Capitala except that the representation expanded to include McGlinn after Mansfield sued him personally in August of 2019.[6] (Wright Dec. ¶¶ 6-7; M. Adv. Dkt. 272-2).

C. K&L Gates's Alleged Former Representation of On-Site Fuel Service

The Trustee alleges that K&L Gates represented both Capitala and On-Site Fuel Service prior to the Order for Relief in four (4) legal matters: (1) the negotiation of the SAA and the related TPA; (2) On-Site Fuel Service's October 31, 2018 letter to Mansfield terminating the SAA; (3) On-Site Fuel Service's sale of assets to Diesel Direct; and (4) the litigation of On-Site Fuel Service's Involuntary Proceeding. (M. Adv. Dkt. 191 at 3). The Fifth Circuit Court of Appeals has observed that "when dealing with ethical principles, . . . we cannot paint with broad strokes. The lines are fine and must be so marked. . . . [T]he conclusion in a particular case can be reached

[6] K&L Gates admits that it previously represented On-Site Fuel Service with respect to the lease of office space in Alpharetta, Georgia, a matter that the Trustee does not contend is substantially related to the Consolidated Adversaries. *See infra* p. 25.

only after painstaking analysis of the facts." *Brennan's, Inc. v. Brennan's Rests., Inc.*, 590 F.2d 168, 173-74 (5th Cir. 1979) (quoting *United States v. Standard Oil Co.*, 136 F. Supp. 345, 367 (S.D.N.Y. 1955)). Accordingly, the Court engages in a "painstaking analysis of the facts" regarding these four (4) legal matters.

1. Negotiation of SAA & TPA

Capitala and Harbert are the majority owners of On-Site Fuel Holdings pursuant to the Subordinated Note Purchase Agreement, as amended, dated December 19, 2011 (the "Purchase Agreement") (Bankr. Cl. 51-1 at 32-78). On-Site Fuel Holdings in turn owns 100% of On-Site Fuel Service, a fuel supply company in Mississippi. (M. Adv. Dkt. 82 at 28-59). The Purchase Agreement designates Capitala III to act as the "collateral agent" for both Capitala and Harbert with respect to On-Site Fuel Service's assets and property pledged as collateral. (Bankr. Cl. 51-1 at 67-70).

On-Site Fuel Service's board was composed of five (5) members. (M. Adv. Dkt. 77 ¶ 16; M. Adv. Dkt. 182 ¶ 16). Capitala and Harbert each had two (2) board members, and On-Site Fuel Service's founder, Greg Nethery, was the other board member. (M. Adv. Dkt. 77 ¶ 16; M. Adv. Dkt. 182 ¶ 16). McGlinn was Capitala's primary board representative and served as chairman of the board. Harrison was Harbert's primary board representative. (M. Adv. Dkt. 77 ¶ 18; M. Adv. Dkt. 182 ¶ 18). At some point, a special two (2)-member committee ("Special Committee") of On-Site Fuel Service's board of directors, consisting of McGlinn and Harrison, was formed to pursue strategic options for On-Site Fuel Service, including a business relationship with Mansfield. (M. Adv. Dkt. 77 ¶ 20; M. Adv. Dkt. 182 ¶ 20). At this time, Mansfield was both a customer and fuel supplier of On-Site Fuel Service. (M. Adv. Dkt. 77 ¶ 21; M. Adv. Dkt. 182 ¶ 21). In 2017,

Mansfield and On-Site Fuel Service began discussing a strategic alliance relationship. (M. Adv. Dkt. 77 ¶ 21; M. Adv. Dkt. 182 ¶ 21).

During these discussions, McGlinn provided Mansfield with financial information about On-Site Fuel Service and represented to Mansfield that On-Site Fuel Service was generating "Earnings Before Interest, Taxes, Depreciation and Amortization" ("EBITDA") averaging approximately $300,000.00 per month. Mansfield agreed to become a strategic partner with On-Site Fuel Service and on April 12, 2018, signed the SAA. (M. Adv. Dkt. 77-1, Ex. 1). The SAA contemplated that Mansfield would become On-Site Fuel Service's exclusive fuel supplier. On-Site Fuel Service would continue delivering fuel to the customers, and Mansfield would pay the transportation fees. Mansfield would take over invoicing and credit management for On-Site Fuel Service's customers except for three (3) direct-bill customers that would continue to receive invoices directly from On-Site Fuel Service but would remit their payments to a "lock box" account controlled by Mansfield. The SAA granted the parties "the right at all times to set-off sums that it owes to the other party against sums owed to it by the other party." (M. Adv. Dkt. 77-1, Ex. 1 ¶ 30). The SAA also provided that Mansfield could suspend regular payments to On-Site Fuel Service if On-Site Fuel Service failed to satisfy any payment obligation owed to Mansfield within ten (10) days of the due date. (M. Adv. Dkt. 77-1, Ex. 1 ¶ 2).

As part of the SAA, Mansfield purchased the exclusive option to acquire On-Site Fuel Service's tank wagon business for a pre-negotiated purchase price of $23 million in exchange for an "Acquisition Option Fee" of $1 million. After the SAA went into effect, this fee was credited against the debt then owed by On-Site Fuel Service to Mansfield. The option expired in four (4) years, and during this time, the SAA prohibited On-Site Fuel Service, Capitala, and Harbert from

selling or soliciting a sale of On-Site Fuel Service's assets without Mansfield's consent. (M. Adv. Dkt. 77-1, Ex. 1 ¶¶ 17, 21).

Before the SAA became effective, McGlinn informed Mansfield that PNC Bank would not consent to the contemplated arrangement without an agreement in place for On-Site Fuel Service to pay off its indebtedness. (M. Adv. Dkt. 77 ¶ 31; M. Adv. Dkt. 182 ¶ 31). Mansfield agreed to pay off the debt to PNC Bank and to move forward with the strategic alliance. Mansfield, On-Site Fuel Service, and PNC Bank entered into the TPA on May 12, 2018 (M. Adv. Dkt. 77-3, Ex. 3). Under the TPA, On-Site Fuel Service agreed to use cash payments totaling $4.8 million from Mansfield to pay-off PNC Bank within sixty (60) days. Once the TPA was signed, On-Site Fuel Service's customers, except for the direct-bill customers, transitioned to Mansfield, and the SAA "went live" as of May 13, 2018. (M. Adv. Dkt. 77 ¶ 36; M. Adv. Dkt. 182 ¶ 36). There was a delay until July 31, 2018 in setting up the lock box account for the direct-bill customers. (M. Adv. Dkt. 77 ¶ 43; M. Adv. Dkt. 182 ¶ 43). In the meantime, On-Site Fuel Service continued to receive payments from the direct-bill customers for deliveries of Mansfield's fuel. Beginning June 2018, On-Site Fuel Service provided "wind down" and "burn down" reports to update Mansfield as to the net amount owed. (M. Adv. Dkt. 77 ¶ 45; M. Adv. Dkt. 182 ¶ 45).

2. On-Site Fuel Service's Termination Letter

As of September 15, 2018, On-Site Fuel Service was in default on its obligation to pay-off the debt to Mansfield within 120 days of the effective date of the SAA. (M. Adv. Dkt. 77 ¶ 47). Numerous meetings were held between Mansfield and On-Site Fuel Service to reconcile the intra-company account balances pursuant to the SAA and to discuss On-Site Fuel Service's debt. (M. Adv. Dkt. 77 ¶ 49; M. Adv. Dkt. 182 ¶ 49). At a meeting on October 4, 2018, On-Site Fuel Service presented an "Executive Touchpoint" slide presentation that revealed that On-Site Fuel Service

had experienced a seven percent (7%) drop in fuel sales volume starting in late 2017. Mansfield interpreted the information in the slides as indicating that On-Site Fuel Service could not fund operations, would not generate positive cash flow until at least April 2019, and would require at least $600,000.00 in working capital in addition to regular operating income from Mansfield. (M. Adv. Dkt. 77 ¶ 51). Following the October 4, 2018 meeting, representatives of On-Site Fuel Service and Mansfield continued discussions about the direct-bill customer transactions and possible work-out scenarios to preserve the relationship. (M. Adv. Dkt. 77 ¶ 52; M. Adv. Dkt. 182 ¶ 52). On October 11, 2018, Mansfield suspended any further payments to On-Site Fuel Service. (M. Adv. Dkt. 77 ¶ 52; M. Adv. Dkt. 182 ¶ 52).

During this time, McGlinn provided Mansfield with a copy of an internal, confidential report prepared by Traverse Financial Consulting, LLC ("Traverse") that analyzed On-Site Fuel Service's financial condition through August 31, 2018 (the "Traverse Report") (M. Adv. Dkt. 77 ¶ 53; M. Adv. Dkt. 182 ¶ 53). The Traverse Report included the observation that "[f]or the past twenty months ended 8/13/18 the Company has not generat[ed] sufficient cash flow to (i) service its truck and equipment loans, (ii) pay cash interest, (iii) fund capital expenditures, and (iv) absorb non-operating expenses." (Tr. Adv. Dkt. 27-9, Ex. 9 at 8). The Traverse Report also showed that On-Site Fuel Service had negative "free cash flow" of $7.9 million during the past twenty (20) months and had negative cash flow from operations for the period from January through August 2018 of $1.4 million. (*Id*.).

Representatives of Mansfield and On-Site Fuel Service met again on October 22, 2018. (M. Adv. Dkt. 77 ¶ 56; M. Adv. Dkt. 182 ¶ 56). During this meeting, McGlinn informed Mansfield that Capitala and Harbert were unwilling to infuse any additional cash to fund On-Site Fuel Service's operations. The next day, October 23, 2018, On-Site Fuel Service emailed a letter to

customers stating that it would not remain in business and terminated all of its employees except for a "skeleton crew." (M. Adv. Dkt. 77 ¶ 57; M. Adv. Dkt. 182 ¶ 57). As of that date, On-Site Fuel Service no longer had any viable business.

On October 25, 2018, On-Site Fuel Service disseminated a letter signed by Jared Prentiss ("Prentiss"), On-Site Fuel Service's president, notifying prospective purchasers it was ceasing operations and soliciting offers for its assets. (M. Adv. Dkt. 77-9, Ex. 9). In this letter, Prentiss represented that On-Site Fuel Service's operating assets, defined as all of its tangible and intangible assets used or useable in its operations, had an appraised value of approximately $7 million, including $4 million in unencumbered assets. (M. Adv. Dkt. 77-9, Ex. 9). In a letter dated October 31, 2018, On-Site Fuel Service officially terminated the SAA on account of Mansfield's alleged material breach.

3. On-Site Fuel Service's Sale of Assets to Diesel Direct

On October 31, 2018, On-Site Fuel Service sold substantially all of its assets to Diesel Direct pursuant to the APA for $1 million, the assumption of $3.1 million of liens encumbering its operating assets, and a future royalty of 5% to 10% of gross profits generated by Diesel Direct's servicing of On-Site Fuel Service's former customers. (Tr. Adv. Dkt. 27-1 at 4-5). From the proceeds of the sale, On-Site Fuel Service paid certain creditors, not including Mansfield, and its employees. (M. Adv. Dkt. 77 ¶ 60; M. Adv. Dkt. 182 ¶ 60).

4. Litigation of Involuntary Proceeding

Mansfield filed the Involuntary Petition on October 30, 2018. On November 30, 2018, On-Site Fuel Service filed the Motion to Dismiss Involuntary Petition and Request for Money Judgment Against Petitioning Creditor (the "Motion to Dismiss Involuntary Petition") (Bankr. Dkt. 19) arguing that it had more than twelve (12) creditors within the meaning of 11 U.S.C.

§ 303(b)(2) and, therefore, at least three (3) qualifying creditors were required to commence an involuntary case. On-Site Fuel Service also asserted that Mansfield had filed the Involuntary Petition in bad faith.

On December 20, 2018, nine (9) purported creditors of On-Site Fuel Service filed an Amended Motion to Approve Joinder in Involuntary Petition (the "Motion to Approve Joinder") (Bankr. Dkt. 39) pursuant to 11 U.S.C. § 303(c). On-Site Fuel Service opposed the Motion to Approve Joinder arguing that the "bar-to-joinder doctrine" prevented the creditors from joining the Involuntary Petition when Mansfield did not file it in good faith. The Court held a hearing on both motions on January 10, 2019. At that hearing, the Court declined to adopt the judicially created bar-to-joinder doctrine on the ground it was inconsistent with the plain language of 11 U.S.C. § 303(c). Thereafter, the Court entered an opinion denying the Motion to Dismiss Involuntary Petition and granting the Motion to Approve Joinder. (Bankr. Dkt. 52). The Court set deadlines for On-Site Fuel Service to file an answer to the Involuntary Petition and for the parties to complete discovery and also scheduled dates to submit a pretrial order and for a trial on the Involuntary Petition. (Bankr. Dkt. 46). Three (3) other creditors of On-Site Fuel Service filed motions to join in the Involuntary Petition (Bankr. Dkt. 56, 67, 89), which the Court granted (Bankr. Dkt. 114). On March 6, 2019, the Court entered the Amended Joint Pretrial Order (the "Pre-Trial Order") (Bankr. Dkt. 143). On March 11, 2019, On-Site Fuel Service filed the Proposed Findings of Facts and Conclusions of Law Submitted by Alleged Debtor, On-Site Fuel Service, Inc. (Bankr. Dkt. 148), and Mansfield and the other petitioning creditors filed the Proposed Findings of Fact and Conclusions of Law Submitted by Petitioning Creditors (Bankr. Dkt. 150).

