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When Fiduciary Means Fiduciary: Criminal Bid-Rigging Charges in the Neiman Marcus Bankruptcy Proceedings

I. Introduction

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Complex restructurings are no stranger to colorful facts and unpredictable twists and turns. But few lead to criminal charges. Fewer still involve criminal charges against the chairman of the unsecured creditors' committee, alleging that he abused his position to benefit himself financially.

On September 3, 2020, federal authorities arrested Daniel Kamensky, the co-chair of the Official Committee of Unsecured Creditors (the "Committee") in the Neiman Marcus Group Ltd. bankruptcy proceedings and the founder of Marble Ridge Capital LP ("Marble Ridge"), a New York-based hedge fund that, before recently becoming defunct, managed over $1 billion in assets. The federal criminal charges against Kamensky—accompanied by a parallel civil claim by the Securities and Exchange Commission (the "SEC")—accuse Kamensky of abusing his chairmanship to pressure a rival not to bid for certain assets in the bankruptcy so that he could buy them at a lower price and realize a gain for Marble Ridge. The evidence against Kamensky appears to be robust. In a press release announcing the charges, a government official is quoted as saying: "In a conversation with an employee of the investment bank, Kamensky went as far as to say, 'Maybe I should go to jail.' Today, we've removed the 'maybe,' and forced him to answer for his conduct."

In this alert, we summarize key features of the complex Neiman Marcus Chapter 11 proceedings, which are now winding down, then focus in on the recent criminal allegations against Kamensky before stepping back to offer a practical perspective on the matter and its significance (if any) for clients and other market participants.

II. Neiman Marcus's Bankruptcy and the MyTheresa Litigation

Like many brick-and-mortar U.S. apparel retailers, in recent years Neiman Marcus experienced considerable economic distress and dislocation. On May 7, 2020, the company filed for Chapter 11 bankruptcy protection in the United States Bankruptcy Court for the Southern District of Texas (the "Bankruptcy Court").[1]

Before seeking Chapter 11 protection, Neiman Marcus had entered into an "uptiering" arrangement to recapitalize its debt structure and introduce new tranches of debt to provide the Company with much-needed liquidity. To do so, in September 2018, Neiman Marcus transferred its interests in MyTheresa, a valuable online luxury fashion retailer, to a parent corporation that was not involved in the bankruptcy. Then, in March 2019, Neiman Marcus entered into a Transaction Support Agreement ("TSA") with a majority of creditors of its Term Loan and its Unsecured Notes. Pursuant to the TSA, the parties agreed to an uptiering arrangement focused on the two series of senior notes due in 2021 and outstanding term loans. Part of the consideration for the exchange was to offer collateral from MyTheresa to the exchanging noteholders.

In December 2018, Marble Ridge, an unsecured creditor, sued Neiman Marcus in Texas state court, alleging that the transfer was a fraudulent conveyance. In March 2019, the court dismissed the case on jurisdictional grounds. In August 2019, the trustee for certain of the senior noteholders brought a similar lawsuit against Neiman Marcus in New York state court, alleging, among other things, actual and constructive fraudulent conveyance for dividending MyTheresa to

[1] *In re Neiman Marcus Group Ltd LLC*, No. 20-32519 (Bankr. S.D. Tex. 2020).

hinder creditors and, while insolvent, not providing creditors the reasonably equivalent value of the asset.[2] Proceedings in these lawsuits have been substantially on hold during the pendency of the bankruptcy case due to Chapter 11's automatic stay provision. Ultimately, after heated deliberation among the parties, the Bankruptcy Court, on September 4, 2020, confirmed a restructuring plan.

III. The Kamensky Affair

While the Neiman Marcus restructuring proceedings are now winding down, Kamensky's legal issues are just beginning.

a. Kamensky's Role

Daniel Kamensky is the managing partner and principal of Marble Ridge, an unsecured creditor of Neiman Marcus. He was previously a bankruptcy attorney. In May 2020, the United States Trustee (the "UST") appointed Marble Ridge as one of nine members of the Committee to represent unsecured creditors in Neiman Marcus's bankruptcy. Marble Ridge, represented by Kamensky, was subsequently elected as one of the Committee's three co-chairs. Committee members, including Marble Ridge and Kamensky, are statutorily obligated to act as fiduciaries to all unsecured creditors, which requires them to, among other things, not use their position on the committee to advance their own personal interests.

On August 5, 2020, the Bankruptcy Court ordered the UST to investigate allegations by Committee representatives that Kamensky had pressured an investment bank not to bid for assets related to Neiman Marcus's bankruptcy so that he could buy them at a lower price. The UST filed a report with the Court on August 19, 2020 (the "UST Statement"), finding that Kamensky had abused his Committee position and breached his fiduciary duty "by coercing an outside investor to refrain from bidding against Marble Ridge on a key transaction that was considered integral to a successful plan of reorganization."[3]

b. The MyTheresa Shares and Kamensky

The allegations against Kamensky spring from one of the contested issues in the bankruptcy proceeding—namely, how to resolve the distribution of certain equity holdings in MyTheresa (the "MyTheresa Shares"). On July 30, 2020, the parties announced to the Bankruptcy Court that they had reached a settlement to obtain 140 million MyTheresa Shares for the benefit of certain unsecured creditors of the bankruptcy estate. Because such a settlement would likely involve a transfer of the MyTheresa Shares from Neiman Marcus's parent, the parties explored a so-called "cash out" option under which creditors could exchange the illiquid MyTheresa Shares for cash.

