PACHULSKI STANG ZIEHL & JONES LLP
Jeffrey N. Pomerantz (CA Bar No. 143717) (*admitted pro hac vice*)
Ira D. Kharasch (CA Bar No. 109084) (*admitted pro hac vice*)
John A. Morris (NY Bar No. 266326) *(admitted pro hac vice)*
Gregory V. Demo (NY Bar No. 5371992) (*admitted pro hac vice*)
Judith Elkin (TX Bar No. 06522200)
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone: (310) 277-6910
Facsimile: (310) 201-0760

HAYWARD PLLC
Melissa S. Hayward
Texas Bar No. 24044908
MHayward@HaywardFirm.com
Zachery Z. Annable
Texas Bar No. 24053075
ZAnnable@HaywardFirm.com
10501 N. Central Expy, Ste. 106
Dallas, Texas 75231
Tel: (972) 755-7100
Fax: (972) 755-7110

Counsel for the Debtor and Debtor-in-Possession

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-sgj-11
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

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<tr><td>HIGHLAND GLOBAL ALLOCATION FUND, HIGHLAND INCOME FUND, NEXPOINT CAPITAL, INC., and NEXPOINT STRATEGIC OPPORTUNITIES FUND,

Appellants,

v.

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Appellee.</td><td>§
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<tr><td>JAMES DONDERO,

Appellant,

v.

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Appellee.</td><td>§
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<tr><td>GET GOOD TRUST and THE DUGABOY INVESTMENT TRUST,

Appellants,

v.

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Appellee.</td><td>§
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§</td><td>Civ. Act. No. 3:21-cv-00550-L</td></tr>
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DEBTOR'S OMNIBUS RESPONSE TO MOTIONS FOR STAY PENDING APPEAL OF THE CONFIRMATION ORDER

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The above-captioned debtor and debtor-in-possession (the "Debtor") files this omnibus response ("Response") to the *Brief in Support of Motion for Stay Pending Appeal*, Civ. Act. No. 3:21-cv-00538-N, D.I. 3 (N.D. Tex. Apr. 1, 2021) (the "Advisors Motion") filed by Highland Capital Management Fund Advisors, L.P. and NexPoint Advisors, L.P. (the "Advisors") and *Motion for Stay Pending Appeal*, Civ. Act. No. 3:21-cv-00550-L, D.I. 6 (N.D. Tex. Apr. 6, 2021) (the "Trusts Motion" and together with the Advisors Motion, the "Motions") filed by The Dugaboy Investment Trust ("Dugaboy") and Get Good Trust (collectively, the "Trusts"). The Trusts and Advisors are referred to herein as "Appellants." In support of the Response, the Debtor states as follows:

I. INTRODUCTION[1]

1. On February 22, 2021, the Bankruptcy Court entered the *Order Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (ii) Granting Related Relief* [D.I. 1943][2] (the "Confirmation Order").[3] In doing so, the Bankruptcy Court overruled the only objections to confirmation of the Plan pressed at the confirmation hearing, all of which were filed by James Dondero and his related entities, including Appellants (collectively, the "Dondero Entities"), and found that "[there is] good

[1] Concurrently herewith, the Debtor is filing the *Appendix in Support of the Debtor's Omnibus Response for Stay Pending Appeal of the Confirmation Order* (the "Appendix"). Citations to the Appendix are notated as follows: Appx. #. The Advisors Motion is Appx. 1.

[2] Unless otherwise indicated, all docket numbers refer to the docket maintained by the Bankruptcy Court.

[3] The Confirmation Order is Appx 2. The *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* [D.I. 1808] (as amended, the "Plan") is attached to the Confirmation Order (Appx. 3). All capitalized terms used but not defined herein have the meanings given to them in the Plan. The confirmed Plan included certain amendments filed on February 1, 2021. *See Debtor's Notice of Filing of Plan Supplement to the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)*, Ex. B (the "Plan Amendments") [D.I. 1875] (Appx. 4).

reason to believe that the [Dondero Entities were] not objecting to protect economic interests they have in the Debtor but to be disruptors." Appx. 2, ¶¶ 9, 17.[4]

2. The Dondero Entities filed four separate appeals of the Confirmation Order. They also filed motions to stay the Confirmation Order in the Bankruptcy Court. The Bankruptcy Court denied the motions for stay finding that the Dondero Entities failed to carry their burden of proof justifying a stay under Bankruptcy Rule 8007. In so ruling, the Bankruptcy Court found that certain of the Dondero Entities' arguments "wholly lack merit, and are borderline frivolous"[5] and that the Dondero Entities presented no evidence that they would suffer harm if a stay were not granted. Conversely, the Bankruptcy Court found that the Debtor and its creditors would suffer substantial harm and that the public interest weighed against granting a stay.