The Court conducted the trial on the Involuntary Petition on March 11-13, 2019 with closing arguments held on April 3, 2019. On April 1, 2019, On-Site Fuel Service filed the

Amended Proposed Findings of Fact and Conclusions of Law Submitted by Alleged Debtor, On-Site Fuel Service, Inc. ("On-Site Fuel Service's Amended Findings of Fact and Conclusions of Law") (Bankr. Dkt. 156), and Mansfield filed the Revised Proposed Findings of Fact and Conclusions of Law Submitted by Petitioning Creditors (Bankr. Dkt. 157). On May 24, 2019, the Court entered its opinion granting the Involuntary Petition (Bankr. Dkt. 159) and entered the Order for Relief (Bankr. Dkt. 161).

Stephen Smith originally was appointed the chapter 7 trustee but later resigned and was replaced by the current Trustee. (Bankr. Dkt. 256). On July 30, 2019, On-Site Fuel Service filed its bankruptcy schedules through its designated representative, McGlinn, acting in his capacity as On-Site Fuel Service's chairman of the board. (Bankr. Dkt. 229). Capitala and Harbert filed proofs of claim 49, 50, 51, and 54 (Claim #49-51, 54), asserting a total secured debt of $17,044,999.85 in principal, plus accrued interest, and fees for "Money loaned" pursuant to the Purchase Agreement.

D. Consolidated Adversaries

1. Mansfield Adversary

Mansfield originally filed a lawsuit against the Capitala Defendants and Harbert in the U.S. District Court for the Southern District of Mississippi (the "District Court") in Cause No. 3:19-CV-00587-CWR-FKB on August 20, 2019. (M. Adv. Dkt. 3). On December 16, 2019, the District Court referred the lawsuit to this Court pursuant to 28 U.S.C. § 157(c)(2) to facilitate coordination with the Bankruptcy Case and anticipated litigation by the Trustee. (M. Adv. Dkt. 1); *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665 (2015).

a. Mansfield Complaint

On January 15, 2020, Mansfield filed the First Amended Complaint (the "Mansfield Complaint") (M. Adv. Dkt. 77) adding Harrison as a defendant and requesting entry of a judgment against the Capitala Defendants and the Harbert Defendants, jointly and severally, for compensatory and punitive damages under common-law claims of fraud, negligent misrepresentation, tortious interference with contract, aiding and abetting, and civil conspiracy. (M. Adv. Dkt. 77 ¶¶ 62-84). Mansfield also seeks treble damages under North Carolina's Unfair and Deceptive Trade Practices Act ("NC UDTPA"),[7] N.C. GEN. STAT. § 75-1.1. (M. Adv. Dkt. 77 ¶¶ 85-90). Mansfield did not join On-Site Fuel Service as a defendant in the Mansfield Adversary.

In support of its claims, Mansfield alleges that Capitala and Harbert managed their investment in On-Site Fuel Service as a joint venture by controlling On-Site Fuel Service's board of directors. (M. Adv. Dkt. 77 ¶¶ 15-16). Mansfield contends that McGlinn and Harrison voted as one block to control the operations, finances, and strategic decisions of On-Site Fuel Service for the benefit of Capitala and Harbert. (M. Adv. Dkt. 77 ¶ 19). Mansfield further contends that during the pre-SAA discussions, McGlinn provided financial information about On-Site Fuel Service that he knew or should have known was materially inaccurate in order to persuade Mansfield to sign the SAA. (M. Adv. Dkt. 77 ¶¶ 22-23).

Mansfield asserts that to induce it to provide $4.8 million in financial assistance to pay off On-Site Fuel Service's loan with PNC Bank, McGlinn represented that On-Site Fuel Service had

[7] The Court refers to N.C. GEN. STAT. § 75-1.1 as the Unfair and Deceptive Trade Practices Act although the North Carolina General Assembly amended the statute to delete the word "trade." *Marshall v. Miller*, 276 S.E.2d 397, 401 & n.1 (N.C. 1981).

specific assets of approximately $6 million to repay the debt. (M. Adv. Dkt. 77 ¶¶ 31-32). Mansfield alleges that McGlinn assured it that these assets were valid, collectable, unencumbered, and specifically designed to "settle the account" with Mansfield within 120 days (the "Earmarked Assets").[8] (M. Adv. Dkt. 77 ¶ 32). According to Mansfield, McGlinn knew or should have known that On-Site Fuel Service was undercapitalized and insolvent and that On-Site Fuel Service had neither the ability nor the intention of repaying its debt to Mansfield.

Once the TPA was signed, On-Site Fuel Service's customers, except for the direct-bill customers, transitioned to Mansfield, and the SAA "went live" as of May 13, 2018. (M. Adv. Dkt. 77 ¶ 36). There was a delay until August 22, 2018, however, in setting up the "lock box" account for the direct-bill customers. Mansfield asserts that On-Site Fuel Service had a duty to remit the payments received during the delay from the direct-bill customers to Mansfield but contends that On-Site Fuel Service instead used these payments as an interest-free source of capital to fund its operations.

Mansfield alleges that McGlinn sent an email dated June 15, 2018 to John Byrd ("Byrd"), Mansfield's chief financial officer, falsely assuring Byrd that On-Site Fuel Service still had Earmarked Assets of approximately $7 million with which to repay its debt to Mansfield. (M. Adv. Dkt. 77 ¶ 39; M. Adv. Dkt. 77-5, Ex. 5). Moreover, Mansfield contends that in "wind down" and "burn down" reports provided by On-Site Fuel Service during this time, McGlinn continued to represent falsely to Mansfield that On-Site Fuel Service had Earmarked Assets to repay the debt within the 120-day period. (M. Adv. Dkt. 77 ¶ 45).

[8] Mansfield refers to these assets as Earmarked Assets although no document uses that term.

Mansfield asserts that after On-Site Fuel Service defaulted on its obligation to pay-off the debt on September 15, 2018, On-Site Fuel Service disclosed downward adjustments that had been made to reflect negative EBITDA performance for the 2017 and 2018 years but that had not been disclosed previously to Mansfield. (M. Adv. Dkt. 77 ¶ 47). According to Mansfield, when representatives of On-Site Fuel Service and Mansfield met on October 4, 2018, to discuss On-Site Fuel Service's debt and restated financial reports, On-Site Fuel Service presented the Executive Touchpoint slide presentation that revealed that On-Site Fuel Service had experienced a seven percent (7%) drop in fuel sales volume beginning in late 2017. (M. Adv. Dkt. 77 ¶¶ 45, 49).

Representatives of Mansfield and On-Site Fuel Service met again on October 22, 2018 (M. Adv. Dkt. 77 ¶ 55-56) at which time McGlinn informed Mansfield that Capitala and Harbert were unwilling to infuse any additional cash to fund On-Site Fuel Service's operations. Mansfield alleges that McGlinn proposed that Mansfield continue to fund On-Site Fuel Service's operations while deferring any repayment of On-Site Fuel Service's debt indefinitely. Mansfield further contends that in follow-up discussions with Byrd, McGlinn revealed that instead of using the Earmarked Assets to repay Mansfield as previously represented, these resources were used to fund On-Site Fuel Service's operations.

b. Rule 12 Opinion

On January 29, 2020, the Capitala Defendants and the Harbert Defendants each filed a motion to dismiss all claims in the Mansfield Complaint. (M. Adv. Dkt. 88, 90). In both motions to dismiss, the Capitala Defendants and the Harbert Defendants sought dismissal of all claims asserted against them under Rule 12(b)(7) of the Federal Rules of Civil Procedure ("Rule 12")[9]

[9] Rule 12(b)-(i) is made applicable to adversary proceedings by Rule 7012 of the Federal Rules of Bankruptcy Procedure.

for failure to join On-Site Fuel Service as a necessary and indispensable party. In the alternative, the Capitala Defendants asked the Court to dismiss all claims under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. (M. Adv. Dkt. 90). The Harbert Defendants additionally sought a judgment on the pleadings under Rule 12(c). (M. Adv. Dkt. 88). In the Memorandum Opinion and Order on: (1) Harbert and Harrison's Rule 9(b), 12(b)(7) & 12(c) Motion for Judgment on the Pleadings and (2) the Capitala Defendants' Motion to Dismiss First Amended Complaint (the "Rule 12 Opinion") (M. Adv. Dkt. 171) issued on May 8, 2020, the Court ruled that the Mansfield's claim of aiding and abetting breach of duty failed to state a claim for relief and dismissed the claim against the Capitala Defendants under Rule 12(b)(6) and granted the Harbert Defendants a judgment on the pleadings as to this claim. (M. Adv. Dkt. 171). The Court denied the motions to dismiss as to all other claims.

2. Trustee Adversary

On February 3, 2020, the Trustee commenced the Trustee Adversary against Diesel Direct, Capitala, and Harbert by filing the Adversary Complaint (Tr. Adv. Dkt. 1). The Trustee filed the First Amended Complaint (the "Trustee Complaint") (Tr. Adv. Dkt. 27) on March 2, 2020. In the Trustee Adversary, the Trustee seeks to subordinate the secured claims purportedly held by Capitala and Harbert in the principal amount of $17,044,999.85 pursuant to 11 U.S.C. § 510(c). She also asks the Court to avoid the "fire sale"[10] of On-Site Fuel Service's assets to Diesel Direct pursuant to 11 U.S.C. § 549(a) and (b) to the extent of damages in the amount of $3,519,335.00, representing the difference between the fair value of the assets and the consideration paid by Diesel

[10] The phrase "fire sale" was used by McGlinn to describe the transfer of On-Site Fuel Service's assets during the trial of the Involuntary Proceeding. (Bankr. Dkt. 238 at 129).

Direct. (Tr. Adv. Dkt. 27 ¶ 56). The Trustee did not join McGlinn as a defendant in the Trustee Adversary.

The Trustee's allegations in support of the equitable subordination claims mirror closely those in the Mansfield Complaint. In general, the Trustee alleges that Capitala and Harbert exercised control over On-Site Fuel Service's assets and business decisions through their appointment of four of five members of On-Site Fuel Service's board of directors. (Tr. Adv. Dkt. 27 ¶ 25(a)).

The Trustee contends that during discussions with Mansfield concerning the SAA, McGlinn and Harrison provided materially inaccurate information to Mansfield. (Tr. Adv. Dkt. 27 ¶ 32). For example, On-Site Fuel Service disclosed its 2017 financial statements to Mansfield that reflected positive EBITDA of approximately $300,00.00 per month for year 2018. (Tr. Adv. Dkt. 27 ¶ 31). Later, on December 9, 2017, McGlinn, or others under his direction, allegedly prepared On-Site Fuel Service's 2018 budget forecast projecting positive EBITDA of approximately $4.3 million.

Then, by allegedly representing to Mansfield that On-Site Fuel Service anticipated receipt of $6 million in collectable cash inflows in the near term, McGlinn obtained Mansfield's agreement to contribute $4.8 million towards paying off the debt to PNC Bank. (Tr. Adv. Dkt. 27 ¶ 35; Tr. Adv. Dkt. 27-3, Ex. 3). The Trustee asserts that McGlinn either knew this representation was false or was ignorant of its truth.

The Trustee alleges that through early September 2018, McGlinn and On-Site Fuel Service's executive officers continued to assure Mansfield of On-Site Fuel Service's financial stability and ability to perform, even though they were cognizant of On-Site Fuel Service's rapidly deteriorating financial condition. (Tr. Adv. Dkt. 27 ¶ 38; Tr. Adv. Dkt. 27-4 to 27-8, Exs. 4-8).

After On-Site Fuel Service breached the SAA, the Trustee asserts that McGlinn and On-Site Fuel Service's executives presented information to Mansfield in a meeting on October 4, 2018 reflecting a financial performance that sharply deviated from On-Site Fuel Service's prior representations to Mansfield, including a significant decrease in On-Site Fuel Service's business volume and a $1.4 million loss from operations through August 2018. (Tr. Adv. Dkt. 27 ¶ 42). The Trustee contends that as of October 4, 2018, On-Site Fuel Service owed Mansfield approximately $5,892,161.00 with no ability or means to repay Mansfield. (Tr. Adv. Dkt. 27 ¶ 42). The Trustee relies on the observation in the Traverse Report that during the twenty (20) months ending on August 31, 2018, "[On-Site Fuel Service was] not generating sufficient cash flow to service its truck and equipment loans, pay cash interest, fund capital expenditures, and absorb non-operating expenses." (Tr. Adv. Dkt. 27 ¶ 43; Tr. Adv. Dkt. 27-9, Ex. 9). The Trustee alleges that upon receipt of this information, Mansfield exercised its contractual right of set-off and ceased payments to On-Site Fuel Service. (Tr. Adv. Dkt. 27 ¶ 44).

According to the Trustee, McGlinn abandoned his fiduciary duty to act in the best interests of On-Site Fuel Service by informing all customers on October 22, 2018 that On-Site Fuel Service would no longer service their fuel needs, thus causing a *de facto* dissolution of On-Site Fuel Service's business. (Tr. Adv. Dkt. 27 ¶ 47). She also asserts that McGlinn breached his fiduciary duty by later disposing of On-Site Fuel Service's assets on October 31, 2018, in a manner that minimized their value and that placed the interests of Capitala and Harbert over the interests of On-Site Fuel Service's other creditors, including Mansfield. (*Id.*). In that regard, the Trustee alleges that the transfer of assets to Diesel Direct resulted in a net-value loss of $3,519,335.00 (Tr. Adv. Dkt. 27 at 5). The Trustee also alleges that McGlinn, Capitala, and Harbert structured the

APA so that the consideration paid by Diesel Direct would be routed directly to Capitala and Harbert and bypass On-Site Fuel Service. (Tr. Adv. Dkt. 27 ¶ 50).

