

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re HIGHLAND CAPITAL
MANAGEMENT L.P.,
Debtor.

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§ Bankruptcy Case No. 19-34054-sgj11
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UBS SECURITIES LLC AND UBS AG
LONDON BRANCH,
Appellants.

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§ Case No. 3:20-CV-03408-G
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§
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vs.

HIGHLAND CAPITAL MANAGEMENT
L.P.
Appellee.

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**REDEEMER COMMITTEE OF THE HIGHLAND CRUSADER FUND
AND THE CRUSADER FUNDS’ MOTION TO INTERVENE AS APPELLEES**

The Redeemer Committee of the Highland Crusader Funds (the “Redeemer Committee”) and Highland Crusader Offshore Partners, L.P., Highland Crusader Fund, L.P., Highland Crusader Fund, Ltd. and Highland Crusader Fund II, Ltd. (collectively, the “Crusader Funds,” and together with the Redeemer Committee, the “Movants”) respectfully move (the “Intervention Motion”) for an order granting the Redeemer Committee and Crusader Funds leave to intervene as appellees under Rule 8013(g) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) in the above-captioned appeal of the *Order Approving Debtor’s Settlement with (A) the Redeemer Committee of the Highland Crusader Fund (Claim No. 72), and (B) the Highland Crusader Funds (Claim No. 81), and Authorizing Actions Consistent Therewith*, dated October 22, 2020 [Dkt. 1273]¹ (the “Settlement Approval Order”), entered by the United States Bankruptcy Court for the Northern District of Texas,

¹ Unless otherwise noted, all docket references are to the Debtor’s chapter 11 case.



which granted the Debtor's motion [Dkt. 1089] (the "Settlement Motion") to approve a settlement agreement [Dkt. 1090-1] (the "Settlement Agreement") entered by and among the Redeemer Committee, the Crusader Funds, and Highland Capital Management, L.P. (the "Debtor" or "HCMLP"). In support of the Intervention Motion, the Movants respectfully state:

Preliminary Statement

1. The Settlement Agreement between the Redeemer Committee, the Crusader Funds, and the Debtor resolves hundreds of millions of dollars in claims the Movants have asserted against the Debtor, and sets forth the parties' agreement regarding the implementation of a prepetition arbitration award that the Redeemer Committee obtained against the Debtor. As the instant appeal seeks to overturn the Bankruptcy Court's approval of the Settlement Agreement, and thereby prevent its implementation, the Redeemer Committee and Crusader Funds have a direct and substantial interest in the outcome of this appeal. Accordingly, the Movants should be permitted to intervene in this appeal as appellees.

Background

A. The Debtor's Chapter 11 Case

2. On October 16, 2019 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS).

3. On December 4, 2019, the Delaware bankruptcy court entered an order transferring venue of the Debtor's bankruptcy case to the Bankruptcy Court for the Northern District of Texas (the "Bankruptcy Court") [Dkt. 186].

4. The Debtor has continued in the possession of its property and has continued to operate and manage its business as a debtor-in-possession pursuant to sections 1107(a) and 1108

of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. No trustee or examiner has been appointed in the Debtor's chapter 11 case.

B. The Movants' Claims

5. The Crusader Funds were formed between 2000 and 2002, and HCMLP served as the funds' investment manager. In October 2008, HCMLP gave notice of its intention to wind down the Crusader Funds, which were the subject of insolvency proceedings in Bermuda and the Cayman Islands. The Redeemer Committee is a committee of investors, elected pursuant to the Scheme and Plan of Liquidation of the Crusader Funds approved by the Bermuda Court, to oversee HCMLP's management of the Crusader Funds through what was intended to be the complete liquidation of the funds.

6. The Redeemer Committee, by letter and notice dated July 5, 2016, terminated HCMLP as the investment manager for the Crusader Funds. The Redeemer Committee also commenced an arbitration against HCMLP, asserting various claims arising from HCMLP's service as investment manager.

7. On March 6, 2019 and May 9, 2019, a panel of arbitrators issued an arbitration award (the "Arbitration Award") awarding the Redeemer Committee gross damages of \$136,808,302.00, plus interest, attorneys' fees, costs and other expenses, for claims arising from HCMLP's service as the Crusader Funds' investment manager. As of the Petition Date, the total value of the Arbitration Award was \$190,824,557.00.