3. The Motions are part of a continuing coordinated effort by Mr. Dondero and Appellants to frustrate confirmation of the Plan (which is supported by 98.8% in amount of the Debtor's creditors). Having lost control of the Debtor and unable to reach a commercial deal with the Debtor and its creditors to reacquire his company, Mr. Dondero and Appellants are continuing their campaign to disrupt and frustrate the chapter 11 process. These misguided efforts have increased the cost of the bankruptcy by millions of dollars and will further delay implementation of the Plan and distributions to creditors, some of whom have been waiting for more than a decade to be paid. The Court should overrule the Motions as Appellants cannot satisfy the difficult standard for a stay of the Confirmation Order.

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[4] Appellants' – including Mr. Dondero's – interests in the Estate are tenuous at best as they either have ***no*** claims against the Estate or assert claims that are not colorable. Appx. 2, ¶¶ 17-19. Appx. 5 is an analysis of the Dondero Entities' interests in the Estate (or lack thereof).

[5] Transcript of Stay Hearing, March 19, 2020 (Appx. 6), 70:5-6; 71: 14-19.

A. The Debtor's Chapter 11 Bankruptcy Case

4. The Debtor is headquartered in Dallas, Texas, and is an investment adviser registered with the Securities and Exchange Commission. The Debtor is a Delaware limited partnership founded by Mr. Dondero and Mark Okada and is managed by its general partner, Strand Advisors, Inc. ("Strand"). Strand is 100% owned by Mr. Dondero, and, prior to the Governance Settlement (defined below), was solely controlled by Mr. Dondero.[6]

5. "The Debtor's case is not a garden variety chapter 11 case" (Appx. 2, ¶ 4) and was not caused by any of the typical reasons for a chapter 11. Instead, the filing was necessitated by the Debtor's prepetition culture of highly acrimonious litigation and its history of hiding assets by transferring them amongst Mr. Dondero's byzantine web of related companies. The Debtor under Mr. Dondero was a "serial litigator" and litigated with its opponents in the U.S. and internationally, in some cases, for over a decade. *Id.*, ¶¶ 8; 77. Ultimately, the Debtor filed bankruptcy in the Bankruptcy Court for the District of Delaware (the "Delaware Court") to prevent the entry of a $190,824,557 arbitration award in favor of the Redeemer Committee of the Highland Crusader Fund ("Crusader") in a dispute dating back to 2008 involving the Debtor's fraudulent conduct and improper conversion of Crusader assets. *Id.*, ¶ 8(a).

6. On October 29, 2019, the U.S. Trustee appointed the Committee[7] [D.I. 65], consisting of three of the Debtor's largest prepetition litigation claimants ((a) the Redeemer Committee; (b) Acis; and (c) UBS) and Meta-E Discovery, a prepetition litigation services vendor. The Committee is representative of the Debtor's creditors as they are ***all*** litigation

[6] In the aggregate, the Debtor's interests were held: (a) 99.5% by the Hunter Mountain Investment Trust; (b) 0.1866% by Dugaboy, (c) 0.0627% by Mr. Okada, personally and through his family trusts, and (d) 0.25% by Strand.

[7] Following its appointment, the Committee moved to transfer venue of the case to the Bankruptcy Court for the Northern District of Texas, Dallas Division (the "Bankruptcy Court") [D.I. 9]. On December 4, 2019, the Delaware Court entered an order transferring venue to the Bankruptcy Court [D.I. 1].

claimants or parties who provided services in furtherance of such litigation. *Id.*, ¶ 77. The Debtor's other creditors are generally small dollar trade creditors or vendors.[8]

7. In addition to the Redeemer Committee's claim, the major prepetition claims against the Estate are:[9]

- **UBS:** UBS's claims relate to litigation commenced in 2008 when two Debtor-managed funds breached a contractual obligation to UBS, and involved material allegations of misconduct, including that the Debtor caused the two funds to transfer assets to frustrate UBS's ability to recover. In November 2019, a judgment was entered against the funds for over $1 billion. *Id.*, ¶ 8(c). UBS has alleged the Debtor is liable for this judgment under a number of theories.

- **Acis:** The Acis claims arose out of contentious litigation with the Debtor's former employee, Joshua Terry. Mr. Terry won an arbitration award against Acis, a wholly-owned subsidiary of the Debtor. Instead of satisfying this judgment, the Debtor caused Acis to transfer its assets to become judgment proof. Mr. Terry consequently filed an involuntary bankruptcy petition against Acis in the Bankruptcy Court, Case No. 18-30264-SGJ. After intense litigation and the appointment of a chapter 11 trustee, Acis confirmed its chapter 11 plan.[10] Mr. Terry is now the sole owner of Acis. *Id.*, ¶ 8(b).

- **HarbourVest:** HarbourVest asserted claims in excess of $300 million for, among others, fraud and fraudulent inducement, concealment, and misrepresentation. The settlement with HarbourVest was approved on January 21, 2021 [D.I. 1788]. The Trusts appealed the settlement [D.I. 1870].

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[8] Appellants argue that certain former employees of the Debtor have claims. These claims generally arise from two Debtor bonus plans. However, because the employees were terminated post-confirmation, none of them are eligible for bonuses and none have any claims. Despite this, after entry of the Confirmation Order, a number of former employees filed amended proofs of claim asserting administrative claims. The Debtor has objected to these claims. *See Debtor's Third Omnibus Objection to Certain No Liability Claims* [D.I. 2059] ("Third Omnibus Objection").