E. Consolidation of Mansfield Adversary & Trustee Adversary

At a status conference held in both the Mansfield Adversary and the Trustee Adversary on February 26, 2020, the Court determined, and the parties agreed, that the Mansfield Adversary and the Trustee Adversary shared common questions of fact and law and, therefore, should be consolidated for discovery and trial purposes pursuant to Rule 42 of the Federal Rules of Civil Procedure ("Rule 42").[11] Counsel for all parties in the Consolidated Adversaries signed an Agreed Order Consolidating Cases and Amending Scheduling Order (Tr. Adv. Dkt. 28; M. Adv. Dkt. 105) to that effect, which the Court signed on March 4, 2020.

F. Derivative Standing Opinion

On March 16, 2020, Capitala III filed in the Bankruptcy Case the CapitalSouth Partners SBIC Fund III, LLP Motion for Derivative Standing to Assert Estate Claims Against Mansfield Oil Company of Gainesville, Inc. (the "Derivative Standing Motion") (Bankr. Dkt. 320). The Trustee filed Trustee Eileen N. Shaffer's Response to Motion by CapitalSouth Partners SBIC Fund III, LP for Derivative Standing to Assert Estate Claims Against Mansfield Oil Company of Gainesville, Inc. (the "Trustee's Response to Derivative Standing Motion") (Bankr. Dkt. 326), and Mansfield filed the Response of Mansfield Oil Company of Gainesville, Inc. to Motion for Derivative Standing to Assert Estate Claims (Bankr. Dkt. 327).

In the Derivative Standing Motion, Capitala III, acting as the collateral agent, sought authorization to assert claims allegedly held by On-Site Fuel Service's bankruptcy estate against

[11] Rule 42 is made applicable to adversary proceedings by Rule 7042 of the Federal Rules of Bankruptcy Procedure.

Mansfield for breaches of the SAA, torts arising out of Mansfield's "wrongful acts . . . giving rise to the Estate's contract claims," and claims under chapter 5 of the Bankruptcy Code, "including preference claims." (Bankr. Dkt. 320 at 1). Capitala III proposed to pursue these claims in a third-party complaint filed in the Mansfield Adversary.

With respect to the contract claims, Capitala III alleged that Mansfield breached the SAA by: (1) failing to drive new customer volume to On-Site Fuel Service; (2) impairing On-Site Fuel Service's recovery of "pre-SAA" accounts receivable because of invoicing errors; (3) ceasing all payments to On-Site Fuel Service in October 2018; and (4) soliciting On-Site Fuel Service's customers. (Bankr. Dkt. 320 at 1-2). Capitala III further alleged that On-Site Fuel Service may have tort claims "for, among other things, breach of fiduciary duty, tortious breach of contract, conversion, and tortious interference" but did not disclose their legal or factual basis. (Bankr. Dkt. 320 at 2). At the hearing on the Derivative Standing Motion, counsel for Capitala III described the breach of fiduciary duty as arising out of Mansfield's control over On-Site Fuel Service as part of the strategic alliance and withdrew its request for derivative standing to pursue preference claims against Mansfield.

In the Trustee's Response to Derivative Standing Motion, the Trustee stated that "the proposition of bringing the contract claims" against Mansfield was discussed with Capitala III but that the Trustee "verbally refused" because such claims lacked merit. (Bankr. Dkt. 326 at 2). The Trustee asserted that no provision in the SAA expressly or impliedly imposed an obligation on Mansfield to provide On-Site Fuel Service with new or additional customer volume and that a merger clause in the SAA would prevent the introduction of evidence of any pre-contractual discussions about customer volume pursuant to the parol evidence rule. The Trustee questioned whether the SAA imposed any obligation on Mansfield to invoice for fuel deliveries that occurred

before the effective date of the SAA, but even assuming it did, the Trustee maintained that the SAA apparently limited Mansfield's obligations to those customers that received petroleum products supplied by Mansfield. As to the cessation of payments to On-Site Fuel Service in October 2018, the Trustee viewed Capitala III's allegation as overlooking the factors unrelated to Mansfield that caused or substantially contributed to On-Site Fuel Service's insolvency. Moreover, the Trustee cited to McGlinn's previous testimony that Mansfield acted within its contractual rights under the SAA in suspending payments. (Bankr. Dkt. 326 at 6). Finally, with respect to Mansfield's alleged solicitation of On-Site Fuel Service's customers, the Trustee rejected Capitala III's assumption that On-Site Fuel Service's customers would have been serviced by Diesel Direct in the absence of the alleged breach. The Trustee contended that On-Site Fuel Service's "going out of business" letter dated October 23, 2018 resulted in On-Site Fuel Service's customers scrambling in search of an alternative fuel supply source. The Trustee found it problematic that any loss of earn-out revenue by On-Site Fuel Service arose from On-Site Fuel Service's own breach of the SAA by selling its assets without Mansfield's consent. Also, the Trustee interpreted the APA as contracting away On-Site Fuel Service's exclusive right to receive earn-out payments by routing any earn-out payments directly to Capitala and Harbert. Moreover, the Trustee maintained that proof of lost future profits was afflicted with speculation and conjecture.

Because the Trustee continued to investigate chapter 5 claims, including those that may exist against Mansfield, the Trustee opposed standing as to any preference claims. The Trustee nevertheless did not oppose the standing of Capitala III, "[s]ubject to approval of the Court," to pursue some of the contract claims against Mansfield "however unlikely the chance of success." (Bankr. Dkt. 326 at 14). The Trustee initially opposed the standing of Capitala III to assert any

tort claims but later indicated that she did not oppose Capitala III's standing to pursue any tort claims as long as any recovery would inure to the benefit of On-Site Fuel Service's bankruptcy estate and any litigation expenses would be borne initially by Capitala III.

In the Memorandum Opinion and Order Denying Capitala South Partners SBIC Fund III, LP Motion for Derivative Standing to Assert Estate Claims Against Mansfield Oil Company of Gainesville, Inc. (the "Derivative Standing Opinion") (Bankr. Dkt. 330), the Court denied the Derivative Standing Motion on the ground that Capitala III had failed to meet its burden of proof given the absence of clear, unequivocal consent to standing by the Trustee and the lack of a clear, colorable claim against Mansfield. *See La. World Exposition v. Fed. Ins. Co. (In re La. World Exposition)*, 858 F.2d 233 (5th Cir. 1988). In addition, the Court noted in the Derivative Standing Opinion that a conflict of interest would arise if Capitala III and K&L Gates were allowed to pursue claims on behalf of the Trustee in the Mansfield Adversary or in any other adversary proceeding while simultaneously defending the equitable subordination claims in the Trustee Adversary. When the Trustee initiated the Trustee Adversary, the Trustee determined which factual narrative was more credible and chose Mansfield's. Because the operative facts that would support the contract and tort claims that Capitala III proposed to assert in the Mansfield Adversary and those operative facts that the Trustee asserted in the Trustee Adversary in support of the equitable subordination claims were irreconcilable, allowing Capitala III to pursue the contract and tort claims against Mansfield would place Capitala III "on both sides of the v." in the Consolidated Adversaries. (Bankr. Dkt. 327 ¶ 14).

G. Motion to Disqualify

Inspired by the conflict-of-interest discussion in the Derivative Standing Opinion, the Trustee filed the Motion to Disqualify pursuant to Rules 1.9(a) and 1.10(a) of the Mississippi Rules

of Professional Conduct (the "Mississippi Rules"). (M. Adv. Dkt. 191 at 2). As noted previously, the Trustee alleges that K&L Gates represented both the Capitala Defendants and On-Site Fuel Service before the filing of the Involuntary Petition and thereafter until entry of the Order for Relief on four legal matters: (1) the negotiation of the SAA and the related TPA; (2) On-Site Fuel Service's October 31, 2018 letter to Mansfield terminating the SAA; (3) On-Site Fuel Service's sale of assets to Diesel Direct; and (4) the litigation of On-Site Fuel Service's Involuntary Proceeding. The Trustee seeks the disqualification of the following lawyers affiliated with K&L Gates that have been admitted *pro hac vice* in the Consolidated Adversaries as counsel for the Capitala Defendants: La Rocco, Pawlowski, and Wright. (M. Adv. Dkt. 54-56). The Trustee does not seek the disqualification of either Blackwood, Webster, or the law firm of Bradley Arant Boult Cummings, LLP who have appeared as local counsel representing the Capitala Defendants provided that they agree, on the record, not to communicate with K&L Gates during the remainder of the Consolidated Adversaries.

K&L Gates denies that it represented On-Site Fuel Service with respect to any of the above matters but admits that in late 2017 and early 2018 it provided legal advice to On-Site Fuel Service's parent company, On-Site Fuel Holdings, regarding the negotiation of the SAA and the related TPA "pursuant to a common interest." K&L Gates also admits that it represented On-Site Fuel Service with respect to a lease agreement and related insurance issue in Alpharetta, Georgia.[12] K&L Gates's argument that On-Site Fuel Service was not a client as to the four legal matters rests on three allegations: (1) K&L Gates did not accept On-Site Fuel Service as a client and does not have an engagement letter with On-Site Fuel Service; (2) even if On-Site Fuel Service were a

[12] The Trustee does not rely on this prior representation of On-Site Fuel Service as grounds for K&L Gates's disqualification.

client, the advice provided by K&L Gates is not substantially related to the Trustee's equitable subordination claims; and (3) the Trustee waived any right to disqualify K&L Gates by her delay in raising the issue. Finally, K&L Gates contends that even if it were disqualified from representing the Capitala Defendants in the Trustee Adversary, no basis exists to disqualify it from continuing to represent the Capitala Defendants in the Mansfield Adversary and, therefore, K&L Gates asks the Court to deconsolidate the Consolidated Adversaries.

1. Exhibits of Trustee

The Trustee attached thirty-eight (38) exhibits to the Motion to Disqualify (M. Adv. Dkt. 190), referred to as "Trustee Motion Exhibits 1-38," as follows: a summary invoice of K&L Gates dated December 5, 2017 with attached emails (Tr. Mot. Ex. 1, M. Adv. Dkt. 190-1); a schedule of the distribution of the proceeds from the sale of On-Site Fuel Service's assets to Diesel Direct filed in the Bankruptcy Case (Tr. Mot. Ex 2, M. Adv. Dkt. 190-2); a schedule of payments made by On-Site Fuel Service during the Gap Period from October 30, 2018 through May 24, 2019 filed in the Bankruptcy Case (Tr. Mot. Ex. 3, M. Adv. Dkt. 190-3); redacted emails from McGlinn to K&L Gates dated September 8, 2017 and September 11, 2017 (Tr. Mot. Ex. 4, M. Adv. Dkt. 190-4); redacted emails between K&L Gates and McGlinn dated October 30-31, 2017 (Tr. Mot. Exs. 5-6, M. Adv. Dkt. 190-5, 190-6), May 10, 2018 (Tr. Mot. Ex. 7, M. Adv. Dkt. 190-7), October 27, 2018 (Tr. Mot. Ex. 9, M. Adv. Dkt. 190-9), and October 31, 2018 (Tr. Mot. Ex. 8, M. Adv. Dkt. 190-8); redacted emails between Baker Donelson and Prentiss dated October 31, 2018 (Tr. Mot. Ex. 8, M. Adv. Dkt. 190-8); redacted invoices of Jones Walker dated December 6, 2018, January 10, 2019, February 25, 2019, March 7, 2019, and April 2, 2019 (Tr. Mot. Ex. 10, M. Adv. Dkt. 190-10); email from K&L Gates dated December 17, 2018 (Tr. Mot. Ex. 11, M. Adv. Dkt. 190-11); redacted emails exchanged between K&L Gates and Jones Walker on February 10-11, 2019 (Tr. Mot. Exs.

12-13, M. Adv. Dkt. 190-12, 190-13), February 27, 2019 (Tr. Mot. Ex. 14, M. Adv. Dkt. 190-14), March 1, 2019 (Tr. Mot. Exs. 15-17, M. Adv. Dkt. 190-15, 190-16, 190-17), March 2, 2019 (Tr. Mot. Ex. 18, M. Adv. Dkt. 190-18), March 4, 2019 (Tr. Mot. Exs. 190-20, M. Adv. Dkt. 190-19, 190-20), March 5, 2019 (Tr. Mot. Exs. 21-24, M. Adv. Dkt. 190-21, 190-22, 190-23, 190-24); March 6, 2019 (Tr. Mot. Ex. 25, M. Adv. Dkt. 190-25), March 7, 2019 (Tr. Mot. Ex. 26, M. Adv. Dkt. 190-26), March 8, 2019 (Tr. Mot. Ex. 27, M. Adv. Dkt. 190-27), March 10, 2019 (Tr. Mot. Ex. 28, M. Adv. Dkt. 190-28), March 22, 2019 (Tr. Mot. Ex. 29-30, M. Adv. Dkt. 190-29, 190-30), March 24, 2019 (Tr. Mot. Ex. 31, M. Adv. Dkt. 190-31), March 26, 2019 (Tr. Mot. Ex. 32, M. Adv. Dkt. 190-32), March 29, 2019 (Tr. Mot. Ex. 33, M. Adv. Dkt. 190-33), March 31, 2019 (Tr. Mot. Ex. 34, M. Adv. Dkt. 190-34); and April 3, 2019 (Tr. Mot. Ex. 35, M. Adv. Dkt. 190-35); an email from K&L Gates to Liston dated May 25, 2020 (Tr. Mot. Ex. 36, M. Adv. Dkt. 190-36); excerpts from the transcript of the deposition of Kevin French ("French") on June 10, 2020 (Tr. Mot. Ex. 37, M. Adv. Dkt. 190-37); and excerpts from the transcript of the deposition of Billy Lawder ("Lawder"), On-Site Fuel Service's chief operating office, on May 26, 2020 (Tr. Mot. Ex. 38, M. Adv. Dkt. 190-38).

