

No. _____

In the
Supreme Court of the United States

LI LI,
Petitioner,

v.

J. C. PENNEY COMPANY, INCORPORATED,
Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

**APPENDIX TO THE PETITION
FOR A WRIT OF CERTIORARI**

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Appendix A

United States Court of Appeals
for the Fifth Circuit



No. 21-40046

A True Copy
Certified order issued Feb 17, 2021

Jyle W. Guyce
Clerk, U.S. Court of Appeals, Fifth Circuit

IN THE MATTER OF: J. C. PENNEY COMPANY, INCORPORATED

Debtor,

LI LI,

Appellant,

versus

J.C. PENNEY COMPANY, INCORPORATED,

Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 2:20-CV-280

Before DENNIS, SOUTHWICK, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the opposed motion of appellee to dismiss the appeal for lack of jurisdiction is GRANTED.

ENTERED

January 13, 2021

Nathan Ochsner, Clerk

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Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

AD HOC COMMITTEE OF EQUITY INTEREST HOLDERS, <i>et al</i> ,	§
	§
	§
Appellants,	§
VS.	§ CIVIL ACTION NO. 2:20-CV-280
	§
J.C. PENNEY COMPANY, INC., <i>et al</i> ,	§
	§
Defendants.	§

ORDER

Before the Court are Debtor, J.C. Penney Company, Inc.'s Motion to Dismiss Appeal as Moot and for Lack of Standing (D.E. 44) and Walker & Patterson's Emergency Motion to Withdraw as Counsel for Appellant (D.E. 53). Appellant represents itself to be an ad hoc committee of equity interest holders or shareholders of the Debtor. D.E. 2. According to Appellant's withdrawing counsel, the committee is led by an individual named Mr. Niko Celentano (without any indication that he is a licensed attorney) and the committee does not intend to secure new counsel or prosecute this appeal. D.E. 53, 58.

It is not clear whether any of the members of the committee are business entities that must be represented by counsel or natural persons who may appear pro se. *See generally, Sw. Exp. Co., Inc. v. I.C.C.*, 670 F.2d 53, 55 (5th Cir. 1982). Nevertheless, an individual named Li Li has filed a response to the motion to dismiss (the only timely-filed opposition filing), purporting to be a shareholder and member of AHEC, and proceeding pro se as an appellant. D.E. 51; *see also*, D.E. 57 (Li Li's Appellant's Brief).

Because Li Li's response does not adequately address the grounds for dismissal, the Court GRANTS the motion to dismiss (D.E. 44) without addressing whether Li Li may act alone as an Appellant on the record of this case. And because the motion to withdraw (D.E. 53) is unopposed, it is GRANTED.

DISCUSSION

A. Statutory Mootness

AHEC filed this appeal to halt the bankruptcy court-approved sale of virtually all of the assets of the Debtor. AHEC argued, among other more technical bankruptcy issues, that the sale proceeds were grossly inadequate and unfair to creditors and equity interest holders, allowing for no distributions to equity interests holders through the bankruptcy proceeding. After an emergency temporary injunction hearing, the Court refused to enjoin the sale and the sale has since been consummated. D.E. 38, 44, p. 28 (Affidavit of Wafford). As a result, the Debtor claims that this appeal should be dismissed on the basis of statutory mootness. 11 U.S.C. §§ 363(m), 364(e).

The statute assures purchasers that once the bankruptcy court approves the sale and it is consummated (that is, the order is not stayed), then no appellate court can later second-guess the deal. The cost, of course, is disposing of the full judicial review for legal accuracy that typically follows a trial court's ruling. But Congress thought that trade was worth making to encourage buyers to come to the table ready to revitalize useful assets, as those buyers might otherwise stay away when a transaction remains shrouded in legal uncertainty. The Bankruptcy Code thus entrusts review of a sale solely to the bankruptcy court's in-the-moment judgment unless a stay is obtained that prevents the sale from closing prior to appellate review.

Matter of Sneed Shipbuilding, Inc., 916 F.3d 405, 409–10 (5th Cir. 2019).