8. On April 3, 2020, the Redeemer Committee filed a general unsecured claim in the amount of \$190,824,557.00, plus interest, fees, and expenses (the "Redeemer Committee Claim"). *See* Proof of Claim No. 72.

9. On April 6, 2020, the Crusader Funds filed a general unsecured claim in the amount of \$23,483,446.00, plus interest, fees, and expenses (the "Crusader Funds Claim"). *See* Proof of

Claim No. 81. The Crusader Funds Claim sought the disgorgement of all management, distribution, and deferred fees paid to HCMLP due to HCMLP's breaches of fiduciary duties to the Crusader Funds and application of the "faithless servant" doctrine.

10. On August 26, 2020, UBS AG London Branch and UBS Securities, LLC (together, "UBS") filed its objection to the allowance of the Redeemer Committee Claim and the Crusader Funds Claim. *Objection to the Proof of Claim Filed by Redeemer Committee of the Highland Crusader Fund* [Dkt. 996].

C. The Settlement Agreement

11. After extensive, arms'-length negotiations, the Debtor, the Redeemer Committee, and the Crusader Funds entered into the Settlement Agreement, which contains the following material terms (among others):

- a. The Redeemer Committee Claim will be allowed in the amount of \$136,696,610 as a general unsecured claim;
- b. The Crusader Funds Claim will be allowed in the amount of \$50,000 as a general unsecured claim;
- c. HCMLP releases all claims to any deferred fees, management fees, and distribution fees, and also agrees that its limited partnership interests in the Crusader Funds will be cancelled and that HCMLP will not receive any distributions in respect of those interests;
- d. HCMLP will, in good faith, use commercially reasonable efforts to monetize all shares of capital stock of Cornerstone Healthcare Group ("Cornerstone"), a privately-owned company that is held by the Crusader Funds, an investment fund managed by the Debtor, and the Debtor; and
- e. the parties to the Settlement Agreement will exchange broad mutual releases.

12. On September 23, 2020, the Debtor filed the Settlement Motion with the Bankruptcy Court, seeking approval of the Settlement Agreement, and authority to perform under that agreement.

13. On October 16, 2020, UBS objected to the Settlement Motion [Dkt. 1190], arguing among other things that the Debtor could prevail in an action to vacate the Arbitration Award, that the Settlement Agreement improperly limits the Debtor's right to collect deferred fees, and that the Settlement Agreement undervalues the Cornerstone shares.

14. On October 20, 2020, the Court held an evidentiary hearing on the Settlement Motion. Counsel for the Redeemer Committee and Crusader Funds made an opening argument, cross-examined UBS's expert witness, and presented a closing argument in support of the Settlement Motion. (Oct. 20, 2020 Hr'g Tr. ("Tr.") 22-43, 134-36, 152-58.) The Bankruptcy Court approved the Settlement Motion at the conclusion of the hearing, and entered the Settlement Approval Order on October 23, 2020.²

15. On November 6, 2020, UBS filed a notice of appeal of the Settlement Approval Order [Dkt. 1339], and on November 12, 2020, an amended notice of appeal [Dkt. 1369] (together, the "Notice of Appeal"). The Notice of Appeal identifies the Redeemer Committee and Crusader Funds as "Parties in Interest." (See *id.* at 3-4.)

16. On November 13, 2020, this Court docketed the appeal of the Settlement Approval Order.

17. On December 7, 2020, UBS filed its Certificate of Interested Persons [20-CV-03408, Dkt. 13], which identifies the Redeemer Committee and the Crusader Funds as entities that are "financially interested in the outcome of the case." (See *id.* at 1-2.)

Argument

18. Bankruptcy Rule 8013(g) governs intervention in bankruptcy appeals pending in the District Court. It provides that a party seeking to intervene:

² The Settlement Approval Order is dated October 22, 2020 and was entered on the docket on October 23, 2020.

must move for leave to intervene . . . within 30 days after the appeal is docketed. [The motion] must concisely state the movant's interest, the grounds for intervention, whether intervention was sought in the bankruptcy court, why intervention is being sought at this stage of the proceeding, and why participating as an amicus curiae would not be adequate.