The Trustee redacted twenty-nine (29) of these exhibits "[o]ut of an abundance of caution" based upon the contention of the Capitala Defendants that they share with the Trustee a common-interest based attorney-client and/or work product privilege. (M. Adv. Dkt. 192). The Trustee filed the Trustee's Motion for *In Camera* Submission of Redacted Exhibits (the "Motion for *In Camera* Submission") (M. Adv. Dkt. 192), seeking the Court's permission to submit these exhibits in their unredacted form for the Court's *in camera* inspection.

The Trustee filed the Trustee's Motion for Expedited Hearing on Trustee's Motion to Disqualify K&L Gates, LLP as Counsel for Capitala Defendants (the "Motion to Expedite") (M.

Adv. Dkt. 193) on June 15, 2020. After a telephonic hearing held on June 17, 2020, the Court entered an order granting the Motion to Expedite, setting the date of the Hearing, and imposing a deadline of July 6, 2020 for the Capitala Defendants to file a response to the Motion to Disqualify. (M. Adv. Dkt. 200). In that same order, the Court set a deadline of June 26, 2020 for the parties to engage in discovery limited to the issues raised in the Motion to Disqualify. The Court also scheduled a hearing on the Motion for *In Camera* Submission on the same date as the Hearing on the Motion to Disqualify. Finally, the Court instructed the Trustee to deliver to the Court the exhibits attached to the Motion to Disqualify in their unredacted form in a sealed envelope by July 12, 2020. (M. Adv. Dkt. 200).

The Trustee attached eight (8) exhibits to the Trustee's Reply filed on July 10, 2010, referred to as "Trustee's Reply Exhibits 1-8," as follows: excerpts from the transcript of the deposition of McGlinn on June 29, 2020 (Tr. Reply Ex. 1, M. Adv. Dkt. 287-1); redacted invoices of K&L Gates dated December 15, 2017, September 18, 2018, December 26, 2018, May 23, 2019, and December 18, 2019 (Tr. Reply Ex. 2, M. Adv. Dkt. 287-2); a letter from K&L Gates to Liston dated June 26, 2020 (Tr. Reply Ex. 3, M. Adv. Dkt. 287-3); informal transcript of On-Site Fuel Service's meeting of creditors (Tr. Reply Ex. 4, M. Adv. Dkt. 287-4); excerpts from the transcript of the deposition of the Trustee on June 25, 2020 (Tr. Reply Ex. 5, M. Adv. Dkt. 287-5); Trustee Eileen N. Shaffer's Answers/Responses to the Capitala Defendants' Revised Interrogatories and Requests for Production of Documents (the "Trustee's Discovery Responses") (Tr. Reply Ex. 6, M. Adv. Dkt. 287-6); emails from Jones Walker dated May 21, 2020 (Tr. Reply Ex. 7, M. Adv. Dkt. 287-7); and emails exchanged between Liston and K&L Gates dated May 26, 2020 (Tr. Reply Ex. 8, M. Adv. Dkt. 287-8).

On July 10, 2020, the Trustee hand-delivered to the Court in a sealed envelope unredacted versions of all redacted exhibits attached either to the Motion to Disqualify or the Trustee's Reply with one exception. The Trustee did not produce an unredacted version of Trustee Motion Exhibit 8, described as Baker Donelson emails dated October 25, 2018 and October 31, 2018 (Tr. Mot. Ex. 8, M. Adv. Dkt. 190-8). According to Liston, the Trustee was never provided an unredacted version of Trustee Motion Exhibit 8.

The Court entered the Agreed Order Granting Trustee's Motion for *In Camera* Submission of Redacted Exhibits (M. Adv. Dkt. 316) on July 17, 2020. Accordingly, the Court has available the unredacted versions of the Trustee Motion Exhibits and the Trustee's Reply Exhibits with the sole exception of Trustee Motion Exhibit 8.

2. Exhibits of Capitala Defendants

The Capitala Defendants filed the Capitala Response on July 6, 2020. They attached two exhibits to the Capitala Response, as follows: the Unsworn Declaration under Penalty of Perjury (Pursuant to 28 U.S.C. § 1746) of John C. Harrison (the "Harrison Declaration") (M. Adv. Dkt. 272-1) and the Declaration of James A. Wright III in Opposition to Trustee's Motion to Disqualify K&L Gates LLP as Counsel for Capitala Defendants (the "Wright Declaration") (M. Adv. Dkt. 272-2). In further support of the Capitala Response, the Capitala Defendants filed the Pawlowski Certification to which they attached ten (10) exhibits, referred to as "Capitala Exhibits A-J," as follows: excerpts from the transcript of the deposition of the Trustee on June 25, 2020 (Cap. Ex. A, M. Adv. Dkt. 273-1); excerpts from the transcript of the deposition of McGlinn on June 29, 2020 (Cap. Ex. B, M. Adv. Dkt. 273-2); excerpts from the transcript of the deposition of French on June 10, 2020 (Cap. Ex. C, M. Adv. Dkt. 273-3); redacted emails exchanged among Baker Donelson and On-Site Fuel Service (Cap. Ex. D, M. Adv. Dkt. 273-4); redacted invoice for legal

services performed by K&L Gates in connection with On-Site Fuel Service's lease of office space in Alpharetta, Georgia and a related insurance issue (Cap. Ex. E, M. Adv. Dkt. 273-5); excerpts from the transcript of the deposition of French on June 4, 2020 (Cap. Ex. F, M. Adv. Dkt. 273-6); excerpts from the transcript of the deposition of Prentiss on May 5, 2020 (Cap. Ex. G, M. Adv. Dkt. 273-7); a chart prepared by counsel for Capitala indicating when certain unredacted documents were available to the Trustee (Cap. Ex. H, M. Adv. Dkt. 273-8); the Trustee's Discovery Responses (Cap. Ex. I, M. Adv. Dkt. 273-9); and a chart prepared by counsel for Capitala indicating the depositions scheduled and completed since the Trustee filed the Motion to Disqualify (Cap. Ex. J, M. Adv. Dkt. 273-10).

The Capitala Defendants filed the Capitala Defendants' Motion for Leave to File Under Seal Certain Documents in Support of Opposition to Trustee's Motion to Disqualify K&L Gates LLP as Counsel for the Capitala Defendants and, in the Alternative, Motion for Administrative De-Consolidation of the Adversary Proceedings (M. Adv. Dkt. 278), in which the Capitala Defendants sought permission to file two exhibits under seal: Capitala Exhibit D, emails exchanged among Baker Donelson and On-Site Fuel Service (Cap. Ex. D, M. Adv. Dkt. 273-4) and Capitala Exhibit E, an invoice for legal services performed by K&L Gates in connection with On-Site Fuel Service's lease of office space in Alpharetta, Georgia and a related insurance issue (Cap. Ex. E, M. Adv. Dkt. 273-5). The parties subsequently agreed that the filing of Capitala Exhibits D and E would not constitute a waiver by the Capitala Defendants of undisclosed communications or information that may be privileged. Consistent with that agreement, the Court entered the Agreed Order Denying Motion for Leave to File Under Seal Certain Documents in Support of Opposition to Trustee's Motion to Disqualify K&L Gates LLP as Counsel for the Capitala Defendants and, in the Alternative, Motion for Administrative De-Consolidation of the

Adversary Proceedings (M. Adv. Dkt. 299) on July 14, 2020. The Capitala Defendants filed unredacted copies of Capitala Exhibit D (M. Adv. Dkt. 300) and Capitala Exhibit E (M. Adv. Dkt. 301) on July 14, 2020.

That same day, the Capitala Defendants filed the Capitala Defendants' Motion for Leave to File Supplemental Exhibits to Certification of Robert F. Pawlowski (M. Adv. Dkt. 297), seeking permission to file two supplemental exhibits. The Court entered the Agreed Order Granting Motion for Leave to File Supplemental Exhibits to Certification of Robert F. Pawlowski (M. Adv. Dkt. 302) on July 15, 2020. The Capitala Defendants filed Capitala Exhibit K, excerpts from the transcript of the deposition of Byrd on July 7, 2020 (Cap. Ex. K, M. Adv. Dkt. 303), and Capitala Exhibit L, the OFS Management Presentation on Mansfield Strategic Alliance (the "OFS Management Presentation") (Cap. Ex. L, M. Adv. Dkt. 304). The Court has unredacted versions of the Capitala Defendants' exhibits.

3. Summary of Exhibits

In summary, the Trustee filed a total of 46 exhibits, Trustee Motion Exhibits 1-38 and Trustee's Reply Exhibits 1-8. In general, these exhibits consist of: bankruptcy schedules; a series of emails between K&L Gates and McGlinn, K&L Gates and Jones Walker, and K&L Gates and Liston, as well as emails from Baker Donelson, K&L Gates, and Jones Walker; excerpts from the transcript of the depositions of French, Lawder, McGlinn, and the Trustee; invoices of K&L Gates; a letter from K&L Gates to Liston; a transcript of On-Site Fuel Service's meeting of creditors; and the Trustee's Discovery Responses. The Capitala Defendants submitted a total of 14 exhibits, the Harrison Declaration, the Wright Declaration, and Capitala Exhibits A-L, consisting of: excerpts from the transcript of the depositions of McGlinn, French, Prentiss, and Byrd; a series of emails between Baker Donelson and On-Site Fuel Service; an invoice of K&L Gates; charts summarizing

the availability of certain documents and the dates of depositions; and the OFS Management Presentation.

Discussion

Disqualification of counsel "is an extreme remedy that will not be imposed lightly." *Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 646 F.2d 1020, 1025 n.6 (5th Cir. 1981). Because disqualification abrogates the right of a party to his counsel of choice, courts do not apply disqualification rules "mechanically" but consider "[a]ll of the facts particular to a case . . . in the context of the relevant ethical criteria and with meticulous deference to the litigant's rights." *F.D.I.C. v. U.S. Fire Ins. Co.*, 50 F.3d 1304, 1314 (5th Cir. 1995). The comment to Mississippi Rule 1.7 states that although opposing counsel may bring a conflict-of-interest question before a court "[w]here the conflict is such as clearly to call in question the fair or efficient administration of justice, . . . [s]uch an objection should be viewed with caution . . . for it can be misused as a technique for harassment." MISS. R. PROF'L CONDUCT r. 1.7 cmt. "A disqualification inquiry, particularly when instigated by an opponent, presents a palpable risk of unfairly denying a party the counsel of his choosing. Therefore, notwithstanding the fundamental importance of safeguarding popular confidence in the integrity of the legal system, attorney disqualification . . . is a sanction that must not be imposed cavalierly." *U.S. Fire Ins.*, 50 F.3d at 1316 (observing that the opposing party's "tortured justification for disqualification . . . premised on a purported possible conflict of interest sometime in the future, suggests not so much a conscientious professional concern for the profession and the client of the opposing counsel as a tactic designed to delay and harass.").

A. Standard to Disqualify

Because motions to disqualify are substantive motions, they are resolved by applying standards developed under federal law. *In re Dresser Indus., Inc.*, 972 F.2d 540, 543 (5th Cir. 1992). In evaluating such motions, federal courts are guided by state and national ethical standards. *See In re Am. Airlines*, 972 F.2d 605, 610 (5th Cir. 1992). Accordingly, the Mississippi Rules and the ABA Model Rules of Professional Conduct (the "Model Rules") are both relevant to the Court's resolution of the disqualification issue. *Id.* at 615. As noted previously, the Trustee seeks to disqualify K&L Gates from representing the Capitala Defendants in the Consolidated Adversaries under Rules 1.9 and 1.10 of the Mississippi Rules. Rule 1.9 provides in pertinent part:

> A lawyer who has formerly represented a client in a manner shall not thereafter:
>
> (a) represent another in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
>
> (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

MISS. R. PRO'F. CONDUCT r. 1.9. Mississippi Rule 1.9 does not differ materially from corresponding Model Rule 1.9, and, thus, the Court's analysis is the same for both.

In the Fifth Circuit, a party seeking to disqualify an attorney or law firm on the ground of a former representation under Rule 1.9 "must establish two elements: (1) an actual attorney-client relationship between the moving party and the attorney he seeks to disqualify and (2) a substantial relationship between the subject matter of the former and present relationships." *See American Airlines*, 972 F.2d at 614. If both elements are established, then an irrebuttable presumption arises that the attorney obtained confidential information while employed by the law firm that represented the party moving for disqualification. *Id.* "A second irrebuttable presumption is that

confidences obtained by an individual lawyer will be shared with the other members of his firm." *Id*. at 614 n.1. For that reason, Mississippi Rule 1.10 prohibits lawyers associated in a firm from knowingly representing a client when any one of them is prohibited from doing so by Mississippi Rule 1.9.

Here, the parties dispute both elements of the *American Airlines* test. The Court first turns to whether an actual attorney-client relationship existed between K&L Gates and On-Site Fuel Service and, if so, then considers whether a substantial relationship exists between K&L Gates's former representation of On-Site Fuel Service and the Consolidated Adversaries.

B. Alleged Former Attorney-Client Relationship Between K&L Gates & On-Site Fuel Service

With respect to the four legal matters in question, K&L Gates contends that its client was Capitala—in its role as an indirect equity investor in, and a direct secured creditor of, On-Site Fuel Service—and also On-Site Fuel Holdings—the non-debtor parent company of On-Site Fuel Service—but only with respect to the negotiation of the SAA and TPA. In contrast, the Trustee argues that K&L Gates formerly represented On-Site Fuel Service in all four legal matters, which are substantially related to the Consolidated Adversaries, and, therefore, the Trustee is a former client of K&L Gates because she stands in the shoes of On-Site Fuel Service. *In re Cabe & Cato, Inc.*, 524 B.R. 870, 882 (Bankr. N.D. Ga. 2014).