[9] In addition to the litigation with the Redeemer Committee, UBS, and Acis, the Debtor (both directly and through its related entities) was party to other acrimonious and bitter prepetition lawsuits, including (i) a multi-year, multi-jurisdictional fight with Patrick Daugherty, a former limited partner and employee of the Debtor, who has asserted claims against the Debtor he valued at, at least, $40,710,819.42 [Claim No. 77] (the "Daugherty Claim"); and (ii) a lawsuit filed by Integrated Financial Associates, Inc., seeking damages of $241,002,696.73 (the "IFA Claim").

[10] The Debtor (then under the control of Mr. Dondero) and a number of affiliated and related entities controlled by Mr. Dondero appealed many rulings entered in the Acis bankruptcy. The Debtor has caused the entities it controls to stop pursuing those appeals; however, Mr. Dondero's entities are still challenging the Acis case.

B. The Governance Settlement and the Debtor's Current Management

8. Based upon the Committee's lack of confidence in the Debtor's ability to act as a fiduciary because of its history of self-dealing, fraud, and other misconduct, the Committee, the Debtor, and Mr. Dondero agreed to a settlement (the "Governance Settlement") that:

- created an independent board of directors at Strand consisting of James P. Seery, Jr., John S. Dubel, and retired bankruptcy judge Russell Nelms (collectively, the "Independent Directors");
- removed Mr. Dondero from his control positions at the Debtor and Strand;[11]
- imposed a number of stringent operating protocols [D.I. 466] (as amended, the "Protocols") (Appx. 16) that gave the Committee substantial oversight over how the Debtor managed its assets, subsidiaries, and investment vehicles;
- granted standing to the Committee to pursue certain Estate claims and causes of action against Mr. Dondero, Mr. Okada, other insiders of the Debtor, and other "Related Entities" (as defined in the Protocols);
- prohibited Mr. Dondero from causing any "Related Entity" to terminate an agreement with the Debtor; and
- installed the Bankruptcy Court as a "gatekeeper" with respect to any litigation commenced against the Independent Directors and exculpated the Independent Directors by limiting claims to willful misconduct and gross negligence.

Appx. 2, ¶ 12. The Court approved the Governance Settlement on January 9, 2020 [D.I. 339] (the "January 9 Order"),[12] which order was not appealed and is a final order.

C. Post-Petition Settlement of Claims

9. The Independent Directors successfully changed the Debtor's prepetition culture of litigation and resolved significant litigation claims against the Estate.[13] Settlements with the

[11] Mr. Dondero remained an unpaid employee of the Debtor with the title of portfolio manager and was subject to the oversight of the Independent Directors. In September 2020, in accordance with the January 9 Order, the Independent Directors requested Mr. Dondero's resignation because of certain actions he took adverse to the Estate. On October 9, 2020, Mr. Dondero resigned as an employee and portfolio manager of the Debtor.

[12] Appx. 7. On July 16, 2020, the Court entered an order approving the Debtor's application to appoint Mr. Seery as its Chief Executive Officer and Chief Restructuring Officer [D.I. 854] (the "July 16 Order") (Appx. 8). The July 16 Order contained a "gatekeeper" provision substantially the same as that included in the January 9 Order. Appx. 2, ¶ 14. The July 16 Order was never appealed and is a final order.

Redeemer Committee and Acis were approved by the Bankruptcy Court on October 23, 2020 [D.I. 1273], and October 28, 2020 [D.I. 1302], respectively. Mr. Dondero appealed the Acis settlement [D.I. 1347]. The Independent Directors also resolved several of the Estate's other material claims, all of which related to multi-million (or in the case of UBS, a billion) dollar Dondero-era, multi-year, contested litigations based on various frauds perpetrated by the Debtor and its related entities.

D. The Negotiation and Confirmation of the Plan of Reorganization

10. On August 12, 2020, the Debtor filed the first iteration of the Plan, which provided for the reorganization of the Debtor and the creation of a Claimant Trust to monetize the Debtor's assets under the supervision of the Claimant Trust Oversight Board. During the Plan negotiation and confirmation process, Mr. Dondero proposed alternative plans, which provided for his acquisition of the Debtor's assets. These proposals were not acceptable to the Debtor or the Committee. Also during this time, the Debtor engaged with Mr. Dondero to reach agreement on an orderly transition of the "Shared Services Agreements"[14] to an entity affiliated with Mr. Dondero as the Debtor would not provide those services after confirmation. During these negotiations, Mr. Dondero told Mr. Seery that if a plan acceptable to him was not proposed he would "burn the place down."[15] Appx. 2, ¶ 78.

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[13] To assist in this process, on August 3, 2020, the Bankruptcy Court ordered mediation [D.I. 912] to resolve the Redeemer Committee and UBS claims and to negotiate a "grand bargain" plan that would (a) include Mr. Dondero contributing cash or other assets in a global resolution of all claims and (b) return the Debtor to Mr. Dondero. Appx. 2, ¶ 15.