Fed. R. Bankr. P. 8013(g). Intervention under Rule 8013(g) is warranted for a party who has a “strong interest regarding the issues” on appeal and “actively participated in litigation of these issues before the Bankruptcy Court.” *In re Samson Res. Corp.*, No. 15-11934-BLS, 2018 WL 4658212, at *1 (D. Del. Sept. 27, 2018).

19. Congress has recognized the necessity for creditor participation in chapter 11 cases, and Section 1109(b) of the Bankruptcy Code provides “in unqualified terms, that any creditor . . . shall have the right to be heard as a party in interest” in a chapter 11 case.³ S. Rep. 95-989, 95th Cong., 2d Sess. 116 (1978); *see also Fuel Oil Supply & Terminaling v. Gulf Oil Corp.*, 762 F.2d 1283, 1286 (5th Cir. 1985) (“Congress intended § 1109(b) to carry forward to the current Bankruptcy Code the broad rights to appear and be heard granted to interested parties under the former bankruptcy code.” (citation omitted)); *In re Bumper Sales, Inc.* 907 F.2d 1430, 1433 (4th Cir. 1990) (Section 1109(b) is to be read broadly in favor of giving parties in interest an opportunity to be appear in proceedings affecting their interests); *In re Amatex*, 755 F.2d 1034, 1042 (3d Cir. 1985) (same). As one court in this Circuit explained, Section 1109(b)'s plain language applies to a “case under Chapter 11” and “[n]othing in that provision, for example, suggests that its broad right to appear and be heard is inapplicable to proceedings held before an appellate court.” *S. Pac. Transp. Co. v. Voluntary Purchasing Groups, Inc.*, 227 B.R. 788, 792-93 (E.D. Tex. 1998).

³ Section 1109(b) provides in full: “A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.” 11 U.S.C. § 1109.

Accordingly, “the right to appear and be heard in bankruptcy cases extends to both trial and appellate court proceedings.” *Id.* at 793.

A. The Redeemer Committee and Crusader Funds Have a Direct and Substantial Interest in the Appeal.

20. The Redeemer Committee and Crusader Funds’ interest in this appeal is direct and substantial. Under the Settlement Agreement and the Settlement Approval Order, the Redeemer Committee Claim and the Crusader Funds Claim are allowed as general unsecured claims in the Debtor’s chapter 11 case in the aggregate amount of approximately \$136.8 million. Given the Movants’ economic interest, counsel for the Movants actively participated in the Bankruptcy Court’s evidentiary hearing on the Settlement Motion. (*See* Tr. 22-43, 134-36, 152-58); *see also Samson Res. Corp.*, 2018 WL 4658212, at *1 n.2. Thus, the Redeemer Committee and Crusader Funds’ economic interest in the implementation of the Settlement Agreement and participation in the Bankruptcy Court hearing warrants their intervention as appellees. *See S. Pac. Transp. Co.* 227 B.R. at 791 (“[T]he court discerns no principled reason for denying appellate standing to a party in interest that fully participated in the underlying bankruptcy proceeding[.]”)

21. The reason the Redeemer Committee and the Crusader Funds are not already designated as appellees is because settlement motions in bankruptcy are made by the debtor or trustee—not the settling creditors. *See* Fed. R. Bankr. P. 9019(a) (“On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement.”). This feature of bankruptcy procedure does not alter the importance of the Redeemer Committee and Crusader Funds’ participation in the appeal given their interest in the subject matter of the appeal. In fact, UBS identifies the Redeemer Committee and the Crusader Funds as “Parties in Interest” in its Notice of Appeal. *See* Notice of Appeal at 3-4.

B. The Redeemer Committee and Crusader Funds Participated in the Settlement Motion Hearing in the Bankruptcy Court as Parties in Interest and No Intervention Was Required.

22. Because the Redeemer Committee and Crusader Funds are parties to the Settlement Agreement and, as creditors, parties in interest with the right to be heard in the Debtor's chapter 11 case, there was no need to intervene before the Bankruptcy Court. *See* 11 U.S.C. § 1109(b) (“A party in interest, including . . . a creditor, . . . may raise and may appear and be heard on any issue in a case under [chapter 11]”).)