The existence of an attorney-client relationship is controlled by state law. *Hopper v. Frank*, 16 F.3d 92, 95 (5th Cir. 1994). In Mississippi,[13] an attorney-client relationship exists when: (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services; and (2)(a) the lawyer manifests to the person consent to do so, or (b) fails to manifest lack of consent to do

[13] For purposes of the Motion to Disqualify, the parties assume that Mississippi law applies with respect to the creation of the alleged attorney-client relationship, and so this Court does too.

so, knowing that the person reasonably relies on the lawyer to provide the services. *Singleton v. Stegall*, 580 So. 2d 1242, 1244 n.2 (Miss. 1991) (quoting *Restatement of the Law: The Law Governing Lawyers* § 26 (Prelim. Draft No. 6, July 25, 1990)); *see Crews & Assocs. v. City of Port Gibson*, No. 5:14-cv-37-DCB-MTP, 2014 WL 6069320, at *2 (S.D. Miss. Nov. 13, 2014) ("Mississippi courts have found that an attorney-client relationship can arise when the elements are less discrete."). The Mississippi Supreme Court has held that "the existence of a professional, attorney-client relationship is fact specific." *Baker Donelson Bearman Caldwell & Berkowitz, P.C. v. Seay*, 42 So. 3d 474, 487 n.28 (Miss. 2010). The Fifth Circuit has noted that the test for establishing the existence of an attorney-client relationship in Mississippi can be difficult to apply although the formula at first blush appears to be simple. *Hopper*, 16 F.3d at 95.

Applying Mississippi law, the district court in *Hood v. Central United Life Ins. Co.* No. 2:07-CV-00164-MPM, SAA, 2008 WL 2593787 (N.D. Miss. June 27, 2008), explained that "[t]he [attorney-client] relationship is not formed by passivity; rather it comes about by the actions of *both* the client and the attorney. The client must request the services of the attorney, and the attorney must assent in order for the relationship to exist." *Id*. at *1. The comments to the *Third Restatement of the Law Governing Lawyers* provide some insight. "A client's manifestation of intent that a lawyer provide legal services to the client may be explicit" or "may be manifest from surrounding facts and circumstances." RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 14, comment c (AM. LAW INST. 2000). The comments also provide an example of a situation that would not give rise to the attorney-client relationship—"the fact of receiving some benefit of the lawyer's service, for example when the lawyer represents a co-party." *Id.*

Pursuant to the *Singleton* test, the issue before the Court depends on whether On-Site Fuel Service, through its authorized officers, made it known to K&L Gates an "intent that it provide

legal services" to On-Site Fuel Service and whether K&L Gates either agreed to provide legal services to On-Site Fuel Service or did not refuse to provide legal services knowing that On-Site Fuel Service's officers would still rely on K&L Gates. The Trustee bears the burden of proof. *American Airlines*, 972 F.2d at 614. To establish the existence of an attorney-client relationship, the Trustee relies on evidence of On-Site Fuel Service's payment of K&L Gates's legal fees, K&L Gates's emails and invoices, and K&L Gates's former representation of On-Site Fuel Holdings. The Court considers each separately but pauses briefly here to address K&L Gates's argument that the absence of a written employment agreement supports its position that no attorney-client relationship existed.

1. Absence of Written Employment Agreement Between K&L Gates & On-Site Fuel Service

There is no formal written agreement establishing an attorney-client relationship between On-Site Fuel Service and K&L Gates. In the Wright Declaration, Wright testified that his review of K&L Gates's internal records revealed that On-Site Fuel Service has never signed an engagement letter with K&L Gates. (Wright Dec. ¶ 7, M. Adv. Dkt. 272-2). Moreover, the record shows that Baker Donelson represented On-Site Fuel Service before the filing of the Involuntary Petition, and Jones Walker did so afterwards during the Involuntary Proceeding.

The Trustee points out that even in the absence of a written employment agreement an attorney-client relationship in Mississippi may be created implicitly by conduct manifesting such an intention. The Trustee cites two cases applying Mississippi law where there was no written employment agreement but where both courts, according to the Trustee, found that "legal assistance" amounted to "legal representation." In *Seay*, the Mississippi Supreme Court held that an attorney-client relationship existed between lifelong friends because the attorney opened a "pro bono" file, attended his friend's deposition, and wrote a letter to his friend's former employer

referring to himself as his friend's counsel. 42 So. 3d at 485. Similarly, in *Snider v. L-3 Commc'ns Vertex Aerospace, LLC*, 3:09-cv-704-HTW-LRA, 2016 WL 3648281 (S.D. Miss. Mar. 15, 2016), the federal district court found that an attorney-client relationship existed because the attorney edited a factual narrative that his friend used as the basis for a complaint and also provided his friend with legal authority to support her employment discrimination claims.

The Court agrees with the Trustee that the "manifestation" test under Mississippi law does not require proof of a written employment agreement as demonstrated by the holdings in *Seay* and *Snider*. Moreover, K&L Gates's admission at the Hearing that it was unable to locate in its files an employment agreement with its client, On-Site Fuel Holdings, shows that the firm did not always require a formal agreement before providing legal services to a client. Thus, the absence of such an agreement with On-Site Fuel Service does not support K&L Gates's position. Additionally, the Court finds that the representation of On-Site Fuel Service by Baker Donelson and Jones Walker does not preclude the possibility that K&L Gates also may have served as On-Site Fuel Service's counsel.

2. On-Site Fuel Service's Payment of K&L Gates's Legal Fees

The Trustee argues that On-Site Fuel Service's payment of K&L Gates's fees for legal services—both pre-Involuntary Petition and in the Gap Period—establish the existence of an attorney-client relationship. The Trustee cites McGlinn's testimony that "we have got years of history of On-Site paying K&L Gates legal bills on behalf of Capital South, you know, all the way back to the closing of the transaction back in 2011." (McGlinn Dep. at 240, Tr. Reply Ex. 1, M. Adv. Dkt. 287-1). Moreover, the Trustee relies on an email with an attached invoice showing that On-Site Fuel Service paid K&L Gates at least $42,964.81 before the date of the Involuntary Petition. (Tr. Mot. Ex. 1, M. Adv. Dkt. 190-1). In addition, the Trustee relies on On-Site Fuel

Service's bankruptcy schedules that indicate that $208,932.72 was paid to K&L Gates by On-Site Fuel Service during the Gap Period and that $50,000.00 of the sale proceeds from Diesel Direct also was paid to K&L Gates. (Tr. Mot. Exs. 2-3, M. Adv. Dkt. 190-2, 190-3; Bankr. Dkt. 229).

K&L Gates argues that On-Site Fuel Service's payment of K&L Gates's legal fees does not establish the existence of an attorney-client relationship *per se* and that the payments can be explained. On May 12, 2018, On-Site Fuel Service, Capitala, and Harbert entered into the Twelfth Amendment to Subordinated Note Purchase Agreement and Consent (the "Amendment") (Bankr. Cl. 51-1). The Amendment includes a written consent to the option acquired by Mansfield in the SAA and also includes a provision in which On-Site Fuel Service agreed to pay Capitala's reasonable fees and expenses "in connection with the preparation, execution and delivery of this Amendment, including the reasonable fees and expenses of [Capitala's] legal counsel." (Bankr. Cl. 51-1 pt. 2 at 75). K&L Gates argues that this provision covered work performed by K&L Gates reviewing the SAA for Capitala. (M. Dkt. 272 at 6). K&L Gates relies on the deposition testimony of McGlinn and French for the proposition that the payment of attorney's fees is a "standard practice in the private equity sector." (McGlinn Dep. at 198-99, Cap. Ex. B, M. Adv. Dkt. 273-2; French Dep. at 324, Cap. Ex. C, M. Adv. Dkt. 273-3). McGlinn testified:

> Q. Were you aware—On-Site has to pay for Capitala's legal bills?
>
> A. I don't know specifically. I know we have it in our docs, so we could go reference it.
>
> Q. You sound very confident about that, and I'm just wondering if you can point me to that.
>
> A. I just said we have it in our docs all the time. That's a standard term. I don't think we have ever done a deal where that wasn't in our loan docs.
>
> Q. Are you talking about the note purchase agreement?
>
> A. Yes. I'm sure we could look it up.

(McGlinn Dep. at 199, Cap. Ex. B, M. Adv. Dkt. 273-2). French similarly testified:

> Q. Greg Nethery, the former CEO and founder, was also a 30 percent shareholder; is that right?
>
> A. Yes.
>
> Q. And was he suing Capitala and Harbert alleging that they were conspiring to freeze him out of the company? Was that your understanding?
>
> A. Yes.
>
> Q. Can you explain why K&L Gates was billing On-Site for work on the Nethery matter?
>
> A. It's like I said, I mean, it was work in connection with On-Site, I mean, and related to the portfolio companies and/or people related to the portfolio companies always gets passed. So that's a standard practice in private equity and/or–that happens all the time, so there was nothing out of the ordinary on that.

(French Dep. at 324, Cap. Ex. C, M. Adv. Dkt. 273-3).

The Trustee contends that whether On-Site Fuel Service paid K&L Gates's fees pursuant to a preexisting credit arrangement with Capitala or not "makes little difference." The Trustee's contention, however, is inconsistent with *Singleton*, where the Mississippi Supreme Court held that the payment of legal fees does not establish an attorney-client relationship *per se*. *Singleton*, 580 So. 2d at 1244; *see Gold v. LaBarre*, 455 So. 2d 739, 748 (Miss. 1984). Indeed, K&L Gates's invoices may have been paid by On-Site Fuel Service, but they were addressed to the attention of Joe A. Alala ("Alala"), board chairman of Capitala, at "Capital South Partners Funds" in North Carolina (Tr. Mot. Ex. 1, M. Adv. Dkt. 190-1; Tr. Reply Ex. 2, M. Adv. Dkt. 287-2), including the invoice in the amount of $42,964.81 (Tr. Mot. Ex. 1, M. Adv. Dkt. 190-1), except for one invoice addressed to Alala at "On-Site Fuel Holdings, Inc. c/o CapitalSouth Partners, LLC" (Tr. Reply Ex. 2 at 1, M. Adv. Dkt. 287-2). For this reason, and in light of On-Site Fuel Service's agreement

to pay Capitala's fees in the Amendment and the testimony of McGlinn and French, the Court finds that On-Site Fuel Service's payment of fees to K&L Gates does not constitute evidence of the existence of an attorney-client relationship between On-Site Fuel Service and K&L Gates.[14]

3. K&L Gates's Emails & Jones Walker's Timesheets

The Trustee contends that numerous emails and timesheets demonstrate that an implicitly created attorney-client relationship existed between K&L Gates and On-Site Fuel Service with regard to the negotiation and drafting of the SAA, the TPA, the termination letter to Mansfield, the APA, and/or the defense of the Involuntary Proceeding. According to the Trustee, the manifestation of an attorney-client relationship occurred each time that McGlinn, as On-Site Fuel Service's board chairman, asked K&L Gates to perform legal services and K&L Gates, in turn, performed those legal services.

a. Negotiation of SAA & TPA

The Trustee argues that K&L Gates drafted or revised the SAA and TPA at issue in the Consolidated Adversaries even though Capitala was not a party to either contract. The Trustee attributes the creation of an attorney-client relationship between K&L Gates and On-Site Fuel Service to the different "hats" worn by McGlinn, one "hat" as a Capitala officer and the other "hat" as the chairman of On-Site Fuel Service's board of directors. According to the Trustee, on multiple occasions McGlinn solicited K&L Gates's legal advice and services for On-Site Fuel Service's benefit that gave rise to an attorney-client relationship.

The Trustee contends that an email exchange dated September 11, 2017 between McGlinn and Rick Giovannelli ("Giovannelli"), a K&L Gates attorney, reflects that K&L Gates represented

[14] Whether all of the fees paid by On-Site Fuel Service were for services covered by the Amendment is a question of contract interpretation that is not before the Court.

On-Site Fuel Service regarding the "On-Site Fuel Special Committee Matter" and the "Draft Term Sheet-Strategic Alliance Acquisition Option Agreement." (Tr. Mot. Ex. 4, M. Adv. Dkt. 190-4). The Trustee alleges that K&L Gates continued to advise On-Site Fuel Service regarding the SAA, as evidenced in an email to McGlinn dated October 30, 2017, in which Giovannelli provides an analysis of the "MOC/On-Site—Strategic Alliance and Acquisition Option Agreement, APA and LOI." (Tr. Mot. Ex. 5, M. Adv. Dkt. 190-5). In an email dated October 31, 2017, Giovannelli then shared his legal analysis of the SAA with French, On-Site Fuel Service's chief executive officer. The Trustee views this email as direct evidence that K&L Gates provided legal services to On-Site Fuel Service. (Tr. Mot. Ex. 6, M. Adv. Dkt. 190-6). The Trustee contends that French, in his deposition testimony, recognized that K&L Gates performed legal work for On-Site Fuel Service. (French Dep. at 320-24, Tr. Mot. Ex. 37, M. Adv. Dkt. 190-37). French, when asked about an email from McGlinn on December 14, 2017 requesting payment of an invoice from K&L Gates to "Capital South Partners Funds," testified:

> Q. Do you know who K&L [Gates] is?
>
> A. Yes, K&L Gates was the law firm that Capitala used for legal work.
>
> Q. Did the K&L Gates firm also do work for On-Site?
>
> A. They did mostly work for Capitala. Most of our general counsel was through Baker Donelson and Robert Walker.
>
> Q. Did K&L Gates perform legal services for On-Site?
>
> A. Yes. It was normal for issues that involved On-Site or any of the portfolio companies from Capitala, that they would pass along those expenses to the portfolio company, and that's what this is. They had been accruing—you know, K&L Gates had maybe not invoices or accrued for a period of time and then our portion of the work that they worked on for On-Site was sent to us. So we were just trying to get it in and go from there.