[14] Historically, the Debtor generated revenue by providing services to entities owned and/or controlled by Mr. Dondero pursuant to various agreements (the "Shared Services Agreements"). The Shared Services Agreements were generally terminable at will and have been terminated by the Debtor.

[15] Transcript, Confirmation Hearing, Feb. 2, 2021 (Appx. 9), 105:10-20 (Mr. Seery: "I had direct discussions with Mr. Dondero regarding the plan, the asset monetization plan, as I mentioned, direct discussions regarding a potential grand bargain. The initial view from Mr. Dondero was, and he told me, that if he didn't get a plan that he agreed to, if he didn't have a specific control or agreement around what got paid to Acis and Mr. Terry and what got paid to Redeemer specifically, that he would, quote, burn the place down. I know that because it is, excuse the pun, seared into my mind, but I also wrote it down. And that was, you know, in the early summer.").

11. After a two day evidentiary hearing, the Bankruptcy Court entered the Confirmation Order overruling the Dondero Entities' objections. The Plan has the overwhelming support of the Debtor's creditors. Approximately 98.8% in amount of ***all*** creditors (collectively holding approximately $345 million in claims) voted for the Plan.

E. <u>Mr. Dondero's Commencement of Hostilities</u>

12. Once Mr. Dondero realized he would not regain control of the Debtor, he began to execute on his promise to Mr. Seery to "burn the place down" by interfering with the Debtor's management of its Estate – conduct that resulted in the Bankruptcy Court entering a preliminary injunction against him and a motion for contempt for violating the preliminary injunction being filed.[16] These actions began in mid-September 2020 after the announcement of the Debtor's settlement with Acis and escalated once it was clear that Mr. Dondero's "grand bargain" plan would fail. *Id.*, ¶ 78. Each action had a common theme: returning control of the Debtor to Mr. Dondero or, barring that, "burn[ing] the place down." *Id.* Mr. Dondero's conduct caused highly contentious litigation on almost every aspect of this case and ***weeks*** of expensive evidentiary hearings. *Id.*, ¶¶ 77-78. Mr. Dondero and his proxies have been unsuccessful in each action, and the Bankruptcy Court has found a number to be frivolous. That has not, however, stopped Mr. Dondero from filing multiple appeals to this Court and to the Fifth Circuit, including a request for a writ of mandamus.[17] Mr. Dondero's actions have successfully drained the Estate of millions of dollars.

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[16] *Plaintiff's Motion for an Order Requiring Mr. James Dondero to Show Cause Why He Should Not Be Held in Civil Contempt for Violating the TRO*, Adv. Proc. No. 20-03190-sgj, D.I. 48 (Bankr. N.D. Tex. Jan. 7, 2021) (Appx. 10); *Order Granting Debtor's Motion for a Preliminary Injunction against James Dondero*, Adv. Proc. No. 20-03190-sgj, D.I. 59 (Bankr. N.D. Tex. Jan. 11, 2021) (Appx. 11).

[17] Appx. 12 is a summary of the Debtor's material litigation with Mr. Dondero and his related entities since September 2020, excluding motions to continue hearings, discovery disputes, and similar matters which have been legion.

II. APPELLANTS ARE NOT ENTITLED TO A STAY PENDING APPEAL

13. A stay pending appeal is an "extraordinary remedy." *Belcher v. Birmingham Trust Nat'l Bank*, 395 F.2d 685, 686 (5th Cir. 1968). To obtain a stay, Appellants bear the burden of demonstrating by a preponderance of the evidence[18] ***each*** of the following: (1) substantial likelihood of success on the merits of its appeal; (2) irreparable injury if the stay is not granted; (3) the stay will not substantially harm other parties, including those not before the court; and (4) the stay would serve the public interest. *See In re First S. Sav. Assoc.*, 820 F.2d 700, 704 (5th Cir. 1987); *see also Arnold v. Garlock Inc.*, 278 F.3d 426, 438 (5th Cir. 2001); *In re Scotia Dev. LLC*, 2008 Bankr. LEXIS 5127, *7-8 (Bankr. S.D. Tex. July 15, 2008).[19] Appellants cannot carry their burden.

A. Appellants Fail to Show Likelihood of Success on the Merits

i. The Plan Does Not Violate the Absolute Priority Rule[20]

14. Appellants contend that providing Class 10 and 11 with a Contingent Claimant Trust Interest which will only vest if Class 8 and 9 creditors are paid in full with interest violates the absolute priority rule and is inconsistent with Supreme Court precedent. The Bankruptcy Court's response to that argument was that it bordered on being frivolous.[21] The only reported

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[18] *See, e.g., In re Dernick*, 2019 Bankr. LEXIS 116, at *9 (Bankr. S.D. Tex. Jan. 16, 2019); *see also In re Tex. Health Enters.*, 255 B.R. 185, 187-88 (Bankr. E.D. Tex. 2000).