23. The Redeemer Committee and Crusader Funds filed the Motion “at this stage of the proceeding” to be within the thirty-day time period required under Bankruptcy Rule 8013(g). The appeal was docketed on November 13, 2020. The Redeemer Committee and the Crusader Funds are seeking to intervene at the first such opportunity, and without prejudice to any other parties in interest.

C. Participation as Amicus Curiae is Inadequate to the Protect the Movants' Interests.

24. Limiting the Redeemer Committee and the Crusader Funds to participating as amicus curiae would be inappropriate. Bankruptcy Rule 8017 places extensive limitations on the involvement of amicus curiae. Critically, amici do not have standing to appeal any disposition by this Court. And, in this court, amicus briefs are limited to half the maximum length for a party's principal brief and amici must obtain court permission to file a reply brief or to participate in oral argument. The Redeemer Committee and the Crusader Funds have a direct financial stake in the Settlement Agreement and are therefore not merely “friends of the court” with respect to the appeal of the Settlement Approval Order. They should be permitted to participate in every aspect of this appeal, both substantively and procedurally, without any of the limitations that could be imposed on entities that are participating purely as amicus curiae.

Conclusion

WHEREFORE, the Redeemer Committee and Crusader Funds respectfully request that the Court enter an order, substantially in the form attached hereto as Exhibit A, granting the Redeemer Committee and Crusader Funds (i) leave to intervene as appellees in this appeal, and (ii) such other and further relief as the Court may deem proper.

Dated this 14th day of December, 2020

Respectfully submitted,

/s/ Mark A. Platt

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*Counsel for the Redeemer Committee of the
Highland Crusader Fund and the Crusader Funds⁴*

⁴ Frost Brown Todd LLC is counsel only for the Redeemer Committee and Jenner & Block, LLP is counsel to the Redeemer Committee, and for the limited purpose of this Motion, the Crusader Funds.

CERTIFICATE OF CONFERENCE

The undersigned certifies that on December 11, 2020, I conferred with (i) counsel for UBS Securities LLC and UBS AG London Branch, and (ii) counsel for the HCMLP via Zoom video conference regarding the relief requested herein. An agreement could not be reached with regard to the relief requested in the Intervention Motion because, although counsel for HCMLP consented to the relief requested, counsel for UBS did not.

/s/ Marc B. Hankin
Marc B. Hankin

CERTIFICATE OF SERVICE

The undersigned hereby certifies, that on this 14th day of December, 2020, he caused to be served a true and correct copy of the *Redeemer Committee of the Highland Crusader Fund and the Crusader Funds' Motion to Intervene as Appellees* by electronically filing it with the Court using the CM/ECF system, which sent notification to all parties of interest participating in the CM/ECF system.

/s/ Mark A. Platt

Mark A. Platt

Exhibit A
Proposed Order

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re HIGHLAND CAPITAL MANAGEMENT L.P., <i>Debtor.</i>	§ § Bankruptcy Case No. 19-34054-sgj11 § § §
<hr/>	
UBS SECURITIES LLC AND UBS AG LONDON BRANCH, <i>Appellants.</i>	§ § Case No. 3:20-CV-03408-G § § §
vs.	§
HIGHLAND CAPITAL MANAGEMENT L.P. <i>Appellee.</i>	§ § § §

**[PROPOSED] ORDER APPROVING THE REDEEMER COMMITTEE
OF THE HIGHLAND CRUSADER FUND AND
THE CRUSADER FUNDS' MOTION TO INTERVENE AS APPELLEES**

Upon *The Redeemer Committee of the Highland Crusader and Crusader Funds' Motion to Intervene as Appellees* (the "Motion"), filed by the Redeemer Committee of the Highland Crusader and Crusader Funds (the "Movants"); and this Court having reviewed the Motion, any and all other documents filed in support of the Motion, and this Court having determined that the legal and factual bases set forth in the Motion establish good cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is

HEREBY ORDERED THAT:

1. The Motion is GRANTED.
2. The Redeemer Committee of the Highland Crusader and Crusader Funds are added as additional appellees.

3. The Court shall retain jurisdiction with respect to all matters arising from or relating to the implementation, interpretation, and enforcement of this Order.

BY THE COURT:

A. JOE FISH
UNITED STATES DISTRICT JUDGE