Docket #0006 Date Filed: 4/6/2021

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

In re: HIGHLAND CAPITAL MANAGEMENT, L.P., Debtor.	§ § § § § § §	Bankruptcy Case No. 19-34054
THE DUGABOY INVESTMENT TRUST AND GET GOOD TRUST Appellants, v. HIGHLAND CAPITAL MANAGEMENT, L.P., Appellee.	§ § § § § § § § § § § § § §	Civ. Act. No. 21-cv-00550-L

BRIEF IN SUPPORT OF
MOTION FOR STAY PENDING APPEAL

Now into Court, through undersigned counsel, comes The Dugaboy Investment Trust and Get Good Trust, (the "Appellants") who hereby submit and adopt as support the *Motion for Stay Pending Appeal:* (i) the Motion and Brief in Support of Stay Pending Appeal filed by Highland Capital Management Fund Advisors, L.P. and NexPoint Advisors L.P. attached hereto and incorporated herein as **Exhibit 1.**

{00375464-2}

Respectfully submitted,

/s/ Douglas S. Draper
Douglas S. Draper, (*pro hac vice admittance requested*)
Heller, Draper & Horn, L.L.C.
650 Poydras Street, Suite 2500
New Orleans, LA 70130
Phone: 504-299-3300/Fax: 504-299-3399
e-mail: ddraper@hellerdraper.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this the 6th day of April 2021, true and correct copies of this document, with any exhibits attached thereto, were served on the recipients listed below via email, and true and correct copies of this document, with any exhibits attached thereto, were served on the recipients listed below via first class U.S. mail, postage prepaid:

Jeffrey N Pomerantz
Pachulski Stang Ziehl & Jones LLP
10100 Santa Monica Blvd
13th Floor
Los Angeles, CA 90067
Email: jpomerantz@pszjlaw.com

John A Morris
Pachulski Stang Ziehl & Jones LLP
780 Third Avenue, 34th Floor
New York, NY 10017-2024
Email: jmorris@pszjlaw.com

Zachery Z. Annable
Hayward PLLC
10501 N. Central Expressway
Suite 106
Dallas, TX 75231
Email: zannable@haywardfirm.com

/s/ Douglas S. Draper
Douglas S. Draper

{00375464-2}

EXHIBIT 1

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

In re: HIGHLAND CAPITAL MANAGEMENT, L.P., Debtor.	§ § § § § § §	Bankruptcy Case No. 19-34054
HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P. and NEXPOINT ADVISORS, L.P., Appellants, v. HIGHLAND CAPITAL MANAGEMENT, L.P., Appellee.	§ § § § § § § § § § § § §	Civ. Act. No. 3:21-cv-00538-N

APPELLANTS' MOTION FOR STAY PENDING APPEAL

TO THE HONORABLE DAVID C. GODBEY, U.S. DISTRICT JUDGE:

COME NOW Highland Capital Management Fund Advisors, L.P. and NexPoint Advisors, L.P. (the "Movants" or "Appellants"), creditors and parties-in-interest in the above styled and numbered bankruptcy case (the "Bankruptcy Case") of Highland Capital Management, L.P. (the "Debtor"), and file this their *Motion for Stay Pending Appeal* (the "Motion"), respectfully stating as follows:

Contemporaneously herewith, the Appellants are filing their *Brief in Support of Appellants' Motion for Stay Pending Appeal* (the "Brief") and their *Appendix in Support of Appellants' Motion for Stay Pending Appeal* (the "Appendix"). Pursuant to this Motion and Fed. R. Bankr. P. 8007, the Appellants request that the Court issue a stay of that certain *Order (i)*

Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (ii) Granting Related Relief [Bankr. Dkt. No. 1943] (the "Confirmation Order"[1]), pending the outcome of this appeal through the Fifth Circuit. Such a stay is justified for the reasons set forth in the Brief, based on the evidence set forth in the Appendix, all of which is incorporated herein by reference.

Pursuant to Fed. R. Bankr. P. 8007(b)(2)(B), the Appellants state that (A) this Motion was originally made in the Bankruptcy Court on February 28, 2021 [Bankr. Dkt. No. 1955]; (B) the Bankruptcy Court conducted a hearing on March 19, 2021; and (C) the Bankruptcy Court denied the Motion for the reasons given in the transcript of said hearing that is included in the Appendix.[2]

WHEREFORE, PREMISES CONSIDERED, the Appellants request that the Court enter an Order:

1. Staying the effectiveness of the Confirmation Order pending the conclusion of the appeal thereof through the Fifth Circuit; and

2. Granting such other relief as is just and proper.

[1] Appx. 1.
[2] Appx. 1199 (beginning on line 13).

RESPECTFULLY SUBMITTED this the 1st day of April, 2021.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Davor Rukavina
Davor Rukavina, Esq.
Texas Bar No. 24030781
Julian P. Vasek, Esq.
Texas Bar No. 24070790
500 N. Akard Street, Ste. 3800
Dallas, Texas 75201-6659
Telephone: (214) 855-7500
Facsimile: (214) 855-7584
E-mail: drukavina@munsch.com

COUNSEL FOR HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., AND NEXPOINT ADVISORS, L.P.

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that, pursuant to Fed. R. Bankr. P. 8007, this Motion was originally filed in the Bankruptcy Court. The Debtor/Appellee opposed the relief requested herein in the Bankruptcy Court, and, after conference regarding the same, the Debtor/Appellee will continue to oppose such relief in this Court.

/s/ Davor Rukavina
Davor Rukavina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this the 1st day of April, 2021, true and correct copies of this document, with any exhibits attached thereto, were served on the recipients listed below via email, and on April 2, 2021, true and correct copies of this document, with any exhibits attached thereto, were served on the recipients listed below via first class U.S. mail, postage prepaid:

Jeffrey N Pomerantz
Pachulski Stang Ziehl & Jones LLP
10100 Santa Monica Blvd
13th Floor
Los Angeles, CA 90067
Email: jpomerantz@pszjlaw.com

John A Morris
Pachulski Stang Ziehl & Jones LLP
780 Third Avenue, 34th Floor
New York, NY 10017-2024
Email: jmorris@pszjlaw.com

Zachery Z. Annable
Hayward PLLC
10501 N. Central Expressway
Suite 106
Dallas, TX 75231
Email: zannable@haywardfirm.com

/s/ Davor Rukavina
Davor Rukavina

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

In re: HIGHLAND CAPITAL MANAGEMENT, L.P., Debtor.	§ § § § § § §	Bankruptcy Case No. 19-34054
HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P. and NEXPOINT ADVISORS, L.P., Appellants, v. HIGHLAND CAPITAL MANAGEMENT, L.P., Appellee.	§ § § § § § § § § § § § §	Civ. Act. No. 3:21-cv-00538-N

BRIEF IN SUPPORT OF APPELLANTS' MOTION FOR STAY PENDING APPEAL

Davor Rukavina, Esq.
Texas Bar No. 24030781
Julian P. Vasek, Esq.
Texas Bar No. 24070790
MUNSCH HARDT KOPF & HARR, P.C.
500 N. Akard Street, Ste. 3800
Dallas, Texas 75201-6659
Telephone: (214) 855-7500
Facsimile: (214) 855-7584
E-mail: drukavina@munsch.com