[19] The Advisors cite to *Saldana v. Saldana*, 2015 U.S. Dist. Lexis 112164, at *2 (N.D. Tex. Aug. 25, 2015) for the proposition that the first two factors "are the most critical" but ignore the next sentence. "The movant . . . has the burden to satisfy all four requirements." *Saldana*, 2015 U.S. Dist. LEXIS, at *2.

[20] As an initial matter, Appellants do not have standing to raise this issue on appeal. In the context of a confirmation order, a party only has standing to object to those portions of the plan that "directly implicate its own rights and interests." *In re Cypresswood Land Partners, I*, 409 B.R. 396, 418 (Bankr. S.D. Tex. 2009) (*citing In re Quigley Co., Inc.,* 391 B.R. 695, 705 (Bankr. S.D.N.Y. 2008)). ***Neither the Advisors nor the Trusts are creditors of the Debtor.*** Therefore, none of their rights or interests could possibly be implicated by the alleged violations of the absolute priority rule or section 1129(b)(2) of the Bankruptcy Code. *See also In re Johns-Manville Corp.,* 68 B.R. 618, 623 (Bankr. S.D.N.Y. 1986) ("[N]o party may successfully prevent the confirmation of a plan by raising the rights of third parties who do not object to confirmation."), *aff'd,* 78 B.R. 407 (S.D.N.Y. 1987), *aff'd sub nom. Kane v. Johns-Manville Corp. (In re Johns-Manville Corp.),* 843 F.2d 636, 644 (2d Cir. 1988).

[21] Appx. 6, 70:5-6.

case dealing with facts similar to this case held that a liquidating plan that provides a contingent trust interest to equity conditioned upon payment of all senior creditors in full does not violate the absolute priority rule. *In re Introgen Therapeutics*, 429 B.R. 570 (Bankr. W.D. Tex. 2010).

15. Under the Plan, the Claimant Trust will monetize assets, which include the proceeds of certain causes of action which will be prosecuted by a Litigation Sub-Trust. The value of these causes of action ***at confirmation*** was unknown. Because Class 8 and 9 creditors may receive more than full payment on account of their claims based upon such value ***at confirmation***, the Plan must provide for equity to recover any value in excess of creditor claims based upon value ***at confirmation***. To account for this possibility, and comply with the absolute priority rule, the Plan provides that holders of equity interests in Classes 10 and 11 will receive Contingent Claimant Trust Interests. Those Contingent Claimant Trust Interests, however, will vest ***only*** if "the Claimant Trustee Files a certification that all holders of Allowed General Unsecured Claims . . . have been paid in full [including] all accrued and unpaid post-petition interest from the Petition Date at the Federal Judgment Rate and all Disputed Claims in Class 8 and Class 9 have been resolved." Plan, Art. I.B. Def. 44. The Contingent Claimant Trust Interests, therefore, will not be entitled to any distribution unless all senior claims have been paid in full with interest. The Contingent Claimant Trust Interests also will ***never*** have any control rights (even if vested) over the administration of the Claimant Trust.[22]

16. The Plan is consistent with the absolute priority rule, which is embodied in the "fair and equitable" test in 11 U.S.C. § 1129(b)(2). The "fair and equitable test" has two components: (a) the absolute priority rule and (b) the rule that no creditor can receive more than 100% of its claim. *See* 7 COLLIER ON BANKRUPTCY ¶ 1129[4][a]; *see also In re Idearc, Inc.*, 423

[22] Appx. 13, §§ 4.9; 4.10.

B.R. 138, 170 (Bankr. N.D. Tex. 2009) (corollary of absolute priority rule is that senior classes cannot receive more than a 100% recovery for their claims); *In re MCorp Fin., Inc.*, 137 B.R. 219, 235 (Bankr. S.D. Tex. 1992), *appeal dismissed and remanded*, 139 B.R. 820 (S.D. Tex. 1992) (same).

17. This exact situation was addressed in *Introgen*. In *Introgen*, the court addressed whether a debtor's liquidating plan violated the absolute priority rule by allowing equity to receive cash distributions "solely to the extent that all [senior] interest holders . . . [had] been paid in full." *Introgen,* 429 B.R. at 585. The court "appeal[ed] to common sense" and found:

> Creditors question whether the right to receive a contingent interest in a liquidating trust, when the contingency is "payment in full of all senior classes," is really property . . . . Creditors appear to be trying to have it both ways. Either they will ultimately receive adequate property to satisfy their claims as contemplated in the Plan, or this property does not now, and will never exist. The right to receive something imaginary is not property. The only way Class 4 will receive anything is if Class 3 in fact gets paid *in full,* in satisfaction of § 1129(b)(2)(B)(i), meaning the absolute priority rule would not be an issue. If Class 3 is not paid in full, Class 4's "property interest" is not just valueless, as Creditors argue, it simply does not exist.

Id. (emphasis in original); *see also In re CRB Partners, LLC*, 2013 Bankr. LEXIS 800, at *39-41 (Bankr. W.D. Tex. Mar. 4, 2013) (citing *Introgen*). *Introgen* is on all fours. The Contingent Claimant Trust Interests will not receive anything of value until senior creditors are paid in full.