(French Dep. at 321-22, Tr. Mot. Ex. 37, M. Adv. Dkt. 190-37). Moreover, the Trustee relies on an email dated May 10, 2018 from another K&L Gates attorney, Tricia Argentine, to show that K&L Gates drafted the TPA and circulated the draft to McGlinn for execution by On-Site Fuel Service. (Tr. Mot. Ex. 7, M. Adv. Dkt. 190-7).

In support of her arguments, the Trustee cites *Kirschner v. K&L Gates LLP*, 46 A.3d 737 (Pa. Super. Ct. 2012), a legal malpractice case where a state court found that K&L Gates's provision of legal services at the request of a corporate fiduciary created an attorney-client relationship. There, K&L Gates was hired by a "special committee" comprised of three members of the board of directors of Le-Nature's, Inc. ("Le-Nature's") to investigate suspected fraudulent activity by its chief executive officer. The retention agreement disclaimed any attorney-client relationship between K&L Gates and Le-Nature's. K&L Gates issued a report finding no evidence of fraud. Several of Le-Nature's creditors initiated an involuntary bankruptcy proceeding, and the bankruptcy court later confirmed a chapter 11 plan that created a liquidation trust and appointed a liquidating trustee. The liquidating trustee uncovered a massive fraud perpetrated by the chief executive officer and other insiders and sued K&L Gates in state court for legal malpractice in failing to detect the fraud during its investigation. The state trial court dismissed the trustee's claim on the ground that K&L Gates was retained by the special committee to protect the interests of the investors and not by Le-Nature's. On appeal, the state court reversed, holding that the attorney-client relationship was formed because of the fiduciary duties that the special committee owed to Le-Nature's and K&L Gates's performance of services intended to benefit the corporation. The Trustee contends that from *Kirschner*, K&L Gates was aware that providing legal services at the request of a corporate fiduciary would manifest an intent to create an attorney-client relationship with On-Site Fuel Service. (M. Adv. Dkt. 287 at 3).

The Trustee also cites *Cabe & Cato, Inc.*, where the bankruptcy court disqualified the law firm of Burr & Forman ("B&F") from representing the owners of the corporate debtor, Cabe & Cato, Inc. and Turnkey ATM Solutions, Inc. ("Turnkey") after concluding that the firm previously had represented Cabe & Cato, Inc. in a substantially related matter. *Cabe & Cato, Inc.*, 524 B.R. at 874-75. B&F's legal work consisted of forming Turnkey and drafting a bill of sale conveying Cabe & Cato, Inc.'s assets to Turnkey. After unsuccessfully attempting to settle Cabe & Cato, Inc.'s fraudulent transfer avoidance claims against B&F, the owners of Cabe & Cato, Inc., and Turnkey, the chapter 7 trustee moved to disqualify B&F. The bankruptcy court granted the motion based on a finding "that the matters in this bankruptcy case and related adversary proceeding are substantially related." *Id*. at 885.

K&L Gates concedes that it provided legal advice about the SAA and the TPA but insists that it did so only as counsel to Capitala and On-Site Fuel Holdings to safeguard: (1) Capitala's interests as an investor and a secured creditor to On-Site Fuel Service and (2) On-Site Fuel Holdings' interests as 100% direct equity owner of On-Site Fuel Service. With respect to its representation of Capitala and On-Site Fuel Holdings, K&L Gates asserts that it communicated almost exclusively with McGlinn in his role as Capitala's senior managing director but admits that on occasion, McGlinn included French, then On-Site Fuel Service's chief executive officer, in his communications with K&L Gates. The purpose was to provide input and information concerning transactions from On-Site Fuel Service's perspective. K&L Gates relies on McGlinn's deposition testimony to show that those communications with French did not create an attorney-client relationship between K&L Gates and On-Site Fuel Service. McGlinn testified:

> Q: Okay . . . Do you recall communicating with Mr. Giovannelli about the proposed strategic alliance agreement with Mansfield with those communications occurring in the year 2017?

A: In 2017, year, I might—Yes, I probably had conversations with him there just kind of strategically about how that might work within our—within our debt framework, you know, and how that—how that could work out.

Q: Okay. And do you recall that, at some point in those communications, you included Mr. Kevin French, who was then CEO of On-Site, in the communications with you and Mr. Giovannelli about the strategic alliance agreement?

A. Again, without showing me specifically what you're referring to, I mean, it wouldn't surprise me if I had Kevin involved in conversations, whether it was with Robert Walker with Baker Donelson or with K&L Gates.

But, again, it was important for Kevin who was negotiating the deal with Doug Haugh at Mansfield that he understood, you know, some of the –some of the limitations that would involve the lenders when it came to approving a deal.

Q: Okay. Do you recall Mr. Giovannelli reviewing the term sheet for the strategic alliance?

A: Yes, I do recall that I asked him to review the agreement, again, as part of the, you know—as the lenders would have to sign off on that deal, specifically because the –you know, in that case the option price was below the total amount of debt held by the secured lenders, so that would kind of doubly need approval from the lenders. So, again, if it was done, it was done in that vein—done in that vein.

* * * *

Q: Okay. . . . Do you have a recollection of anyone from the K&L Gates law firm working on the tri-party agreement between On-Site, Mansfield, and PNC Bank?

A: Yes, same kind of arrangement, the lenders had to sign—the lender, specifically Capital South in this case, had to sign off on that agreement so K&L Gates was reviewing the document that was prepared by PNC.

(McGlinn Dep. at 227-29, Cap. Ex. B, M. Adv. Dkt. 273-2).

The Court finds that the Trustee's argument as to K&L Gates's involvement in the negotiation of the SAA and TPA is premised on the assumption that McGlinn acted as On-Site Fuel Service's board chairman when he asked K&L Gates to review the SAA and, furthermore,

that McGlinn did so with the intent that K&L Gates act as counsel for On-Site Fuel Service. As the Trustee has acknowledged, however, McGlinn wore more than one "hat" during these negotiations, and McGlinn testified that he asked K&L Gates to review the documents on behalf of Capitala, not On-Site Fuel Service. Although Capitala was not a party to the SAA and TPA, its interest in the strategic alliance as an investor and/or secured creditor is undisputed. Moreover, Harrison's understanding of K&L Gates's role in the negotiation of the strategic alliance is consistent with McGlinn's. Harrison testified, "I understood K&L Gates LLP's clients with respect to all matters involving On-Site were solely the Capitala Defendants and later, also Jack McGlinn in this proceeding." (Harrison Dec. ¶ 13, M. Adv. Dkt. 272-1). Also, McGlinn aptly explained why he shared K&L Gates's legal analysis with French. For these reasons, the Court does not find that the emails manifest an intent by McGlinn to establish an attorney-client relationship between K&L Gates and On-Site Fuel Service or that they manifest an intent by K&L Gates to provide legal services to On-Site Fuel Service.

The Court, moreover, disagrees with the Trustee's description of French's deposition testimony as recognizing that K&L Gates performed legal work for On-Site Fuel Service. First, it is unclear whether the Trustee asked French if K&L Gates had performed legal services for On-Site Fuel Service or for On-Site Fuel Holdings since no attempt was made to distinguish between the two entities.[15] Second, French's answer "yes" appears to be an affirmation that On-Site Fuel Service paid K&L Gates's legal fees rather than an affirmation that K&L Gates provided legal services to On-Site Fuel Service because of what he says next: "It was normal for issues that

[15] Liston asked French, "Did K&L Gates perform legal services for On-Site?" (French Dep. at 321-22, Tr. Mot. Ex. 37, M. Adv. Dkt. 190-37). The excerpts from French's deposition, however, do not indicate whether the term "On-Site" was ever defined to refer to On-Site Fuel Service, On-Site Fuel Holdings, or both.

involved On-Site or any of the portfolio companies from Capitala, that [Capitala] would pass along those expenses." (French Dep. at 321-22, Tr. Mot. Ex. 37, M. Adv. Dkt. 190-37). Regardless, the relevancy of French's testimony is unclear because it is unknown from the record whether French, in addition to McGlinn, possessed the ability or authority to hire counsel for On-Site Fuel Service.

The Court finds that the cases cited by the Trustee, *Kirschner* and *Cabe & Cato, Inc.*, are distinguishable. In *Kirschner*, the state court found that Le-Nature's, acting through the special committee, sought K&L Gates's legal assistance and that the special committee had a fiduciary duty to act in the best interests of not only the shareholders but also the corporation under state law. K&L Gates indicated by its actions that it agreed to provide legal services to Le-Nature's by providing a draft of its report to the chief executive officer before presenting it to the special committee and attaching to its report a cover letter addressed to the board of directors summarizing its findings of no evidence of fraud. Unlike the special committee, Capitala owed no similar fiduciary duty to On-Site Fuel Service under state law. Moreover, K&L Gates communicated almost exclusively with McGlinn regarding the SAA and TPA. Also, the facts in *Cabe & Cato, Inc.* are distinguishable because B&F did not dispute the existence of an attorney-client relationship but argued that the substantial relationship did not apply in cases of prior joint representation.

The arrangement here is more analogous to the one at issue in *Hopper*. There, the majority shareholders of a limited partnership hired a law firm to prepare public offering documents for the partnership. *Hopper*, 16 F.3d at 95. The Fifth Circuit held that the law firm's work on the discrete project was for the partnership, not the individual shareholders. Although the shareholders were secondary beneficiaries of the attorney's work for the partnership, the shareholders were not clients and thus were not entitled to bring a malpractice claim against the law firm.

The Court notes that in the Trustee Adversary, the Trustee alleges that Capitala and Harbert exercised control over On-Site Fuel Service's assets and business decisions with the intent to harm On-Site Fuel Service and defraud its creditors. (Tr. Adv. Dkt. 27 ¶ 27). That allegation and others like it form the basis of the Trustee's equitable subordination claims against Capitala and Harbert under 11 U.S.C. § 510(c). Specifically, the Trustee contends that McGlinn, acting as the primary agent for the Capitala-Harbert joint venture, misrepresented On-Site Fuel Service's financial condition to Mansfield to persuade Mansfield to enter into the SAA and later entered into the APA that transferred On-Site Fuel Service's assets for inadequate consideration and assigned the sale proceeds to Capitala and Harbert. A recognized category of "inequitable conduct," one of the three elements of an equitable subordination claim, is the "claimant's use of the debtor as a mere instrumentality or alter ego." *Fabricators, Inc. v. Technical Fabricators (In re Fabricators, Inc.)*, 926 F.2d 1458, 1464-65, 1467 (5th Cir. 1991). For this reason, the Court finds that the Trustee's legal theory is more consistent with an attorney-client relationship where K&L Gates represented Capitala only and less so with an attorney-client relationship where K&L Gates represented both Capitala and On-Site Fuel Service jointly.

The Court also notes that the Motion to Disqualify does not appear to be based upon any real concern that confidential information will be shared. The Trustee alleges that counsel for K&L Gates used confidential information obtained during its prior alleged relationship with On-Site Fuel Service in cross-examining witnesses in depositions. (Tr.'s Disc. Resps., Tr. Reply Ex. 6 at 11-14, M. Adv. Dkt. 287-6). Specifically, the Trustee maintains that "despite the Trustee's lack of psychic ability, certain lines of questioning by the KLG attorney . . . in depositions conducted in these adversaries give rise to suspicion" that K&L Gates is drawing from a "bucket" of information learned in the course of its prior representation of On-Site Fuel Service. (*Id*. at

12). As an example, the Trustee cites to a deposition taken on May 26, 2020 when a K&L Gates attorney questioned Lawder about a conversation that he allegedly had with Byrd of Mansfield on October 19, 2018 regarding Capitala's disinterest in investing additional funds in On-Site Fuel Service. Another example cited by the Trustee is a deposition taken on May 5, 2020 when a K&L Gates attorney questioned Prentiss about Mansfield's purported obligation to provide On-Site Fuel Service with additional fuel volume. (*Id.*).

McGlinn's deposition testimony, however, indicates that Lawder's conversation with Byrd previously was known to Capitala. "[I]n both my conversation with Byrd on the 18th [of October 2018] and follow up conversations that Byrd had with Billy [Lawder] and Jared [Prentiss] on the 19th [of October 2018] that the investor group did not have an interest in putting more money in." (McGlinn Dep. at 96, Cap. Ex. B, M. Adv. Dkt. 273-2). Also, at the trial of the Involuntary Petition on March 11, 2019, McGlinn testified that he believed that additional fuel volume was part of the SAA. (Test. of McGlinn at 93-94, 168, Bankr. Dkt. 238).

Regardless, disqualifying K&L Gates in favor of different counsel will not remedy any concern about confidential information obtained by K&L Gates because McGlinn will continue to have all relevant information in his memory. Whoever represents McGlinn will necessarily have access to that information. K&L Gates could not have learned anything from On-Site Fuel Service that Capitala did not already know or have a right to know through McGlinn. *Brennan's Rests.*, 590 F.2d at 173.