COUNSEL FOR HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., AND NEXPOINT ADVISORS, L.P.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. SUMMARY 1

II. BACKGROUND 2

III. ARGUMENTS AND AUTHORITIES 4

A. STANDARD FOR A STAY PENDING APPEAL 4

B. THERE IS A LIKELIHOOD OF SUCCESS ON THE MERITS 5

i. Legal Standard 5

ii. Absolute Priority Rule 6

iii. Exculpation and Injunction Provisions 10

C. MOVANTS WILL SUFFER IRREPARABLE INJURY WITHOUT A STAY 16

D. NO SUBSTANTIAL HARM TO DEBTOR OR OTHER PARTIES 19

E. THE PUBLIC INTEREST IS SERVED BY A STAY PENDING APPEAL 21

F. SECURITY FOR STAY PENDING APPEAL 22

IV. CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Associated Press v. Otter, 682 F.3d 821 (9th Cir. 2012) 17

Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. Lasalle P'ship, 526 U.S. 434 (1999) 9

Cooper v. U.S. Postal. Serv., 246 F.R.D. 415 (D. Conn. 2007)..17

In re Adelphia Commc'ns. Corp., 361 B.R. 337 (S.D.N.Y. 2007) 5

In re Best Products Co., 177 B.R. 791 (S.D.N.Y. 1995) 18

In re Blast Energy Services, Inc., 593 F.3d 418 (5th Cir. 2010)..18

In re Craig's Stores of Tex. Inc., 266 F.3d 388 (5th Cir. 2001)..15

In re Dernick, No. 18-32417, 2019 WL 236999 (Bankr. S.D. Tex. Jan. 16, 2019) 16, 19

In re Dropbox, Inc. v. Thru, Inc. (In re Thru, Inc.), Civil Action
No. 3:17-CV-1958-G, 2018 WL 5113124, 2018 U.S. Dist. LEXIS
179769 (N.D. Tex. Oct. 19, 2018) 11, 12, 18, 23

In re Edmonds, 273 B.R. 527 (Bankr. E.D. Mich. 2000) 7

In re First S. Sav. Ass'n, 820 F.2d 700 (5th Cir. 1987) 5, 6, 16

In re Gleasman, 111 B.R. 595 (Bankr. W.D. Tex. 1990) 23

In re Introgen Therapeutics, 429 B.R. 570 (Bankr. W.D. Tex. 2010)...8

In re Nat'l Gypsum Co., 208 F.3d 498 (5th Cir. 2000)..17

In re Pacific Lumber Co., 584 F.3d 229 (5th Cir. 2009) 10, 11, 13, 14, 18

In re Rigg, 198 B.R. 681 (Bankr. N.D. Tex. 1996)...17

In re Scotia Dev. LLC, 2008 Bankr. LEXIS 5127 (Bankr. S.D. Tex. 2008) 22

In re Texas Equip. Co., 283 B.R. 222 (Bankr. N.D. Tex. 2002) 5, 6, 9, 16, 22

In re Tex. Grand Prairie Hotel Realty LLC, 710 F.3d 324 (5th Cir. 2013)....................................6

In re Westwood Plaza Apartments, Ltd., 150 B.R. 163 (Bankr. E.D. Tex. 1993) 16, 18

Norwest Bank Worthington v. Ahlers, 485 U.S. 197 (1988)....8

Saldana v. Saldana, 2015 WL 502145 (N.D. Tex. Aug. 25, 2015)....5

Scott v. Schedler, 826 F.3d 207 (5th Cir. 2016)....13

SR Constr. Inc. v. Hall Palm Springs, LLC, 2020 U.S. Dist. LEXIS 224334 (N.D. Tex. Dec. 1, 2020) 18

Statutes and Rules

11 U.S.C. § 524....11

11 U.S.C. § 1129....6

28 U.S.C. § 158....19

FED. R. BANKR. P. 8007 4

TO THE HONORABLE DAVID C. GODBEY, U.S. DISTRICT JUDGE:

COME NOW Highland Capital Management Fund Advisors, L.P. and NexPoint Advisors, L.P. (the "Movants" or "Appellants"), creditors and parties-in-interest in the above styled and numbered bankruptcy case (the "Bankruptcy Case") of Highland Capital Management, L.P. (the "Debtor"), and file this their brief in support of their *Motion for Stay Pending Appeal* (the "Motion"), respectfully stating as follows:

I. SUMMARY[1]

1. The Bankruptcy Court, by entering the Confirmation Order and confirming the Plan, made two fundamental errors as a matter of law. First, the Plan violates the Absolute Priority Rule by providing property and a potential recovery to equity holders even though unsecured creditors rejected the Plan. Second, the Plan contains exculpation and injunction provisions directly foreclosed and prohibited by binding precedent from the Fifth Circuit and from this Court. This second issue, which the Bankruptcy Court agreed raised a serious legal question for purposes of a stay pending appeal, is of particular importance to the Appellants, who are subject to the Plan's permanent injunctions even during the pendency of this Appeal.

2. Thus, on the first element of a stay pending appeal, the Appellants will demonstrate that they have a likelihood of success on the merits of their Appeal. As for the second element, the Appellants will suffer irreparable injury absent a stay of the Confirmation Order. If the Plan becomes effective, the Debtor will argue that any appeal will be equitably moot, and the Appellants' right to have an Article III judge review the appropriateness of the Confirmation Order may be lost. More particularly, if the Plan's permanent injunctions prevent the Appellants from exercising their lawful and contractual rights, then they will suffer

[1] Capitalized terms used in this Summary are defined below.

irreparable injury as a matter of law, especially because the Plan exculpates the Debtor from various forms of potential liability that the prompt exercise of those rights may prevent.

3. On the third element, a stay pending appeal will not substantially harm the Debtor. The Plan provides for no exit financing, no capital infusion, and no sale of property. The Plan does not provide the Debtor with anything that it does not have at present to manage its estate and monetize its assets. The Plan, while labeled a "reorganization" plan, is in reality a "liquidation" plan, and whether the Debtor liquidates in Chapter 11 during the pendency of an appeal, or outside of Chapter 11, will not materially prejudice or harm its plans.

4. On the fourth element, the public interest will best be served by staying the Confirmation Order. Thousands of innocent investors, whose investments the Debtor manages and who the Appellants advise, have had their rights impaired by the Plan and are enjoined from exercising their solemn contractual rights. Potential claims they hold against the Debtor's management and others are simultaneously judicially extinguished through the Plan's impermissible exculpation provisions. And, the public interest cannot be served by permitting a Plan that clearly violates express Fifth Circuit precedent, as well as precedent from this Court, to become effective. Respect for the law, precedent, and the judiciary is as important, if not more so, than the discrete issues involved with the Plan.

II. BACKGROUND[2]

5. On February 22, 2021, the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, the Honorable Stacey G.C. Jernigan presiding, entered its *Order (i) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (ii) Granting Related Relief* [docket no. 1943] (the

[2] Contemporaneously with the filing of the Motion and this brief, the Movants are filing their *Appendix in Support of Appellants' Motion for Stay Pending Appeal* (the "Appendix"). Citations to the Appendix shall be notated as follows: Appx. #.