18. Appellants argue that *Introgen* was wrongly decided and is inconsistent with Supreme Court precedent. Specifically, they cite *Norwest Bank Worthing v. Ahlers*, 485 U.S. 197 (1988) and *Bank of America National Trust & Savings Association v. 203 N. LaSalle Partnership*, 526 U.S. 434 (1999), but they misinterpret both. In *Ahlers,* the Supreme Court rejected an argument that the owner of a debtor should be able to retain its interest in the debtor without paying senior creditors in full because that interest had no value. The Supreme Court concluded that the determining factor is not whether property has value but whether equity is

retaining value without senior creditors being paid in full: "[W]hether the value is 'present or prospective, for dividends or only for purposes of control' a retained equity interest is a property interest ***to 'which the creditors [are] entitled . . . before the stockholders [can] retain it for any purpose whatever.'***" *Ahlers*, 485 U.S. at 208 (citation omitted) (emphasis added). The Supreme Court's concern was whether equity was retaining property that creditors were entitled to receive. The Plan is entirely faithful to this rule of law. Class 10 and 11 will not retain equity under the Plan and will not receive anything that senior creditors are entitled to receive.

19. Similarly, the citation of *LaSalle* misses the point. In *LaSalle*, the Supreme Court ruled that the right to bid on the debtor's equity was a property right that implicated the absolute priority rule. However, the Debtor is not arguing that the Contingent Claimant Trust Interests are not a property right or might not, at some point, have value. Rather, because the Contingent Claimant Trust Interests will not vest and Class 10 and 11 will not receive any value until Class 8 and 9 are paid in full, the absolute priority rule is not implicated.

ii. <u>The Plan Protections Are Consistent with Applicable Precedent</u>

20. After a lengthy trial, with substantial evidence and testimony, the Bankruptcy Court made detailed findings of fact and conclusions of law in support of the Plan's Exculpation, Injunction, and Gatekeeper provisions (the "<u>Plan Protections</u>"). The Bankruptcy Court ruled the facts of the case justified the Plan Protections which were important to the Debtor's ability to implement the Plan free from harassment from the Dondero Entities. Similarly, the Bankruptcy Court determined it had the legal authority to approve the Plan Protections. Appx. 2, ¶¶ 72-81. Appellants challenge the Bankruptcy Court's rulings on both legal and factual grounds.

21. To show a likelihood of success on the merits on the appeal of a legal issue, Appellants must show the existence of a serious legal question and the "balance of the equities weighs ***heavily*** in favor of granting the stay." *In re Texas Equip. Co.*, 283 B.R. 222, 227

(Bankr. N.D. Tex. 2002) (emphasis added). Factual findings, however, are reviewed under a "clearly erroneous" standard. *In re First S. Sav. Ass'n*, 820 F.2d at 711. Appellants cannot satisfy either of these standards.

(a) Exculpation Provision[23]

22. Appellants argue the Exculpation Provision violates *Bank of New York Trust Co., N.A. v. Official Unsecured Creditors' Comm. (In re Pacific Lumber Co.)*, 584 F.3d 229 (5th Cir. 2009) ("*Pacific Lumber*"). Appellants argue that *Pacific Lumber* creates a bright line rule prohibiting, under any circumstances, the exculpation of "parties other than the debtor and the creditors' committee." Appx. 1, ¶ 23. Because Exculpated Parties[24] under the Plan include parties other than the Debtor and the Committee,[25] Appellants argue they have a likelihood of succeeding on their appeal thereby justifying a stay. Appellants ignore the legal and factual bases for the Bankruptcy Court's determination that the Exculpation Provision is consistent with *Pacific Lumber*.

23. First, Appellants ignore the Bankruptcy Court's ruling that *Pacific Lumber* expressly prevented it, under the doctrine of *res judicata*, from revisiting exculpation for the Independent Directors, the CEO/CRO, and their respective agents, advisors and employees all of whom were exculpated for potential negligence claims in the January 9 or July 16 Order. Appx. 7, ¶ 10;[26] Appx. 8, ¶ 5; Appx. 2, ¶ 73; *Pacific Lumber,* 584 F.3d at 252 n.27, citing *Republic*

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[23] *See* Appx. 3, § IX,C.

[24] "Exculpated Parties" is defined in Appx. 3, Plan Art. I.B. Def. 62. Other than the successors to the Debtor and a few employees, none of the Exculpated Parties will continue in existence post-Effective Date. Article IX.C of the Plan provides for the exculpation of certain Exculpated Parties for actions and transactions that took place during the case and in conjunction with the negotiation, confirmation and consummation of the Plan. Appellants' principally take issue with certain of the Exculpated Parties: the Independent Directors, the CEO/CRO, the Professionals, and Strand. Appx. 1, ¶ 24

[25] Appellants appear to acknowledge that (a) the Debtor and (b) the Committee and its members are entitled to exculpation under applicable law.