Li Li argues that § 363(m) mootness does not apply because the transaction does not reflect a purchase “in good faith.” The Debtor argues that a good faith challenge may not be raised for the first time on appeal. *In re Ondova Ltd. Co.*, 620 F. App’x 290, 292 (5th Cir. 2015); *see also, In re Ginther Trusts*, 238 F.3d 686, 689 (5th Cir. 2001). Li Li has not countered this issue by demonstrating that a good faith issue was raised in the Bankruptcy Court proceeding.

Li Li further argues that consummated transactions may be unwound, citing *In re Tribune Media Co.*, 799 F.3d 272, 281 (3d Cir. 2015). *Tribune* permitted a claim for disgorgement of plan distributions to creditors in connection with a contractual claim by the trustees. The legal theory involved was equitable mootness with respect to a plan confirmation, not statutory mootness regarding a sale of assets. Consequently, *Tribune* does not negate the Debtor’s mootness argument.

B. Standing

The Debtor also argues that the equity interest holders that make up AHEC do not have standing to appeal the order of the bankruptcy court under the “person aggrieved” test, which limits appellate rights in order to effectuate the intended equitable efficiencies of bankruptcy proceedings. The record of the bankruptcy hearing by which the sale was approved, uncontradicted by any evidence produced in the stay hearing in this Court, demonstrated that the Debtor’s assets were insufficient to allow any recovery for equity interest holders under any available scenario. Consequently, they have no pecuniary interest to support standing. Li Li has not addressed this argument.

Standing to appeal a bankruptcy court decision is a question of law. *Furlough v. Cage (In re Technicool Sys., Inc.)*, 896 F.3d 382, 385 (5th Cir. 2018). And it involves a bankruptcy-specific test.¹ The bankruptcy court granted AHEC “interested party” status, with the right to participate in the decision at the trial stage. 11 U.S.C. § 1109(b). However, that does not translate into a right to appeal as to AHEC or any of the committee members.

Bankruptcy cases often involve numerous parties with conflicting and overlapping interests. Allowing each and every party to appeal each and every order would clog up the system and bog down the courts. Given the specter of such sclerotic litigation, standing to appeal a bankruptcy court order is, of necessity, quite limited.

Furlough, 896 F.3d at 385; *see also, In re Coho Energy Inc.*, 395 F.3d 198, 202 (5th Cir. 2004); *Matter of Fondiller*, 707 F.2d 441, 443 (9th Cir. 1983); *In re AFY*, 734 F.3d 810, 824 (8th Cir. 2013) (specifically distinguishing status as a party-in-interest from a person-aggrieved).

The limited right to appeal is afforded to “persons aggrieved by an order”—language the courts have carried through subsequent Bankruptcy Code amendments from the Bankruptcy Act of 1898. *Fondiller*, 707 F.2d at 443; *see also, AFY*, 734 F.3d at 824; *In re EToys, Inc.*, 234 Fed. App'x 24, 25 (3d Cir. 2007); *In re Saldana*, 534 B.R. 678, 684 (N.D. Tex. 2015). According to this test, “appellant must show that he was ‘directly and

¹ Article III standing under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (listing the irreducible minimum of constitutional standing) does not apply. *Furlough*, 896 F.3d at 385 n.4 (citing *Rohm & Hass Tex., Inc. v. Ortiz Bros. Insulation*, 32 F.3d 205, 210 n.18 (5th Cir. 1994) (explaining that “Article III is inapplicable to bankruptcy courts”)).

adversely affected pecuniarily by the order of the bankruptcy court' in order to have standing to appeal." *Coho Energy*, 395 F.3d at 203 (quoting *Fondiller*, 707 F.2d at 443).