"Confirmation Order").[3] By the Confirmation Order, and over the Movants' objections, the Bankruptcy Court confirmed the *Debtor's Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* [Bankr. Dkt. No. 1808[4]], as further modified (the "Plan").[5]

6. The Movants advise and manage various funds and investment vehicles including, of relevance to the Bankruptcy Case, various publicly traded retail funds.[6] The Movants are registered as investment advisors under the Investment Advisors Act of 1940.[7] The Movants have fiduciary duties to the funds and other investment vehicles they advise and manage. Three of these retail funds managed by the Advisors are Highland Income Fund, NexPoint Strategic Opportunities Fund, and NexPoint Capital, Inc.[8] In turn, these funds have invested approximately $140 million in various collateralized loan obligations ("CLOs") managed by the Debtor pursuant to portfolio management agreements (the "Portfolio Management Agreements").[9]

7. Under most of the Portfolio Management Agreements, defined "cause" is required to remove the Debtor as manager of the CLOs,[10] but in a handful such removal is also possible without cause.[11] Under at least three of the Portfolio Management Agreements, these funds have the right to remove the Debtor as the manager of the CLOs, because these funds hold the requisite percentage of shares under the agreements to remove the CLO manager.[12] There are

---

[3] Appx. 1.

[4] The Bankruptcy Court also attached a copy of the Plan to the Confirmation Order at Dkt. No. 1943. That is the copy that is included in the Appendix at Appx. 92.

[5] Appx. 92.

[6] Appx. 686 (beginning on line 10).

[7] *See* Appx. 686 (beginning on line 17).

[8] *See* Appx. 686 (beginning on line 20).

[9] Appx. 689 (beginning on line 1).

[10] Appx. 1233, 1259, 1299.

[11] *E.g.*, Appx. 1297 (subparagraph (e)).

[12] Appx. 1217; *see also*, *e.g.*, Appx. 1297.

various other CLOs where the funds do not hold the requisite percentage of shares to remove the Debtor as manager unilaterally, but are able to vote their shares to remove the Debtor as manager if other preference shareholders join in such removal and, collectively, the contractual threshold of voting preference shares for removal is met. Thus, should the Debtor, as manager, be acting inappropriately or against the wishes and interests of the funds, the funds have the contractual ability to protect themselves by removing the Debtor as the manager of their investments.

8. The Movants filed their notice of appeal of the Confirmation Order on March 1, 2021.[13] Various other creditors and parties-in-interest filed separate notices of appeal, and it is expected that the appeals will be consolidated.

9. On February 28, 2021, the Movants filed a motion with the Bankruptcy Court to stay the Confirmation Order pending appeal [Bankr. Dkt. No. 1955]. Various other parties filed separate motions to stay pending appeal, or joined in the Movants' motion. The Bankruptcy Court held a hearing on the motions for stay pending appeal on March 19, 2021. The Bankruptcy Court orally denied the motions, giving its oral findings of fact and conclusions of law, as supplemented by two orders denying the motions.[14] This Motion now follows.

III. ARGUMENTS AND AUTHORITIES

A. STANDARD FOR A STAY PENDING APPEAL

10. Bankruptcy Rule 8007 allows a bankruptcy court, in the first instance, to stay a judgment in order to maintain the status quo pending appeal. FED. R. BANKR. P. 8007(a)(1)(A). If denied, the appellant may then seek relief from the District Court. FED. R. BANKR. P. 8007(b). As discussed in the Motion, the Movants have satisfied the requirements for seeking such relief in this Court.

---

13 Appx. 957.

14 Appx. 1134, 1323, 1326.

11. In determining whether to grant a discretionary stay pending appeal under Bankruptcy Rule 8007, courts consider the following criteria:

(1) the likelihood that the movant will prevail on the merits of the appeal;

(2) whether the movant will suffer irreparable injury if the stay is denied;

(3) whether other parties would suffer substantial harm if the stay is granted; and

(4) whether the public interest will be served by granting the stay.

In re First S. Sav. Ass'n, 820 F.2d 700, 709 (5th Cir. 1987); *In re Tex. Equip. Co.*, 283 B.R. 222, 226-27 (Bankr. N.D. Tex. 2002). The first two elements are the most critical. *Saldana v. Saldana*, 2015 WL 502145, at *2 (N.D. Tex. Aug. 25, 2015).

12. The fundamental purpose of a stay pending appeal, especially with respect to an order of an Article I court, is aptly summarized as follows:

> Without a stay, it is extremely unlikely that Appellants will ever be able to have meaningful appellate review of the rulings of the Bankruptcy Court, a non-Article III court, and in any event, a lower court. The ability to review decisions of the lower courts is the guarantee of accountability in our judicial system. In other words, no single judge or court can violate the Constitution and laws of the United States, or the rules that govern court proceedings, with impunity, because nearly all decisions are subject to appellate review. . . Thus, the ability to appeal a lower court ruling is a substantial and important right.

In re Adelphia Commc'ns. Corp., 361 B.R. 337, 342 (S.D.N.Y. 2007).

B. THERE IS A LIKELIHOOD OF SUCCESS ON THE MERITS

i. Legal Standard.

13. With respect to the first element, the likelihood of success on the merits:

> the Fifth Circuit has explained that the movant need not always show a 'probability' of success on the merits; instead, the movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay. When the issue appealed is mostly a factual question over which the bankruptcy court has broad discretion, such discretion is unlikely to be overturned on appeal. Thus, with respect to questions of fact, the movant usually fails to satisfy the first

> element. With respect to questions of law, however, especially questions involving the application of law, or when the law has not been definitively addressed by a higher court, the movant more easily satisfies the first element.

In re Tex. Equip. Co., 283 B.R. at 227 (internal citations and quotations omitted); *accord In re First S. Sav. Assoc.*, 820 F.2d at 704 ("the movant need only present a substantial case on the merits when a serious legal question is involved").

14. When considering the confirmation of a Chapter 11 plan, the Bankruptcy Court's findings of fact are reviewed for clear error, while its conclusions of law are reviewed *de novo*. *See In re Tex. Grand Prairie Hotel Realty LLC*, 710 F.3d 324, 326 n.1 (5th Cir. 2013). Here, the Movants challenge the Bankruptcy Court's rulings on issues of law. Therefore, the Movants "more easily satisf[y] the first element." *In re Tex. Equip. Co.*, 283 B.R. at 227.

ii. Absolute Priority Rule.

15. Class 8, a class of unsecured creditors, rejected the plan.[15] That means that the Plan could have only been confirmed under the cramdown provisions of section 1129(b) of the Bankruptcy Code. *See* 11 U.S.C. §§ 1129(b)(1); 1129(a)(8). In order to be confirmed, the Plan must be "fair and equitable" with respect to Class 8. A plan is "fair and equitable" with respect to Class 8 if:

> (i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or
>
> (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.

11 U.S.C. § 1129(b)(2)(B).

[15] Appx. 943 – 949. One of the Movants, NexPoint Advisors, L.P., is a partial assignee of four Class 8 Claims. Appx. 1123 – 1133.