[26] "***No entity may commence or pursue a claim or cause of action of any kind*** against any Independent Director, any Independent Director's agents, or any Independent Director's advisors relating in any way to the Independent

Supply Co. v. Shoaf, 815 F.2d 1046 (5th Cir. 1987) (*res judicata* bars a party from bringing a claim on a guaranty that was expressly released by a confirmed reorganization plan where party failed to object to the release at confirmation and was now collaterally attacking the release).[27] Thus, the Independent Directors, their agents, and advisors have already been exculpated for negligence.[28]

24. The Bankruptcy Court also determined the Exculpation Provision was consistent with *Pacific Lumber*, noting that *Pacific Lumber* did not issue a bright line rule against exculpation. Instead, the Fifth Circuit held that public policy justified exculpation of creditors' committees and their members, but not prepetition officers or directors or non-debtor plan sponsors. The Bankruptcy Court concluded that *Pacific Lumber*'s rationale for exculpation of committees and their members – to encourage their active participation in the chapter 11 process – justified exculpation for the Independent Directors and the CEO/CRO in this case. Here, unlike *Pacific Lumber* and *In re Thru*,[29] the Independent Directors and the CEO/CRO were not prepetition officers and directors of the Debtor. The Bankruptcy Court appointed the

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Director's role as an independent director of Strand without the Court (i) first determining after notice that such claim or cause of action represents a colorable claim of ***willful misconduct or gross negligence*** against Independent Director, any Independent Director's agents, or any Independent Director's advisors and (ii) specifically authorizing such entity to bring such claim. The Court will have sole jurisdiction to adjudicate any such claim for which approval of the Court to commence or pursue has been granted." Appx. 7, ¶ 10 (emphasis added).

[27] *See also Miller v. Meinhard-Commercial Corp.*, 462 F.2d 358, 360 (5th Cir. 1972) (regardless of relief sought, it is a collateral attack if it must in some fashion overrule a previous judgment.); *see also In re Moye*, 437 Fed. Appx. 338, 341 (5th Cir. 2011) ("Under the law-of-the-case doctrine, a court follows its prior final decisions in the case as the law of that case, except for a few narrow exceptions.") (internal quotations omitted).; *In re Provenza*, 316 B.R. 177, 220 (Bankr. E.D. La 2003) ("Under the law of the case doctrine, a court may not address issues that have been litigated and decided in earlier proceedings in the same case.")

[28] It is also appropriate to include Strand in the Exculpation Provision. Strand is the Debtor's general partner, and the Independent Directors are the directors of Strand. Strand should be protected to the same extent as the Debtor and the Independent Directors, and for the same reasons. *See In re Houston Regional Sports Network, L.P.*, 505 B.R. 468, 481-82 (Bankr. S.D. Tex. 2014) (directors of a non-debtor general partner owe fiduciary duties to the estate of a debtor limited partnership and the fiduciary duties to the estate are paramount.) In regard to Strand, the Exculpation Provision applies solely with respect to actions taken by Strand from January 9, 2020 through the Effective Date.

[29] *Dropbox, Inc. v. Thru, Inc. (In re Thru, Inc.)*, 2018 U.S. Dist. LEXIS 179769, 2018 WL 5113124 (N.D. Tex. Oct. 19, 2018), *aff'd., In re Thru, Inc.*, 2019 U.S. App. LEXIS 32405, 2019 WL 5561276 (5th Cir. Tex. Oct. 28, 2019).

Independent Directors and the CEO/CRO pursuant to the January 9 and July 16 Orders as a substitute for a chapter 11 trustee to address serious concerns the Committee raised regarding prepetition breaches of fiduciary duty and lack of disinterestedness by the Debtor's prepetition management.[30] The Bankruptcy Court heard substantial uncontroverted testimony that the Independent Directors and the CEO/CRO would not have accepted their positions without the exculpation provisions in the January 9 and July 16 Orders because of the extraordinarily complex, litigious, and volatile situation presented by this case. The Bankruptcy Court also heard uncontroverted testimony from Mr. Dubel that unless independent directors could be assured of exculpation for negligence, they will likely not accept positions in potentially litigious cases. Thus, the Bankruptcy Court concluded strong policy reasons existed for approving the Exculpation Provision, consistent with *Pacific Lumber*.[31] Appx. 2, ¶ 74(a).[32]

(b) Injunction[33]

25. Appellants contend the Injunction is vague and ambiguous and prohibits the Advisors and their clients from being able to enforce their rights under the assumed CLO

[30] Additionally, as the Court indicated, the Independent Directors were appointed as a compromise to the appointment of a trustee, and essentially served in that fiduciary capacity. It is well established that trustees have qualified immunity for acts taken within the scope of their appointment. *Boullion v. McClanahan*, 639 F.2d 213, 214 (5th Cir. 1981). Appx. 2, ¶¶ 13, 14, 74(a).

[31] The Bankruptcy Court also determined that the Fifth Circuit had been swayed in *Pacific Lum*ber by the fact that neither the proposed exculpated parties in that case nor the reorganization itself would be "swamped" by the costs of the potential litigation from which the exculpated parties sought to be protected. *Pacific Lumber*, 584 F.2d at 252. However, in this case, the Bankruptcy Court found just the opposite based on credible and uncontroverted evidence. Appx. 2, ¶ 74(b).