Finally, the Court notes that the Motion to Disqualify is at odds with the Response to Derivative Standing Motion where the Trustee did not oppose the standing of Capitala III, "subject to approval of the Court," to pursue contract claims on her behalf arising out of Mansfield's alleged breach of the SAA. The Court nevertheless denied the Derivative Standing Motion, in part,

because of the conflict of interest that would arise if Capitala III and K&L Gates were allowed to pursue claims on behalf of the Trustee in the Mansfield Adversary while simultaneously defending the Trustee's equitable subordination claims in the Trustee Adversary. The Trustee now asks the Court to recognize an existing conflict of interest when she did not fully oppose the relief requested in the Derivative Standing Motion, which, if the Court had granted, would have created such a conflict.

b. On-Site Fuel Service's Termination Letter & APA

The Trustee alleges that an email dated October 31, 2018 from K&L Gates attorney Aaron S. Rothman ("Rothman") to McGlinn indicates that K&L Gates drafted On-Site Fuel Service's letter to Mansfield terminating the SAA. (M. Adv. Dkt. 191 at 6; Tr. Mot. Ex. 8, M. Adv. Dkt. 190-8). The Trustee also contends that K&L Gates was On-Site Fuel Service's principal attorney in negotiating and drafting the APA based on a string of emails dated October 27, 2018 from K&L Gates's attorneys Dale, Giovannelli, and Rothman to McGlinn providing legal advice and opinions regarding the "On-Site Capitala APA Draft." (Tr. Mot. Ex. 9, M. Adv. Dkt. 190-9). According to the Trustee, McGlinn admitted in his deposition that K&L Gates redlined the APA and the termination letter to Mansfield. (McGlinn Dep. at 149, Tr. Reply Ex. 1, M. Adv. Dkt. 287-1). The Trustee also points to the testimony of Lawder, On-Site Fuel Service's chief operating officer, as evidence that K&L Gates edited the APA. Lawder testified:

> Q. All right. So it says, "Per Jared's conversation with Bill, K&L [Gates] is redlining the doc to reflect that it's solely an asset purchase," etcetera. Did you know who K&L [Gates] is or was?
>
> A. Without it being referenced here, I don't recall.
>
> Q. Did you have any discussions with anybody at K&L [Gates]—with or at K&L [Gates] about the On-Site asset purchase agreement or transaction with Diesel Direct?

A. Not recalling who K&L [Gates] is, I don't recall if I had conversations with them specifically and what we discussed if we did.

(Lawder Dep. at 105-06, Tr. Mot. Ex. 38, M. Adv. Dkt. 190-38).

The Trustee cites *Nathan v. Shea (In re Marks & Georgens, Inc.)*, 199 B.R. 922 (E.D. Mich. 1996). There, an involuntary bankruptcy was filed after the debtor ceased operations and sold its assets to a third party. The chapter 7 trustee filed an adversary proceeding against the officers of the debtor and the third-party purchaser alleging that the sale was for less than reasonably equivalent value. The trustee then filed a motion to disqualify the law firm representing the officers in the adversary proceeding because the law firm formerly represented the debtor in connection with the challenged sale. "If permitted to represent [the majority shareholders, the firm] would have an unfair advantage over the trustee because of the information in its possession from the prior representation. Rule 1.9(a) prohibits such representation without regard to whether [the firm] actually possesses such information or has used it against their former client." *Id*. at 925.

K&L Gates asserts that when disputes arose between On-Site Fuel Service and Mansfield resulting in On-Site Fuel Service's shutdown and sale of assets to Diesel Direct in October of 2018, K&L Gates provided legal advice to Capitala, not On-Site Fuel Service, to protect its investment and interests as a secured creditor. Moreover, K&L Gates contends that McGlinn understood K&L Gates's role as shown by his deposition testimony:

Q: Was Mr. Dale [then a partner at K&L Gates] acting as On-Site's lawyer at this point?

* * *

A: No, he was—I mean, K&L Gates was a trusted advisor of Capitala. We have used them on numerous deals before and had a long-term relationship with them. We had—When things had—you know, when things had gone wrong, we knew we had to engage counsel and get them up to speed on

> what was going on and that each communication was going to be sent to them and that we needed advice on it.

(McGlinn Dep. at 126-27, Cap. Ex. B, M. Adv. Dkt. 273-2).

It is undisputed Walker has long served as On-Site Fuel Service's primary outside counsel, and the Court finds from the record that Walker and another partner at Baker Donelson, Adam H. Gates ("Gates"), represented On-Site Fuel Service in connection with the Mansfield termination letter and the sale of On-Site Fuel Service's assets to Diesel Direct. (French Dep. at 159-61, Cap. Ex. F, M. Adv. Dkt. 273-6; McGlinn Dep. at 60, 137, 148-49, Cap. Ex. B, M. Adv. Dkt. 273-2). On-Site Fuel Service's representation by Walker and Gates in these specific matters is shown in the same series of email relied upon by the Trustee to show K&L Gates's involvement. An email dated October 25, 2018 from Gates to Prentiss and Lawder indicates that Gates, not Rothman, drafted the termination letter. (Tr. Mot. Ex. 8; M. adv. Dkt. 190-8). In a subsequent email dated October 31, 2018 from Rothman to McGlinn, Rothman revises the draft at McGlinn's request. (*Id*.). As to the string of emails dated October 27, 2018, the initial email is dated October 26, 2018 from Bill McNamara ("McNamara") of Diesel Direct to Prentiss and McGlinn in which McNamara attaches the first draft of the APA for their review. (Tr. Mot. Ex. 9; M. Adv. Dkt. 190-9). In other words, the emails show that no K&L Gates attorney wrote the first draft of the APA as the Trustee claims. (M. Adv. Dkt. 191 at 6). In the string of emails dated October 27, 2018, K&L Gates attorneys discuss the draft of the APA only with McGlinn. The Court finds that these communications between McGlinn and K&L Gates attorneys regarding the termination letter and the APA are consistent with K&L Gates's sole representation of Capitala.

Another Baker Donelson attorney, C. Tyler Ball, who Walker described as a transactional lawyer, provided additional edits of the APA in a string of emails to McGlinn, Prentiss, and Lawder. On October 25, 2018, Prentiss emailed Walker asking him to review the draft APA. An

email dated October 31, 2018 demonstrates that Walker emailed the termination letter to Mansfield. (Cap. Ex. D, M. Adv. Dkt. 273-4). In other emails, Gates provides Prentiss and Lawder with drafts of a letter to On-Site Fuel Service's employees notifying them of On-Site Fuel Service's cessation of operations. In light of these email exchanges between attorneys at Baker Donelson and On-Site Fuel Service's officers, the Court rejects the Trustee's description of K&L Gates as On-Site Fuel Service's lawyer in these matters. The Court finds *Marks & Georgens, Inc.* unpersuasive because in that case there was no dispute that the law firm had represented the debtor previously. Instead, the issues were whether the substantial relationship test applied even though the law firm did not acquire any confidential information and, if the test did apply, whether the adversary was substantially related to the law firm's prior representation of the debtor.

Before filing the Motion to Disqualify, the Trustee failed to speak to or request files from On-Site Fuel Service's outside counsel, Walker at Baker Donelson. The Trustee testified at her deposition:

> Q: Before filing this disqualification motion, did you have any communication with a Robert Walker of the Baker Donelson firm?
>
> A: No, I did not.
>
> Q: Do you know who he is?
>
> A: No . . . I don't believe I've met him. I don't recall any conversations with him.
>
> Q: Do you know whether he represented On-Site?
>
> A: I don't know. I do know in the schedules that were filed with the court, there were payments made to Baker Donelson during I believe the gap period, but I don't know what his representation was.
>
> Q: You didn't investigate that?
>
> A: I have not, no.

(Tr. Dep. at 21, Cap. Ex. A, M. Adv. Dkt. 273-1). Missing from the record is Walker's answer to the question, "Who represented whom with respect to the termination letter and the APA?" Liston stated at the Hearing that he had spoken with Walker, but the content of their conversation was not revealed to the Court. Walker's testimony could have clarified the conflict-of-interest issue, but the Trustee, who bears the burden of proof, chose to rely on emails and deposition testimony that did not directly address the matter. (Tr. Dep. at 21, Cap. Ex. A, M. Adv. Dkt. 273-1).

c. Litigation of Involuntary Proceeding

The Trustee alleges that K&L Gates provided substantial legal assistance to On-Site Fuel Service in the Involuntary Proceeding even though only Johnson appeared as On-Site Fuel Service's counsel of record in the Bankruptcy Case before the entry of the Order for Relief. (McGlinn Dep. at 169-70, Tr. Reply Ex. 1, M. Adv. Dkt. 287-1). According to the Trustee, K&L Gates acted "as a sort of counsel *sub rosa*," assisting in, if not directing, On-Site Fuel Service's opposition to the Involuntary Petition by On-Site Fuel Service's counsel of record, Johnson. (M. Adv. Dkt. 191 at 3). The Trustee points specifically to a series of emails dated March 5, 2019 from K&L Gates attorney Wright to Johnson as evidence of K&L Gates's involvement in defending On-Site Fuel Service in the Involuntary Proceeding. (Tr. Mot. Ex. 21, M. Adv. Dkt. 190-21). The Trustee contends that Wright employs language in his emails to Johnson that suggests he is acting as counsel for On-Site Fuel Service. Referring to On-Site Fuel Service as "OSF," his sentences contain phrases such as "OSF does not concede that" and "OSF's position is that."[16] (*Id*.).

[16] The email exchanges between Wright and Johnson were filed in their redacted form. By agreement of the parties, the emails were submitted to the Court under seal for purposes of the Motion to Disqualify. For that reason, certain content is omitted from the descriptions.

The Trustee also relies on Jones Walker's timesheets that show that on twenty-five separate days, from November 1, 2018 through February 25, 2019, Johnson conferred with Dale of K&L Gates regarding On-Site Fuel Service's efforts to invoke the "bar-to-joinder doctrine" to defeat the Involuntary Petition. (Tr. Mot. Exs. 10-12, M. Adv. Dkt. 190-10, 190-11, 190-12). A timesheet entry on March 18, 2019 indicates that Johnson conferred with the "K&L Gates team" regarding On-Site Fuel Service's Amended Proposed Findings of Fact and Conclusions of Law filed on April 1, 2019. (Tr. Mot. Ex. 10, M. Adv. Dkt. 190-10). In a series of emails, Emily Mather, another K&L Gates attorney, provided legal research to Johnson regarding the trial of the Involuntary Petition on February 11, 2019 (Tr. Mot. Exs. 12-13, M. Adv. Dkt. 190-12, 190-13); February 27, 2019 (Tr. Mot. Ex. 14, M. Adv. Dkt. 190-14); March 1, 2019 (Tr. Mot. Exs. 16-17, M. Adv. Dkt. 190-16, 190-17); March 5, 2019 (Tr. Exs. 23-24, M. Adv. Dkt. 190-23, 190-24); and March 8, 2019 (Tr. Mot. Ex. 27, M. Adv. Dkt. 190-27). Johnson and Wright exchanged emails regarding the Pre-Trial Order, On-Site Fuel Service's Amended Proposed Findings of Fact and Conclusions of Law, and/or On-Site Fuel Service's potential appeal of any adverse decision on: March 1, 2019 (Tr. Mot. Ex. 15, M. Adv. Dkt. 190-15); March 2, 2019 (Tr. Mot. Ex. 18, M. Adv. Dkt. 190-18); March 4, 2019 (Tr. Mot. Exs. 19-20, M. Adv. Dkt. 190-19, 190-20); March 5, 2019 (Tr. Mot. Exs. 21-22, M. Adv. Dkt. 190-21, 190-22); March 6, 2019 (Tr. Mot. Ex. 25, M. Adv. Dkt. 190-25); March 7, 2019 (Tr. Mot. Ex. 26, M. Adv. Dkt. 190-26); March 10, 2019 (Tr. Mot. Ex. 28, M. Adv. Dkt. 190-28); March 22, 2019 (Tr. Mot. Exs. 29-30, M. Adv. Dkt. 190-29, 190-30); March 24, 2019 (Tr. Mot. Ex. 31, M. Adv. Dkt. 190-31); March 26, 2019 (Tr. Mot. Ex. 32, M. Adv. Dkt. 190-32); March 29, 2019 (Tr. Mot. Ex. 33, M. Adv. Dkt. 190-33); and April 3, 2019 (Tr. Mot. Ex. 35, M. Adv. Dkt. 190-35). The Trustee asserts that the "litany and frequency" of communications

between Johnson and attorneys at K&L Gates strongly suggests that K&L Gates was the architect of a defense strategy that Johnson merely executed in the Involuntary Proceeding.

K&L Gates, in contrast, contends that it represented Capitala along with its local bankruptcy counsel, Newman, in the Involuntary Proceeding, and that Johnson alone represented On-Site Fuel Service. (Bankr. Dkt. 7). K&L Gates asserts that the Trustee confuses the collaboration between Capitala and On-Site Fuel Service, through their respective attorneys, to defeat the Involuntary Proceeding and explore potential claims against Mansfield with evidence that K&L Gates was acting "as a sort of counsel *sub rosa*" to Jones Walker. (M. Adv. Dkt. 272 at 6). K&L Gates maintains that Capitala, shared a common legal interest with On-Site Fuel Service to defeat the Involuntary Petition and explore potential claims against Mansfield.[17] (Harrison Dec. ¶¶ 7, 11, 13-14, 16, 20, M. Adv. Dkt. 272-1). To advance Capitala's and On-Site Fuel Service's common interests, K&L Gates's attorneys and Newman worked with Johnson, On-Site Fuel Service's counsel. This work included strategic discussions between counsel for Capitala and counsel for On-Site Fuel Service on how best to proceed in the Involuntary Proceeding and suggestions on the language of pleadings filed in the Involuntary Proceeding. (Wright Dec. ¶ 11,

[17] In a letter dated June 26, 2020, to the Trustee that accompanied the production of K&L Gates's timesheets, K&L Gates wrote that the timesheets were "subject to a common interest privilege . . . between On-Site Fuel Service . . . and the Capitala Defendants." (Tr. Reply Ex. 3, M. Adv. Dkt. 287-3). The Trustee argues that K&L Gates's recognition of a shared common-interest privilege "presupposes that On-Site has an attorney-client privilege" that "cannot exist without an underlying attorney-client relationship between On-Site and KLG." (M. Adv. Dkt. 287 at 7). The Trustee's argument fails to distinguish the common-interest privilege from other multi-party privileges, such as the co-client privilege. Whereas the co-client privilege pertains to circumstances where multiple clients are represented by a single attorney, the common-interest privilege contemplates situations where cooperating parties are represented by separate counsel. *In re Santa Fe Int'l Corp.*, 272 F.3d 705 (5th Cir. 2001). By invoking the common-interest privilege, K&L Gates "has not tipped its hand," as the Trustee alleges, since application of the common-interest privilege is consistent with On-Site Fuel Service and Capitala being represented by separate counsel. In this matter, the issue as to whether the common interest privilege applies to K&L Gates's timesheets is not before the Court.