16. The Plan estimates a recovery to Class 8 creditors of 71% over time.[16] As such, subsection (i) above does not apply because Class 8 will not be paid in full. That means that the only way the Plan could be confirmed is under subsection (ii), also known as the Absolute Priority Rule. This Rule is simple: if the class rejects the Plan and is not paid in full under the Plan, then the holder of any junior interest; *i.e.* equity interest, cannot "receive or retain . . . any property" on account of its junior interest.

17. Here, the Plan violates the Absolute Priority Rule as a matter of law. This is because the Plan gives the holders of limited partnership interests in the Debtor contingent interests in the Claimant Trust.[17] There can be no question that the contingent trust interests the Plan gives to holders of equity interests is "property" within the meaning of the Absolute Priority Rule. The Debtor admitted this during closing arguments: "These are contingent interests. They are property. No doubt they are property."[18] The Debtor's Chief Executive Officer and Chief Restructuring Officer, who prepared and authorized the Plan for the Debtor, testified that the contingent interests are, in his belief, inchoate property interests.[19] Moreover, that witness confirmed that these contingent interests may have some value in the future.[20] As a matter of law, an interest in a trust, even one subject to a contingency that may never happen, is "property." *See In re Edmonds*, 273 B.R. 527, 529 (Bankr. E.D. Mich. 2000).

18. That is the beginning and end of the inquiry: the Absolute Priority Rule prohibits equity from receiving or retaining any "property" under the Plan, and that is precisely what they are receiving under the Plan. It does not matter that that property is subject to a contingency that

---

16 Appx. 41 (*See* Confirmation Order at p. 41).
17 Appx. 120 (Plan at p. 23 – 24).
18 Appx. 876 (Feb. 3 Confirmation Hearing Transcript at 242:19-20).
19 Appx. 516 (Feb. 2 Confirmation Hearing Transcript at 177:10 – 178:21).
20 Appx. 517 (Feb. 2 Confirmation Hearing Transcript at 178:22-25).

is only triggered if and when unsecured creditors are paid in full, or that the property has little to no value, or that the contingency may never occur: "property" is being received under the Plan.

19. The Debtor argued, and the Bankruptcy Court agreed, that these contingent interests may have no value and would only vest and be paid if unsecured creditors are paid in full, thus preserving the priority scheme of the Bankruptcy Code.[21] As for the argument regarding value, the United States Supreme Court has squarely rejected any such argument:

> Respondents further argue that the absolute priority rule has no application in this case, where the property which the junior interest holders wish to retain has no value to the senior unsecured creditors. In such a case, respondents argue, the creditors are deprived of nothing if such a so-called interest continues in the possession of the reorganized debtor. . . We join with the overwhelming consensus of authority which has rejected this 'no value' theory. . . Whether the value is present or prospective, for dividends or only for purposes of control a retained equity interest is a property interest. . . And while the Code itself does not define what 'property' means as the term is used in § 1129(b), the relevant legislative history suggests that Congress' meaning was quite broad. Property includes both tangible and intangible property.

Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 207-08 (1988) (internal quotations and citations omitted). Thus, it does not matter that the "property" may be prospective, or that it may be intangible, or that it may have no value. All that matters is that "property," which is intended to be read broadly, is retained or received under the Plan. There can be no question that it is.

20. The Debtor and the Bankruptcy Court relied on *In re Introgen Therapeutics*, 429 B.R. 570 (Bankr. W.D. Tex. 2010) for the proposition that, so long as the contingent interests are not paid unless and until all unsecured claims are paid in full, the Absolute Priority Rule is not violated and is, in fact, preserved. As is the case here, the plan in *Introgen* provided that equity interests, which were retained, would only be paid if and when unsecured creditors were paid in full. This opinion was wrongly decided. First, it directly contradicts the language of the Bankruptcy Code, which implicates the Absolute Priority if *any* "property" is being retained or

[21] Appx. 45 (Confirmation Order p. 45).

received. Second, this opinion looked to the present value of what was being retained, something directly foreclosed by the Supreme Court's opinion in *Norwest Bank Worthington v. Ahlers* quoted above. Third, this opinion fails to take into account the Supreme Court's opinion in *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. Lasalle P'ship*, 526 U.S. 434 (1999). The Supreme Court equated the exclusive opportunity to bid on new equity under a plan as itself "property" that was being granted or retained in violation of the Rule: "[t]his opportunity should, first of all, be treated as an item of property in its own right." *Id.* at 455. If an exclusive "opportunity" is "property" for purposes of the Absolute Priority Rule, then the "opportunity" to perhaps share in a future recovery, however remote, is also "property."

21. The Bankruptcy Court misapplied the Absolute Priority Rule such that the Rule is vindicated so long as equity holders are not actually paid anything unless and until unsecured creditors are first paid in full. But that is neither the language nor the operation of the Rule. The Rule prohibits the receipt or retention of any property under the Plan, and it cannot be denied that equity holders receive or retain *some* property under the Plan, even if that property is contingent and of dubious value. The Movants therefore submit that they have presented "a substantial case on the merits when a serious legal question is involved." *In re Tex. Equip. Co.*, 283 B.R. at 227. Moreover, with respect to the Bankruptcy Court's conclusion that the Absolute Priority Rule is not violated because equity would not be paid anything unless and until all unsecured creditors are paid in full, and notwithstanding the holding of *In re Introgen Therapeutics* supporting that conclusion, neither the Supreme Court nor the Fifth Circuit has addressed this argument. Thus, because this issue has not been "definitively addressed by a higher court," the Movants have "more easily" satisfied this element. *See id.*

iii. Exculpation and Injunction Provisions.

22. The Plan contains a broad exculpation provision exculpating from certain liabilities not only the Debtor but also its professionals and third parties:

> Subject in all respects to ARTICLE XII.D of this Plan, to the maximum extent permitted by applicable law, no Exculpated Party will have or incur, and each Exculpated Party is hereby exculpated from, any claim, obligation, suit, judgment, damage, demand, debt, right, Cause of Action, remedy, loss, and liability for conduct occurring on or after the Petition Date in connection with or arising out of (i) the filing and administration of the Chapter 11 Case; (ii) the negotiation and pursuit of the Disclosure Statement, the Plan, or the solicitation of votes for, or confirmation of, the Plan; (iii) the funding or consummation of the Plan (including the Plan Supplement) or any related agreements, instruments, or other documents, the solicitation of votes on the Plan, the offer, issuance, and Plan Distribution of any securities issued or to be issued pursuant to the Plan, including the Claimant Trust Interests, whether or not such Plan Distributions occur following the Effective Date; (iv) the implementation of the Plan; and (v) any negotiations, transactions, and documentation in connection with the foregoing clauses (i)-(iv); *provided*, *however*, the foregoing will not apply to (a) any acts or omissions of an Exculpated Party arising out of or related to acts or omissions that constitute bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct or (b) Strand or any Employee other than with respect to actions taken by such Entities from the date of appointment of the Independent Directors through the Effective Date. This exculpation shall be in addition to, and not in limitation of, all other releases, indemnities, exculpations, any other applicable law or rules, or any other provisions of this Plan, including ARTICLE IV.C.2, protecting such Exculpated Parties from liability.[22]

"Exculpated Parties," in turn, means, collectively:

> (i) the Debtor and its successors and assigns, direct and indirect majority-owned subsidiaries, and the Managed Funds, (ii) the Employees, (iii) Strand, (iv) the Independent Directors, (v) the Committee, (vi) the members of the Committee (in their official capacities), (vii) the Professionals retained by the Debtor and the Committee in the Chapter 11 Case, (viii) the CEO/CRO; and (ix) the Related Persons of each of the parties listed in (iv) through (viii).[23]

23. The Fifth Circuit has held that exculpation provisions designed to absolve parties other than the debtor and the creditors' committee of any negligent conduct that occurred during the course of the bankruptcy are *per se* inappropriate. *In re Pacific Lumber Co.*, 584 F.3d 229,

[22] Appx. 144 (Plan at 47-48).
[23] Appx. 106 (Plan at 9).