The consensus in the caselaw is that status as a shareholder, alone, is not sufficient to demonstrate a direct and adverse pecuniary effect necessary for standing. The shareholder's interest is derivative, not direct. *See e.g.*, *AFY*, 734 F.3d at 820; *EToys*, 234 Fed. App'x at 25 (citing *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 732 (3d Cir. 1970) ("A stockholder of a corporation does not acquire standing to maintain an action in his own right, as a shareholder, when the alleged injury is inflicted upon the corporation and the only injury to the shareholder is the indirect harm which consists in the diminution in value of his corporate shares resulting from the impairment of corporate assets.")); *Hardes Holding, LLC v. Sandton Credit Solutions Master Fund, III, LP*, 3:19-CV-3009-RAL, 2019 WL 6347775, at *4 (D.S.D. Nov. 27, 2019) ("Under the shareholder standing rule, shareholders cannot appeal a bankruptcy court decision if they have only a derivative interest in the outcome.").

The Fifth Circuit has acknowledged only one limited exception to this rule: *In re First Colonial Corp. of America*, 544 F.2d 1291 (5th Cir. 1977), superseded by statute on other grounds as recognized by *In re Woerner*, 783 F.3d 266, 274 (5th Cir. 2015) (en banc). In that case, the shareholder was permitted to object to the trustee's attorney's fees only because of the unique situation presented by the trustee's apparent conflict of interest—an issue not presented here.

In another unique case, a sister court allowed appellate standing to a creditor, based on a debtor's shareholder interest. *Saldana*, 534 B.R. at 684. There, a divorced

wife was a creditor in the divorced husband's bankruptcy case. He had also placed two of his companies in bankruptcy and the cases were jointly administered. The husband's bankruptcy estate stood to recover equity from one related company's estate, which could then be used to fund her claim as her husband's creditor. Under those circumstances, she was granted standing to enforce her claim, through the husband's equity interest. Again, no such scenario is operative here.

Another district court has suggested that a shareholder might have standing if it can show that there was sufficient equity in the debtor's estate to make a difference to the value of its shares. *See generally, In re Paragon Offshore PLC*, 597 B.R. 748, 758 (D. Del. 2019). The equity holder did not have standing because the debtor's liabilities exceeded its assets and the plan of reorganization would under no circumstances provide for a recovery to him. In comparison to the law set out above, this test is not supported by the majority of the courts. And even if it were an appropriate method for demonstrating standing, Li Li has failed to provide any evidence on which this Court may find the Debtor's assets to exceed its liabilities. Therefore, Li Li has not demonstrated standing.

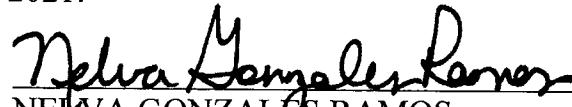
CONCLUSION

For the reasons set out above, the Court GRANTS the Debtor's motion (D.E. 44) and DISMISSES this appeal. The Court further GRANTS the motion to withdraw (D.E. 53) and directs the Clerk of Court to substitute Mr. Niko Celentano as the contact person for AHEC. In the event that AHEC seeks to participate further in this action without licensed legal representation, the Court ORDERS that any paper filed on behalf of AHEC

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demonstrate that right. This Order terminates all pending motions and this action is terminated.

ORDERED this 13th day of January, 2021.



NELVA GONZALES RAMOS
UNITED STATES DISTRICT JUDGE

ENTERED

January 13, 2021

Nathan Ochsner, Clerk

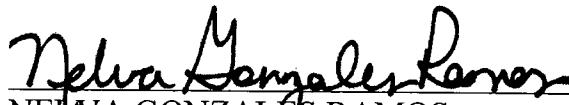
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

AD HOC COMMITTEE OF EQUITY INTEREST HOLDERS, <i>et al</i> ,	§
	§
	§
Appellants,	§
VS.	§ CIVIL ACTION NO. 2:20-CV-280
	§
JC. PENNEY COMPANY, INC., <i>et al</i> ,	§
	§
Defendants.	§

FINAL JUDGMENT

Pursuant to the Court's Order (D.E. 63), the Court enters final judgment
dismissing this action.

ORDERED this 13th day of January, 2021.