M. Adv. Dkt. 272-2). If On-Site Fuel Service had succeeded in defeating the Involuntary Proceeding, it could have pursued claims against Mansfield and the other petitioning creditors under 11 U.S.C. § 303(i)(2). (Wright Dec. ¶ 10, M. Adv. Dkt. 272-2). K&L Gates argues that On-Site Fuel Service's recovery on any such claim would have inured to the benefit of Capitala, On-Site Fuel Service's largest creditor. K&L Gates also asserts that Capitala and On-Site Fuel Service collaborated in the Gap Period regarding potential claims against Mansfield unrelated to the Involuntary Proceeding.

K&L Gates faults the Trustee for relying on its emails and Jones Walker's timesheets without investigating the full nature of the communications or Johnson's representation of On-Site Fuel Service. (Tr. Dep. at 16, 34, 40, Cap. Ex. A, M. Adv. Dkt. 273-1). For example, despite knowing Johnson professionally, the Trustee declined to contact her to inquire about her role as On-Site Fuel Service's counsel or to request her files before filing the Motion to Disqualify. (*Id.*).

The Court finds that the emails and timesheets demonstrate a collaboration among attorneys of different law firms representing separate clients, an arrangement that is not uncommon in complex litigations matters. They do not manifest an intent by McGlinn to retain K&L Gates on behalf of On-Site Fuel Service or an intent by K&L Gates to represent On-Site Fuel Service in the Involuntary Proceeding. Just as Walker's answer to the question "Who represented whom with respect to the termination letter and the APA?" is missing from the record, so too is Johnson's answer to the question, "Who represented whom in the Involuntary Proceeding?" Her testimony could have clarified the conflict-of-interest issue, but the Trustee, who bears the burden of proof, chose not to ask Johnson but instead to rely on emails and timesheets that did not directly address the matter. As a result, the Court is asked to draw inferences from emails and timesheets when more conclusive evidence was available to the Trustee.

4. K&L Gates's Former Representation of On-Site Fuel Holdings

The Trustee appears to argue that even if K&L Gates did not represent On-Site Fuel Service directly, it did so indirectly, at least with respect to the negotiation of the SAA and TPA, because K&L Gates admits it represented On-Site Fuel Holdings as to these two matters and because there is a close relationship between On-Site Fuel Service and On-Site Fuel Holdings, its parent company.[18] Both corporations used the same individuals as directors, and McGlinn served as board chairman of both On-Site Fuel Service and On-Site Fuel Holdings. (McGlinn Dep. at 20-24, Tr. Reply Ex. 1, M. Adv. Dkt. 287-1). The Trustee provides no authority for her position.

In determining whether On-Site Fuel Service and On-Site Fuel Holdings should be treated as a single entity for conflict-of-interest purposes, the Court is guided by the construction of Model Rule 1.7 by the American Bar Association (the "ABA") that a "lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary." MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 34 (AM. BAR ASS'N). The ABA adopts what is known as the "entity theory" of representation that lawyers may regard as their client only those members of a corporate family with which the lawyer has a direct attorney-client relationship. *See* Charles W. Wolfram, *Legal Ethics: Corporate-Family Conflicts*, 2 J. INST. STUDY LEGAL ETHICS 295, 307 (1999). The ABA discussed this subject further in an opinion letter, concluding that "whether a lawyer

[18] K&L Gates could have averted even the suggestion of a corporate family conflict by entering into a written engagement letter defining its relationship with Capitala in a way that clearly excluded On-Site Fuel Service from the matters in question, but no such letter was submitted to the Court. *See* ABA Comm. on Prof'l Ethics, Formal Op. 390 ("The best solution to the problem that may arise by reason of clients' corporate affiliations is to have a clear understanding between lawyer and client, at the very start of the representation, as to which entity or entities in the corporate family are to be the lawyer's clients, or are to be so treated for conflicts purposes.").

represents a corporate affiliate of his client . . . depends not upon any clearcut per se rule but rather upon the particular circumstances." ABA Comm. on Prof'l Ethics, Formal Op. 390 (1995), *reprinted in* ABA/BNA Lawyers Manual on Prof'l Conduct Ethics Ops. 1991-95, at 1001:262 (1996).

Determining whether the circumstances give rise to a corporate-affiliate conflict, however, is a complicated undertaking that requires a fact-intensive inquiry into the degree of operational commonality between the affiliated entities and the extent to which one entity depends financially on the other. As to operational commonality, courts have considered the extent to which entities rely on a common infrastructure. *See Discotrade Ltd. v. Wyeth-Ayerst Int'l, Inc*., 200 F. Supp. 2d 355, 359 (S.D.N.Y. 2002) (corporate affiliates deemed a single entity where each used the same computer network, email system, travel department, and health benefit plan). Courts also have focused on the extent to which the affiliated entities rely on or otherwise share managers, officers, and directors. *Eastman Kodak Co. v. Sony Corp*., Nos. 04-CV-6095, 04-CV-6098, 2004 WL 2984297, at *3-4 (W.D.N.Y. Dec. 27, 2004) (corporate affiliates deemed a single entity based in part on shared directors, officers, and legal department). In this regard, courts have emphasized the extent to which affiliated entities share responsibility for both the provision and management of legal services. *Id*. at *4.

As to financial interdependence, several courts have considered the extent to which an adverse outcome in the matter at issue would result in substantial and measurable loss to the client or its affiliate. *Hartford Accident Indem. Co. v. RJR Nabisco, Inc.*, 721 F. Supp. 534, 540 (S.D.N.Y. 1989). Courts have also inquired into the ownership structure. *Discotrade Ltd*., 200 F. Supp. 2d at 358-59.

The Court agrees with the Trustee that the relationship between On-Site Fuel Service and On-Site Fuel Holdings appears to be close. The Court, however, declines to treat the two entities as one client in the absence of a more developed record showing that On-Site Fuel Service is operationally integrated with its parent company, On-Site Fuel Holdings. The Trustee has not provided sufficient evidence of an interdependent relationship between On-Site Fuel Service and On-Site Fuel Holdings, both in terms of corporate ownership and business management, so that they should be considered as the same client for conflict purposes. Indeed, the evidence in the record shows that Walker of Baker Donelson represented On-Site Fuel Service, not On-Site Fuel Holdings, with respect to these matters, indicating that On-Site Fuel Service and On-Site Fuel Holdings may not have shared responsibility for the management of legal services. *Eastman Kodak Co.*, 2004 WL 2984297, at *4.

C. Substantial Relationship Between Prior Representation & Consolidated Adversaries

K&L Gates concedes that from October 10, 2018 to October 19, 2018, it represented On-Site Fuel Service regarding On-Site Fuel Service's lease of office space in Alpharetta, Georgia and a related insurance issue. (Cap. Ex. E, M. Adv. Dkt. 273-5; M. Adv. Dkt. 301 at 15-16). The Trustee does not allege that this prior representation of On-Site Fuel Service creates an impermissible conflict of interest that justifies K&L Gates's disqualification in the Consolidated Adversaries. McGlinn testified that On-Site Fuel Service's lease of office space near Mansfield's place of business was necessary to facilitate the strategic alliance between On-Site Fuel Service and Mansfield. The description of legal work in K&L Gates's one-page invoice mentions only the lease and a potential insurance issue discussed with an insurance broker. (Cap. Ex. E, M. Adv. Dkt. 273-5, M. Adv. Dkt. 301 at 15-16).

The Court agrees with the parties that there is no substantial relationship between K&L Gates's prior representation of On-Site Fuel Service and the facts and legal questions raised in the Consolidated Adversaries. *American Airlines*, 972 F.2d at 618 (holding that test for substantial relationship requires an inquiry into the similarities between the two factual situations and the legal questions posed). No information disclosed by On-Site Fuel Service with respect to the lease or related insurance issue would be relevant in the Consolidated Adversaries.

D. Decision to File Motion to Disqualify

The Trustee only became aware of the Motion to Disqualify by text message, which she received Saturday night before the Monday it was filed by Liston. (Tr. Dep. at 8, Cap. Ex. A, M. Adv. Dkt. 273-1). Additionally, the Trustee admitted that Liston asked counsel for Mansfield to prepare the initial draft of the Trustee's Brief. (M. Adv. Dkt. 287 at 14; Tr.'s Disc. Resps. at 10, M. Adv. Dkt. 287-6). Because Mansfield lacks standing to bring a motion to disqualify, K&L Gates surmises that Mansfield did so because it perceived a significant tactical advantage. *See Celanese Corp. v. Leesona Corp. (In re Yarn Processing Patent Validity Litig.)*, 530 F.2d 83, 88 (5th Cir. 1976) (holding that courts generally do not disqualify an attorney on grounds of conflict of interest unless the former client moves for the disqualification).

Conclusion

The Court has not viewed the facts in a vacuum in reaching its decision. K&L Gates represented Capitala well before Capitala signed the Purchase Agreement and became part owner of On-Site Fuel Service. Because of its long-standing relationship with Capitala, the Court has not considered its disqualification as counsel lightly. Moreover, because it abrogates the right of the Capitala Defendants to their counsel of choice, the Court has applied disqualification rules "with

meticulous deference to the litigant's rights." and has engaged in a "painstaking analysis of the facts." *U.S. Fire Ins. Co.*, 50 F.3d at 1314; *Brennan's Rests.*, 590 F.2d at 168.

Notwithstanding that disqualification is "an extreme remedy," the Trustee, who bears the burden of proof, made her decision to pursue the Motion to Disqualify based on a text message received from Liston on the Saturday before it was filed on Monday. *Duncan*, 646 F.2d at 1025 n.6. A thorough investigation of the alleged conflict-of-interest issue certainly was warranted. The Court is troubled by the Trustee's failure to question Walker and Johnson. (Tr. Dep. at 16, 21, Cap. Ex. A, M. Adv. Dkt. 273-1); *see Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 349 (1986) (in corporate bankruptcy cases, the chapter 7 trustee acquires the debtor's attorney-client privilege because "when control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well"). Who did these lawyers think represented whom? The Court was never provided an answer to this question even though the parties were given an opportunity to engage in discovery. (M. Adv. Dkt. 200). Then, when Liston asked French the question, he apparently did not distinguish between On-Site Fuel Service and On-Site Fuel Holdings.[19] Without knowing whether French meant On-Site Fuel Service or On-Site Fuel Holdings, his testimony was of limited value. Another troubling aspect of the Trustee's investigation is her failure to develop a record in support of her contention that "there is little distinction to be drawn between [On-Site Fuel] Holdings and On-Site [Fuel Service]." (M. Adv. Dkt. 287 at 6 n.5). Whether corporate affiliates should be treated as a single entity for conflict purposes, however, is a fact-intensive inquiry. In the end, the Trustee relied on ambiguous, incomplete, and contradictory evidence in the form of emails, timesheets, and

[19] *See supra* pp. 45-46.

deposition excerpts that was inconclusive. From such evidence, the Trustee asks the Court to infer an attorney-client relationship.[20]

Based on the evidence presented by the Trustee in support of the Motion to Disqualify, the Court finds that the Trustee's investigation into the conflict-of-interest issue was inadequate. The record made by the Trustee does not permit the Court to make the finding that an attorney-client relationship existed between K&L Gates and On-Site Fuel Service. "[N]otwithstanding the fundamental importance of safeguarding popular confidence in the integrity of the legal system, attorney disqualification . . . is a sanction that must not be imposed cavalierly." *U.S. Fire Ins.*, 50 F.3d at 1316.

Having reached the conclusion that the Motion to Disqualify should be denied, the Court finds it unnecessary to address the waiver issue raised by the Capitala Defendants. Additionally, the Court finds that the alternative relief requested by the Capitala Defendants in the Motion for De-Consolidation has been rendered moot and also should be denied. The Court has considered all of the arguments raised by the parties. Any argument not specifically addressed in this Opinion would not have changed the outcome.

IT IS, THEREFORE, ORDERED that the Motion to Disqualify is hereby denied.

IT IS FURTHER ORDERED that the Motion for De-Consolidation is hereby denied as moot.

##END OF OPINION##

[20] The Trustee does not dispute that Mansfield's counsel prepared the draft of the Trustee's Brief. (M. Adv. Dkt. 287 at 14; Tr.'s Disc. Resps. at 10, M. Adv. Dkt. 287-6). The irony is not lost on the Court. Although the Trustee argues in the Motion to Disqualify that the drafting and/or editing of documents by K&L Gates constituted the provision of legal services that created an attorney-client relationship between K&L Gates and On-Site Fuel Service, she likely would object to the argument that the drafting of the Trustee's Brief by Mansfield's counsel created an attorney-client relationship between her and Mansfield's counsel.