253 (5th Cir. 2009). Indeed, Fifth Circuit authorities broadly "foreclose non-consensual non-debtor releases and permanent injunctions." *Id.* at 252 (citing authorities); *see also In re Dropbox, Inc. v. Thru, Inc. (In re Thru, Inc.)*, Civil Action No. 3:17-CV-1958-G, 2018 WL 5113124 at *22-23, 2018 U.S. Dist. LEXIS 179769 at *62-64 (N.D. Tex. Oct. 19, 2018). This is because, in part, the Bankruptcy Code makes clear that a discharge discharges the debts of only the debtor and not of any other person or party. *See* 11 U.S.C. § 524(e). Exculpating, or judicially releasing, a person from potential liability to another is exactly the type of "non-consensual non-debtor releases" prohibited by *Pacific Lumber*.

24. That should be the beginning and the end of the inquiry: under *Pacific Lumber*, the exculpation of any party other than the Debtor and the members of the creditor's committee is *per se* impermissible. Here, the Plan exculpates the Debtor's employees and managers, as well as its bankruptcy professionals. The Plan also exculpates the Debtor's general partner, Strand—a non-debtor entity—and the directors of Strand. The Plan also exculpates all of their "Related Persons," with certain exceptions not applicable here. And, unlike the extremely narrow and limited exculpation permitted by *Pacific Lumber*, here the Plan exculpates various persons and entities not only for actions they may have taken in the bankruptcy case itself, but also for business decisions and for any matters that arise after confirmation of the Plan ("the implementation of the Plan"). It is the equivalent of a bankruptcy court exculpating General Motors from liability not only for selling a defective car during its bankruptcy case, in which case the consumer would at least have an administrative claim against the estate, but also for a defective car made and sold after the bankruptcy was over.

25. Indeed, this Court, in *In re Thru, Inc.*, struck down a similar exculpation clause to the one in the Plan approved by the same bankruptcy judge as here, even though the clause in

Thru Inc. was significantly narrower than the present one. 2018 WL 5113124 at *22-23, 2018 U.S. Dist. LEXIS 179769 at *62-64. The exculpation clause in that case provided as follows:

> Neither the Debtor nor any of its present officers, directors, employees, agents, advisors, or affiliates, nor any of its Professionals (collectively, the "Exculpated Persons"), shall have or incur any liability to any Entity for any act taken or omission made in good faith in connection with or related to formulating, negotiating, implementing, confirming or consummating the Plan, the Disclosure Statement or any Plan Document. The Exculpated Persons shall have no liability to the Debtor, any Creditor, Interest holder, any other party in interest in the Chapter 11 Case or any other Entity for actions taken or not taken under the Plan, in connection herewith or with respect thereto, or arising out of their administration of the Plan or the property to be distributed under the Plan, in good faith, including failure to obtain Confirmation or to satisfy any condition or conditions, or refusal to waive any condition or conditions, to the occurrence of the Effective Date, and in all respects such Exculpated Persons shall be entitled to rely upon the advice of counsel with respect to their duties and responsibilities under the Plan.

2018 WL 5113124 at *22, 2018 U.S. Dist. LEXIS 179769 at *62-64.

26. This Court concluded that "it was clearly erroneous for the bankruptcy court to approve" this provision under *Pacific Lumber* because the provision "bars the debtor's creditors from pursuing causes of actions against a number of non-debtor third parties, if those causes of action relate to the creditors' claims against the debtor." *Id*. Because this Court has already concluded that confirmation of a plan containing a virtually identical exculpation provision constituted an error as a matter of law under *Pacific Lumber*, the Movants have demonstrated a likelihood of success on the merits of their appeal regarding the Plan's exculpation provisions.

27. The issue is similar with respect to the Plan's sweeping, permanent injunction. The first such injunction provides that:

> Upon entry of the Confirmation Order, all Enjoined Parties are and shall be permanently enjoined, on and after the Effective Date, from taking any actions to interfere with the implementation or consummation of the Plan.[24]

28. As with exculpations, the Fifth Circuit in *Pacific Lumber* broadly foreclosed non-

[24] Appx. 147 (Plan at 50-51).

consensual "permanent injunctions." *In re Pacific Lumber Co.*, 584 F.3d at 252-53. This injunction also suffers from being both fatally overbroad and vague: what does any action to "interfere" with the "implementation or consummation" of the Plan mean? Are the Movants enjoined from advising their clients to exercise their contractual remedies against the Debtor, such as by removing investments managed by the Debtor or removing the Debtor as portfolio manager? That is what the Debtor testified to at the confirmation hearing, among other things.[25] As summarized by the Fifth Circuit with respect to the vagueness and breadth of an injunction:

> 'Vagueness' is a question of notice, *i.e.*, procedural due process, and 'broadness' is a matter of substantive law. [A]n injunction is overly vague if it fails to satisfy the specificity requirements set out in Rule 65(d)(1), and it is overbroad if it is not narrowly tailored to remedy the specific action which gives rise to the order as determined by the substantive law at issue. . . The Supreme Court has repeatedly emphasized that the specificity provisions of Rule 65(d) are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood.

Scott v. Schedler, 826 F.3d 207, 211-12 (5th Cir. 2016) (internal citations and quotations omitted).

29. The Movants and others should not be subjected to potential contempt actions and citations when the Plan fails to define with any reasonable specificity what it means to "interfere" with the "implementation or consummation" of the Plan.