NELVA GONZALES RAMOS
UNITED STATES DISTRICT JUDGE



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Appendix C

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION**

ENTERED
11/12/2020

In re:)	Chapter 11
J. C. PENNEY COMPANY, INC., <i>et al.</i> ¹)	Case No. 20-20182 (DRJ)
Debtors.)	(Jointly Administered)
)	Re: Docket No. 1573

**ORDER DENYING AD HOC EQUITY COMMITTEE'S EMERGENCY MOTION TO
VACATE FINAL ORDER (I) AUTHORIZING THE DEBTORS TO (A) OBTAIN
POSTPETITION FINANCING AND (B) UTILIZE CASH COLLATERAL, (II)
GRANTING ADEQUATE PROTECTION TO THE PREPETITION SECURED
PARTIES, (III) MODIFYING THE AUTOMATIC STAY, AND (IV) GRANTING
RELATED RELIEF**

Came on for consideration the Ad Hoc Equity Committee's emergency motion to vacate final order (i) authorizing the debtors to (a) obtain postpetition financing and (b) utilize cash collateral, (ii) granting adequate protection to the prepetition secured parties, (iii) modifying the automatic stay, and (iv) granting related relief (the "Motion").

After hearing, it is ORDERED THAT:

1. For the reasons stated on the record the Motion is DENIED.
2. This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

Signed: November 12, 2020.

DAVID R. JONES
UNITED STATES BANKRUPTCY JUDGE

¹ A complete list of each of the Debtors in these chapter 11 cases may be obtained on the website of the Debtors' claims and noticing agent at <http://cases.primeclerk.com/JCPenney>. The location of Debtor J. C. Penney Company, Inc.'s principal place of business and the Debtors' service address in these chapter 11 cases is 6501 Legacy Drive, Plano, Texas 75024.

AGREED TO AS TO FORM ONLY:

/s/ Matthew D. Cavanaugh

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**ATTORNEYS FOR THE AD HOC
COMMITTEE OF EQUITY INTEREST
HOLDERS**



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Appendix D

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI

ENTERED
12/14/2020

IN RE:

J. C. PENNEY COMPANY, INC., *et al.*,
Debtors.

§ CASE NO: 20-20182
§
§ CHAPTER 11
§ Jointly Administered
§ David R. Jones

ORDER
(Docket No. 1844)

The Court has considered the Ad Hoc Equity Committee's Emergency Application for an Order Pursuant to Section 328(A) of the Bankruptcy Code Authorizing the Employment and Retention of Walker & Patterson, P.C. as Special Counsel (the "Application"). In the Application, the Ad Hoc Equity Committee seeks to employ Walker & Patterson, PC on a contingency fee basis to pursue an appeal. Specifically, the requested compensation arrangement is a "forty-five percent (45%) contingent fee of any value created or obtained for the estate, or the equity interest holders, by way of settlement, verdict, plan distribution or recovery, obtained on or after the date the Notice Of Appeal is filed, for legal services performed in all appellate proceedings . . . provided, however, that any value received by equity interest holders in excess of \$300 million will be subject to a contingent fee of twenty-five percent (25%)."

The Court previously entered orders requiring the Debtors to fund a total of \$1 million of the Ad Hoc Equity Committee's professional fees and expenses. In consideration of the last increase, the Ad Hoc Equity Committee agreed that it would not request any further funding. The Walker & Patterson application runs counter to that agreement. To the extent that the Application relies on the 11 U.S.C. § 503(b)(3)(D) exception set forth in the Court's order, the Ad Hoc Equity committee would have to first establish the existence of a substantial contribution. The Court notes that nothing prevents Walker & Patterson from being paid from the \$1 million funded by the Debtors.

To the extent that the request seeks the assignment of an interest in the recovery of shareholders, the Court lacks authority to impose the expenses of an ad hoc committee on non-debtor parties. Individual shareholders may, of course, voluntarily agree to such an arrangement.¹

Accordingly, it is **ORDERED THAT:**

1. The application is denied without prejudice.

SIGNED: December 14, 2020.


DAVID R. JONES
UNITED STATES BANKRUPTCY JUDGE

¹ The Court has reviewed the opinions of several shareholders that object to their interests being impaired by the Walker & Patterson contingency fee.