According to the UST Statement, on July 28, 2020, Kamensky submitted a "cash out" proposal to the Committee in which Marble Ridge would purchase MyTheresa Shares at 20 cents per share. On July 31, 2020, Kamensky learned that an investment bank was considering offering around 30 cents per share. He then allegedly told the investment bank not to submit a bid, threatened to use his role on the Committee to block any higher bid, and stated that Marble Ridge—a client of the investment bank —would stop doing business with the investment bank unless it backed off. The investment bank withdrew its bid on the MyTheresa Shares, but simultaneously informed the Committee's legal advisor that it did so upon Kamensky's request. After being alerted to this communication, Kamensky allegedly contacted one of the investment bank's employees, seeking to influence how that employee would describe his purportedly coercive actions.

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[2] *UMB Bank, N.A. as Tr. for 8% Senior Cash Pay Notes Due 2021 v. Neiman Marcus Grp., Inc.*, No. 654509/2019, (N.Y. Sup. Ct.2019).

[3] Statement of the Acting United States Trustee Pursuant to Court Order Regarding the Conduct of Marble Ridge Capital LP and Dan Kamensky, Dkt. 1485 at 2, *In re Neiman Marcus Group Ltd LLC*, No. 20-32519 (Bankr. S.D. Tex. filed Aug. 19, 2020) (the "UST Statement").

Strikingly, all of Kamensky's conduct took place over the course of just a few hours. One of the participants in calls with Kamensky purportedly made an audio recording of their conversation, which the UST reviewed in connection with preparing its Statement. On one follow-up call with the investment bank, Kamensky is alleged to have said:

> . . . [I]f you're going to continue to tell them what you just told me, I'm going to jail, okay? Because they're going to say that I abused my position as a fiduciary, which I probably did, right? Maybe I should go to jail. But I'm asking you not to put me in jail.[4]

On August 1, 2020, Marble Ridge resigned from the Committee.[5] Following the UST Statement, Marble Ridge advised its investors, on August 20, 2020, that it intended to cease its operations and liquidate its assets.[6]

c. The Government's Response

On September 2, 2020, the U.S. Attorney's Office criminally charged Kamensky, in a four-count complaint, for extorting the investment bank to abandon its higher bid and engaging in obstruction of justice to cover up the crime. The government charged Kamensky with (Count One) "willfully and knowingly" violating his fiduciary duties to Neiman Marcus's unsecured creditors by "pressuring" the investment bank to withdraw its higher bid; (Count Two) committing wire fraud; (Count Three) engaging in extortion and bribery in connection with a bankruptcy; and (Count Four) obstructing justice.

Separately, the SEC charged Kamensky with abusing his Committee position by coercing the investment bank to withdraw its bid so that Marble Ridge "could purchase the securities at an artificially lower price." In particular, the SEC's complaint alleges that Kamensky violated section 17(a)(1) of the Securities Act by "directly or indirectly, in the offer or sale of securities," employing a scheme to defraud. The SEC also seeks, among other things, a permanent injunction and civil penalties against Kamensky.

On September 3, 2020, Kamensky made an initial appearance in federal court; bail was set at $250,000.

IV. Key Lessons and Takeaways

While Kamensky's alleged conduct was unambiguously improper, the underlying tensions evident in the Neiman Marcus proceedings are common and, if not appropriately managed, introduce the risk of significant legal exposure and personal liability. Individuals who serve as committee members in bankruptcy proceedings are "hybrids who serve more than one master."[7] Such members may hold both (i) fiduciary obligations to the represented creditors, and (ii) personal economic interests adverse to the other represented creditors.

As the UST acknowledged in its Statement, members of an unsecured creditors' committee "differ from most other bankruptcy fiduciaries . . . in one important respect: committee members are not required to be disinterested, and it is common for committee members to have individual economic interests that may be opposed to the debtor or to other creditors."[8] The UST went on to explain that "a conflict of interest does not automatically prevent a creditor from serving on a committee—provided, however, that the creditor is otherwise able to exercise its fiduciary duties and provide adequate representation for the creditor body."[9] Indeed, the well-established rules of bankruptcy do not prohibit

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[4] *Id.* at 23.
[5] Both the investment bank and Marble Ridge ultimately submitted a cash out proposal to the Committee at a higher share price than Marble Ridge's initial bid.
[6] Other unsecured creditors also sued Marble Ridge and pressured it to segregate $55 million into an escrow account to satisfy any judgment ordering Marble Ridge to pay money damages.
[7] *In re Rickel & Assocs., Inc.*, 272 B.R. 74, 100 (Bankr. S.D.N.Y. 2002).
[8] UST Statement at 28.
[9] *Id.* (citing *In re First RepublicBank Corp.*, 95 B.R. 58, 61 (Bankr. N.D. Tex. 1988)).

committee members from engaging in conduct that is adverse to other creditors or the estate outside the committee, so long as they do not take "unfair advantage" of their committee membership.[10]

Section 1103 of the Bankruptcy Code grants qualified immunity to committee members for performing their duties. Overcoming this qualified immunity requires a showing that the committee or its members engaged in willful misconduct, or otherwise acted *ultra vires*.[11]

To be sure, most cases offer subtler fact patterns than the Neiman Marcus case, and inter-creditor conflicts of interest can be addressed proactively through good governance and procedural protections. As always, best practices include the disclosure of all material conflicts of economic interests to the committee in advance of any committee action or deliberation, along with established procedures for conflicted committee members to recuse themselves from deliberation or otherwise manage potential conflicts. The Kamensky matter, though newsworthy, should not change these "rules of the road" for most credit investors, nor should it deter market participants from sitting on creditor's committees in the right circumstances. It does, however, serve as a stark reminder that sharp practices in bankruptcy matters can involve more than just economic risk.

[10] *In re El Paso Refinery, L.P.*, 196 B.R. 58, 75 (Bankr. W.D. Tex. 1996)
[11] *See In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000).