30. More troubling is the so-called "gatekeeper" injunction, which requires the Movants, among others, to seek leave from the Bankruptcy Court and to demonstrate a "colorable" claim before they may take any action against various non-debtor parties, including for post-confirmation matters. This permanent injunction provides as follows:

> no Enjoined Party may commence or pursue a claim or cause of action of any kind against any Protected Party that arose or arises from or is related to the Chapter 11 Case, the negotiation of the Plan, the administration of the Plan or

---

[25] Appx. 537 (Confirmation Transcript (Feb. 2) 198:12-25).

property to be distributed under the Plan, the wind down of the business of the Debtor or Reorganized Debtor, the administration of the Claimant Trust or the Litigation Sub-Trust, or the transactions in furtherance of the foregoing without the Bankruptcy Court (i) first determining, after notice and a hearing, that such claim or cause of action represents a colorable claim of any kind, including, but not limited to, negligence, bad faith, criminal misconduct, willful misconduct, fraud, or gross negligence against a Protected Party and (ii) specifically authorizing such Enjoined Party to bring such claim or cause of action against any such Protected Party; provided, however, the foregoing will not apply to a claim or cause of action against Strand or against any Employee other than with respect to actions taken, respectively, by Strand or by such Employee from the date of appointment of the Independent Directors through the Effective Date. The Bankruptcy Court will have sole and exclusive jurisdiction to determine whether a claim or cause of action is colorable and, only to the extent legally permissible and as provided for in ARTICLE XI, shall have jurisdiction to adjudicate the underlying colorable claim or cause of action.[26]

31. "Enjoined Party" includes the Movants.[27] "Protected Parties" is defined as:

(i) the Debtor and its successors and assigns, direct and indirect majority-owned subsidiaries, and the Managed Funds, (ii) the Employees, (iii) Strand, (iv) the Reorganized Debtor, (v) the Independent Directors, (vi) the Committee, (vii) the members of the Committee (in their official capacities), (viii) the Claimant Trust, (ix) the Claimant Trustee, (x) the Litigation Sub-Trust, (xi) the Litigation Trustee, (xii) the members of the Claimant Trust Oversight Committee (in their official capacities), (xiii) New GP LLC, (xiv) the Professionals retained by the Debtor and the Committee in the Chapter 11 Case, (xv) the CEO/CRO; and (xvi) the Related Persons of each of the parties listed in (iv) through (xv).[28]

32. Like exculpation, this is exactly the type of permanent injunction that effectuates a non-consensual release of a non-debtor party prohibited by *Pacific Lumber*. *In re Pacific Lumber Co.*, 584 F.3d at 252-53. Nor is this injunction appropriate because it purportedly provides a safety-valve in the nature of seeking leave from the Bankruptcy Court. Why should a party with a claim have to seek leave from any court before bringing its claim? Why should a party have to prove, *a priori*, that its claim is colorable before it can bring that claim? Most importantly, why should the party have to do so before the Bankruptcy Court which, after

26 Appx. 147 (Plan at 50-51).
27 Appx. 105 (Plan at 8).
28 Appx. 110 (Plan at 13).

confirmation, will have very narrow jurisdiction?

33. The question of the Bankruptcy Court's postconfirmation jurisdiction demonstrates the impropriety of this injunction. Jurisdiction, of course, cannot be judicially created nor created by agreement. "After a debtor's reorganization plan has been confirmed, the debtor's estate, and thus bankruptcy jurisdiction, ceases to exist, other than for matters pertaining to the implementation or execution of the plan." *In re Craig's Stores of Tex. Inc.*, 266 F.3d 388, 390 (5th Cir. 2001). The Bankruptcy Court will have no jurisdiction to determine whether an action is "colorable," especially with respect to actions that arise after confirmation ("the wind down of the business of the Debtor or Reorganized Debtor"). Yet, even though the Bankruptcy Court will have no jurisdiction to determine whether an action is "colorable," the person wishing to bring the action will be subject to the injunction anyway.

34. Thus, the "safety valve" is illusory. And, if the Bankruptcy Court attempts to take jurisdiction and determines that the action is not "colorable," now the person has been denied his day in court and has been denied his due process because an Article I court, without even Article I jurisdiction, has effectively decided the person's claims or cause of action without trial, without jury, and without appeal. Or, the person must risk contempt and other serious consequences by proceeding with his claim anyway, under the belief and argument that the gatekeeper injunction is ultimately unenforceable. This is of particular relevance and concern to the Movants and to the funds they advise and manage, who have Constitutionally protected contractual rights against the Debtor that they are now effectively permanently enjoined from enforcing.

35. All of these exculpation and injunction provisions effectuate precisely what *Pacific Lumber* forecloses: a non-consensual release, whether expressly or effectively through an injunction, or a claim held by a non-debtor against a non-debtor. Even the Bankruptcy Court

agreed that this was a "serious legal issue" for purposes of a stay pending appeal.[29] In fact, the Bankruptcy Court stated its belief that the Fifth Circuit would "extend the holding of *Pacific Lumber*" with respect to the proper scope of an exculpation provision.[30] But then that is precisely the point: if the holdings and limitations of *Pacific Lumber* must be extended in order for the Plan's exculpation provision to be permissible, then the Movants have demonstrated a likelihood of success on the merits of this issue *per se*, for this admits that the exculpation provision is impermissible under the current state of the law. At a minimum, the Movants have shown a substantial case on the merits and the balance of equities weighs heavily in favor of a stay. *See In re First S. Savings*, 820 F.2d at 704; *In re Dernick*, No. 18-32417, 2019 WL 236999, at *3 (Bankr. S.D. Tex. Jan. 16, 2019); *In re Tex. Equipment Co.*, 283 B.R. at 227. "A serious legal question exists when legal issues have far-reaching effects, involve significant public concerns, or have a broad impact on federal/state relations." *In re Dernick*, 2019 WL 236999, at *3; *see In re Westwood Plaza Apartments, Ltd.*, 150 B.R. 163, 168 (Bankr. E.D. Tex. 1993).

C. MOVANTS WILL SUFFER IRREPARABLE INJURY WITHOUT A STAY

36. The focus of the second element is whether, absent a stay pending appeal, the Movants may suffer irreparable injury in the form of effectively being denied appellate review due to mootness or similar considerations. *See In re Tex. Equip. Co.*, 283 B.R. at 228. In this respect, it is important to distinguish the *confirmation* of a plan from the *effectiveness* of a plan, for the Plan becomes operative only when it is declared to be effective once all conditions precedent are satisfied.[31] As of the filing of this Motion, the Plan has yet to become effective; thus, the relief requested in this Motion cannot be argued to be moot. Second, it is important to

---

29 Appx. 1204 (lines 4 – 8).

30 Appx. 1203 (lines 8 – 24).

31 Appx. 142 (Article VIII of the Plan governing effectiveness of the Plan).

note that, under the Plan, the Debtor has assumed the CLO Portfolio Management Agreements, by which it manages well over $1 billion in other people's money.[32] The law is clear that, upon the assumption of an executory contract, the Debtor assumes and accepts all obligations and burdens going forward, and the rights of the contract counterparty going forward are fully preserved. *See In re Nat'l Gypsum Co.*, 208 F.3d 498, 506 (5th Cir. 2000); *In re Rigg*, 198 B.R. 681, 685 (Bankr. N.D. Tex. 1996).

37. Most importantly, as argued above with respect to the Plan's exculpation and injunction provisions, the Movants are subject to the Plan's permanent injunctions that prevent them from taking actions or from advising or causing their clients to take actions, including the removal of the Debtor as CLO manager under the Portfolio Management Agreements which the Debtor has otherwise assumed and must, therefore, live with. Being enjoined from doing what one otherwise has the lawful right to do is irreparable injury as a matter of law. *See, generally, Associated Press v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012); *Cooper v. U.S. Postal. Serv.*, 246 F.R.D. 415, 418 (D. Conn. 2007). While these cases arise in the context of the First Amendment, their principles should extend to the exercise of all lawful rights being enjoined but, even if not, the Movants' First Amendment rights are enjoined by the Plan because they are prohibited from advising their clients to take various actions against the Debtor, including to terminate the Debtor's CLO management rights.

38. This is especially the case because the Debtor has stated that it intends to liquidate and wind down the CLOs in approximately two years.[33] During that time, if the Movants dispute how the Debtor is doing so, or believe they have claims against the Debtor for how it is doing so, or wish to advise or cause their clients to take action against the Debtor on account of the same,

---

[32] Appx. 47 (Confirmation Order pp. 47-48); Appx. 68 (Confirmation Order pp. 68-69).

[33] Appx. 451, line 5 ("We anticipate that we'll be able to monetize the assets in two years."); Appx. 521, line 5 (same).

they will be prohibited by the Plan from doing so and the Debtor will be exculpated. Thus, absent a stay pending appeal, by the time that the Movants may ultimately prevail on their Appeal, various rights will effectively have been lost for good, and potential injuries caused during the interim may be impossible to remedy.

39. The other important issue for irreparable injury is the prospect of equitable mootness, which is an appellate doctrine that may foreclose appellate review of a substantially consummated Chapter 11 plan notwithstanding the merits of the appeal, because it may be effectively too late to "unscramble the eggs." *See, e.g., In re Blast Energy Services, Inc.*, 593 F.3d 418, 424 (5th Cir. 2010). Indeed, the Fifth Circuit in *Pacific Lumber*, recognized the potential issues with denying a stay of a confirmation order pending appeal:

> Although the exigencies of the case appeared to demand prompt action, simply denying a stay seems to have been, and often will be, too simplistic a response. A plan may be designed to take effect, as it was here, after a lapse of sufficient time to initiate appellate review. A supersedeas bond may be tailored to the scope of the appeal. An appeal may be expedited. As with all facets of bankruptcy practice, myriad possibilities exist. Thus, substantial legal issues can and ought to be preserved for review.

584 F.3d at 243.

40. Case law confirms that the threat of equitable mootness can constitute irreparable injury when a confirmation order is being appealed. *See, e.g., In re Westwood Plaza Apartments*, 150 B.R. at 169 (factor tilted in favor of granting stay); *In re Thru, Inc.*, 2018 WL 5113124, at *12 (equitable mootness more likely if no stay has been obtained and plan has been substantially consummated); *see also In re Best Products Co.*, 177 B.R. 791 (S.D.N.Y. 1995) (dismissing appeal of confirmation order as moot where appellant failed to seek stay of confirmation order and plan had been consummated); *but see SR Constr. Inc. v. Hall Palm Springs, LLC*, 2020 U.S. Dist. LEXIS 224334, *7 (N.D. Tex. Dec. 1, 2020) ("the risk of mooting a bankruptcy appeal,

standing alone, does not constitute irreparable harm warranting a stay" (emphasis added)). And the threat of equitable mootness necessarily gives rise to irreparable injury because, even though one does not have the right to prevail on appeal, one has the right to appeal a confirmation order, especially when one considers the fact that an Article III court must be able to review the actions of an Article I court. *See, generally,* 28 U.S.C. § 158 (providing for appeal as of right for final orders).

D. NO SUBSTANTIAL HARM TO DEBTOR OR OTHER PARTIES

41. A stay pending appeal is also justified under the third prong because neither the Debtor, nor any of the Debtor's creditors, will be substantially harmed by a stay of the Confirmation Order pending appeal. Courts have found substantial harm to other parties if the stay would cause a significant delay in the administration of the estate or a delay in the distribution to creditors under the plan. *In re Dernick*, 2019 WL 236999, at *4. Here, a stay will not lead to any harm, much less substantial harm, to the Debtor or other creditors. This is because the Debtor can continue doing exactly what it would do under the Plan: (i) the CEO/CRO is still in charge and the members of the creditors committee will be on the trust oversight board, with the addition of one additional member; (ii) the CEO/CRO can continue administering the estate the same as he is doing now; (iii) the CEO/CRO can continue managing affirmative litigation the same as he is doing now; (iv) the CEO/CRO can continue managing the CLOs and funds that the Debtor manages the same as he is doing now; (v) there is no exit financing under the Plan; (vi) there are no asset sales or compromises under the Plan that cannot be effectuated without the Plan; and (vii) there is no new money or new value being contributed under the Plan.[34]

[34] Appx. 524 (Confirmation Transcript (Feb. 2, 2001) 185:3-188:5).

42. As the Debtor's CEO/CRO confirmed, "post-confirmation, you are basically going to continue managing the CLOs and funds and trying to monetize assets for creditors the same as you are today."[35] And, as the CEO/CRO confirmed, he does not "need anything in the plan that [he] does [not] have today to keep managing" the "Funds and the CLOs."[36] Instead, as the CEO/CRO confirmed, the only difference is that he would not be willing to serve as the post-confirmation trustee without the Plan's channeling Injunction, and that the reorganized debtor would be unable to obtain directors and officers insurance.[37] But that is precisely the point: a Plan should not have as its principal purpose the entry of an injunction limiting the ability of parties to exercise their rights for matters arising *after* confirmation and assumption.

43. The Court should also take into account that 27 Class 8 creditors rejected the Plan, while only 17 accepted the Plan.[38] It is the unsecured creditors who would be the only ones potentially prejudiced if the Plan is stayed, as that may delay their recoveries. But Class 8 overwhelmingly rejected the Plan. While 16 Class 7 convenience class creditors accepted the Plan, the total cost to pay those creditors is approximately $10 million.[39] The Debtor has more than sufficient cash on hand to pay these creditors with an interim distribution if it so wished. The five subordinated creditors accepting the Plan do not matter, since they are not projected to receive anything under the Plan, and if they do receive anything, it will be years into the future after extensive litigation. As for the Class 2 Frontier Secured Claim, the Debtor has many options to treat this secured claim with adequate protection and other payments that it can do without need for the Plan.

---

35 Appx. 527 (Confirmation Hearing Transcript (February 2, 2021) at 188:2-5).
36 *Id.* (Confirmation Hearing Transcript (February 2, 2021) at 188:23-189:2).
37 Appx. 507 (Confirmation Hearing Transcript (February 2, 2021) at 168:6-18).
38 Appx. 946.
39 Appx. 951.

E. THE PUBLIC INTEREST IS SERVED BY A STAY PENDING APPEAL

44. Because the Plan's exculpation and injunction provisions impermissibly infringe upon the contractual, legal and due process rights of parties in interest in the bankruptcy case, including such interests and rights *after* the Debtor exists bankruptcy, a stay pending appeal of the Plan will serve the public interest. The rights of thousands of innocent investors who have invested in the CLOs or funds that the Debtor manages, totaling well over $1 billion, are at issue. A stay will ensure that non-debtor parties are held accountable for their post-petition and post-confirmation conduct, while preserving the rights and remedies of parties in interest under applicable non-bankruptcy law. The interests of these many innocent, third party investors must be taken into account, and their interests are not served by a plan that may effectively and permanently prevent them from exercising legitimate contractual and statutory rights, just because the Debtor wants to wind-down and liquidate its affairs. The public has a strong interest in ensuring that securities laws are complied with, including the Investment Advisers Act of 1940. The Plan's Exculpation Provision and Injunction threaten to substantially vitiate these laws and effectively relieve the Debtor from its obligations and duties (and potential liabilities) thereunder.

45. Additionally, the public interest is best served by requiring respect for judicial precedent, here *Pacific Lumber*. While the Bankruptcy Court believes that the Fifth Circuit will revisit its *Pacific Lumber* holdings and will expand *Pacific Lumber*, at present *Pacific Lumber* is the law and the Bankruptcy Court is as bound as anyone else to abide by the law. A Plan that clearly and directly violates *Pacific Lumber*, as well as this Court's precedent in *In re Thru*, should not be permitted to become effective unless and until the Fifth Circuit actually does revisit its precedent. Otherwise, under that precedent, that Plan is illegal, and the public interest

demands that an illegal plan not be given effect in the hope that, eventually, appellate review will be avoided under the doctrine of equitable mootness.

F. <u>Security for Stay Pending Appeal</u>

46. The Court may, but need not, condition a stay pending appeal on a bond or other security being posted. As one Court has summarized:

> The purpose of a supersedeas bond is to preserve the status quo while protecting the non-appealing party's rights pending appeal. The bond secures the prevailing party against any loss sustained as a result of being forced to forgo execution on a judgment during the course of an ineffectual appeal. In deciding how best to secure the non-appealing party from loss, the court applies general equitable principles.

In re Tex. Equip. Co., 283 B.R. at 229.

47. Normally, the amount of any bond should be the amount of the judgment being stayed. The Movants are aware of one bankruptcy court concluding that, when the order being stayed is a confirmation order, the amount of the bond should be the entire amount of debt subject to the plan. *See In re Scotia Dev. LLC*, 2008 Bankr. LEXIS 5127 *32-*33 (Bankr. S.D. Tex. 2008). Here, however, the Plan does not propose to pay any claims any time soon, except for administrative claims and Class 7 convenience claims, both of which can be satisfied by the amount of cash the Debtor is presently holding. Thus, an analogy to *Scotia Dev. LLC* is not warranted, and applying its reasoning here would lead to a punitive result that would actually better the returns to creditors, meaning that it would do far more than preserve the status quo and protect against harm resulting from the stay pending appeal itself. Moreover, the risk in *Scotia Dev. LLC* was that the debtor's business would collapse from a lack of funding that the confirmed plan provided for. *See id*. at *25 ("the continued viability and operation of the debtors must be protected. All parties agree that some extraordinary program is required to allow these

Case 3:21-cv-00538-N Document 26 Filed 04/01/21 Page 27 of 29 PageID 1376

debtors to survive more than even ten days. Without additional cash, both Scopac and Palco would have to shut down immediately”). No such considerations are present here.

48. Instead, the Movants respectfully submit that any such conclusion would be punitive and would not be warranted by the facts. *See, e.g., In re Gleasman*, 111 B.R. 595, 604 (Bankr. W.D. Tex. 1990) (“The purpose of a bond, after all, is to protect Franklin against any loss, not to confer a windfall. The property itself is not going anywhere”). As discussed above, the Plan does not give the Debtor anything it does not have now. No new funds are coming in, no exit financing is involved, and no asset sale is provided for in the Plan. Rather, the Debtor will simply continue doing under the Plan what it is doing now: it will manage its assets, funds, and the CLOs, and will continue monetizing its assets and managing litigation the same as now. Whatever the value of the assets being administered is today will be the same under the Plan as without the Plan. No new funds and no exit financing is involved. Nothing in the Plan gives the Debtor tools to administer its estate that it lacks at present, and nothing in the Plan will increase the value of assets available for creditors. Thus, there will be no harm to the Debtor or to the estate.

49. The only conceivable harm is from a delay in certain payments to certain creditors and minor added administrative expenses for having to file reports and pleadings with the Bankruptcy Court. If the Plan is affirmed, then those creditors would not have the use of those funds for a period of time. Here, the Debtor believes that it will distribute approximately $60 million to Class 7 and Class 8 creditors within one year of the Plan being confirmed.[40] As unsecured creditors, these creditors would be entitled to interest at the federal rate of post-judgment interest. *See In re Thru Inc.*, 2017 Bankr. LEXIS 1902 at *28-29. That rate is at present less than 1% and is unlikely to rise past that amount during the period of any stay. Thus,

[40] Appx. 951.

the interest that any creditor may be able to claim for any delay in payment is less than 1%, or less than $600,000.00. With respect to increased administrative costs for having to file reports and pleadings with the Bankruptcy Court, the Movants estimate that it cannot reasonably cost the Debtor more than $150,000.00 per month to have to continue filing reports and pleadings with the Bankruptcy Court that it would no longer have to do under its Plan.

50. The Bankruptcy Court has certified this Appeal for a direct appeal to the Fifth Circuit [Bankr. Dkt. No. 2034], and the Movants filed their petition for direct appeal with the Fifth Circuit on March 31, 2021. If the Fifth Circuit grants a direct appeal, the Movants submit that the Fifth Circuit will rule within sixteen (16) months while, if this Court will decide the Appeal, the Movants believe that this Court will decide the Appeal within twelve (12) months.

51. The Movants therefore submit that a bond or security of no more than $3 million is sufficient to protect the Debtor and its estate from any harm resulting from the delay in the effectiveness of the Plan.

IV. CONCLUSION

WHEREFORE, premises considered, the Movants request that the Court enter an Order: (i) staying the effectiveness of the Confirmation Order pending appeal through the Fifth Circuit; and (ii) granting such other relief as is just and proper.

RESPECTFULLY SUBMITTED this 1st day of April, 2021.

Case 3:21-cv-00538-N Document 6 Filed 04/06/21 Page 29 of 29 PageID 2138

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Davor Rukavina
Davor Rukavina, Esq.
Texas Bar No. 24030781
Julian P. Vasek, Esq.
Texas Bar No. 24070790
3800 Ross Tower
500 N. Akard Street
Dallas, Texas 75201-6659
Telephone: (214) 855-7500
Facsimile: (214) 855-7584
E-mail: drukavina@munsch.com

COUNSEL FOR HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., AND NEXPOINT ADVISORS, L.P.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this the 1st day of April, 2021, true and correct copies of this document, with any exhibits attached thereto, were served on the recipients listed below via email, and on April 2, 2021, true and correct copies of this document, with any exhibits attached thereto, were served on the recipients listed below via first class U.S. mail, postage prepaid:

Jeffrey N Pomerantz
Pachulski Stang Ziehl & Jones LLP
10100 Santa Monica Blvd, 13th Floor
Los Angeles, CA 90067
Email: jpomerantz@pszjlaw.com

John A Morris
Pachulski Stang Ziehl & Jones LLP
780 Third Avenue, 34th Floor
New York, NY 10017-2024
Email: jmorris@pszjlaw.com

Zachery Z. Annable
Hayward PLLC
10501 N. Central Expressway
Suite 106
Dallas, TX 75231
Email: zannable@haywardfirm.com

/s/ Davor Rukavina
Davor Rukavina