[32] "The Bankruptcy Court concludes that the Independent Directors were appointed under the January 9 Order in order to avoid the appointment of a chapter 11 trustee and are analogous to a creditors' committee rather than an incumbent board of directors. The Bankruptcy Court also concludes that if independent directors cannot be assured of exculpation for simple negligence in contentious bankruptcy cases, they may not be willing to serve in that capacity. Based upon the foregoing, the Bankruptcy Court concludes that Pacific Lumber's policy of exculpating creditors' committees and their members from 'being sued by persons unhappy with the committee's performance during the case or unhappy with the outcome of the case' is applicable to the Independent Directors in this Chapter 11 Case." Appx. 2, ¶ 74(a).

[33] *See* Appx. 3, Plan Art. IX,F.

Agreements.[34] The Advisors misconstrue the effect of the Injunction, which is neither vague nor ambiguous under applicable law. An injunction "must 'state its terms specifically' and 'describe in reasonable detail' the conduct restrained or required." *Daniels Health Scis., L.L.C. v. Vascular Health Scis., L.L.C.,* 710 F.3d 579, 586 (5th Cir.2013) (*quoting* Fed. R. Civ. P. 65(d)). The drafting standard has been described as "that an ordinary person reading the court's order should be able to ascertain from the document itself exactly what conduct is proscribed." *U.S. Steel Corp. v. United Mine Workers of Am.*, 519 F.2d 1236, 1246 n.20 (5th Cir. 1975), as cited in *Scott v. Schedler*, 826 F.3d 201, 211 (5th Cir. 2016).

26. The Injunction contains complimentary sections designed to prevent the Enjoined Parties[35] (essentially the Debtor's creditors, interest holders, and other parties in interest who appeared in the case) from taking certain proscribed actions after the Effective Date. The first paragraph which prevents the Enjoined Parties from interfering with the "implementation or consummation"[36] of the Plan, is similar to plan injunctions approved in hundreds of chapter 11 cases by courts in this Circuit and around the country, and is supported by sections 1123(a), 1123(a)(6), 1141(a) and (c), and 1142 of the Bankruptcy Code. Moreover, pursuant to section 1141(c) of the Bankruptcy Code, all of the Debtor's property is dealt with pursuant to the Plan and transferred free and clear to its successors, and this paragraph of the Injunction is an

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[34] "CLO Agreements" means the management agreements for certain collateralized loan obligations ("CLOs") pursuant to which the Debtor manages the CLOs. The Debtor assumed the CLO Agreements under the Plan and will continue to manage the CLOs after the Effective Date. Notably, Appellants make this argument ***despite not having any interest in the contracts at issue***. Because they have no interest, they will not be affected by the Injunction or Gatekeeper Provision.

[35] "Enjoined Parties" is defined in Appx. 3, Plan Art. I.B. Def. 56.

[36] The terms "implementation" and "consummation" are neither vague nor overly-broad; they are both terms found in the text of the Bankruptcy Code and are well understood. *See e.g.*, 11 U.S.C. § 1123(a)(5) ("a plan ***shall*** . . . provide adequate means for the plan's ***implementation***") (emphasis added); 11 U.S.C. § 1142 entitled "Implementation of plan"). The word "consummation" is also found in the Bankruptcy Code and has been discussed by numerous courts. *See e.g.*, 11 U.S.C. § 1101(2) (defining "substantial consummation" of a plan); *see also U.S. Brass Corp. v. Travelers Ins. Group, Inc. (In re U.S. Brass Corp.)*, 301 F.3d 296, 305 (5th Cir. 2002) (distinguishing "substantial consummation" of a plan from final consummation of a plan, which occurs after the effective date when the plan distributions are concluded.)

appropriate means of enforcing section 1141(c). The second and third paragraphs build on the first and provide a list of the actions which are enjoined, *i.e.*, essentially any actions to collect on the very same debts being handled by the Plan. Importantly, the Enjoined Parties are only prohibited from taking such actions ***against the Debtor*** and its successors, the Reorganized Debtor, the Litigation Sub-Trust, and the Claimant Trust, and their respective property and interests in property. Here too, this portion of the Injunction is similar to countless other plan injunctions, is not vague and does not enjoin actions against non-debtor third parties.

27. As to the concerns about contractual rights, the Debtor has consistently stated on the record that the Plan does not interfere with the ability of the Advisors' clients to exercise their rights after the Effective Date under contracts assumed under the Plan.[37] Litigation is currently pending regarding whether the January 9 Order prevents or limits the Advisors' clients' right to terminate the CLO Agreements.[38] But the Injunction has no such effect.

(c) Gatekeeper Provision[39]

28. Contrary to Appellants' assertions, the Gatekeeper Provision is not a release or injunction but is, in fact, the exact opposite. The Gatekeeper Provision requires any Enjoined Party that believes it has ***any claims*** against a Protected Party relating to the chapter 11 case, the negotiation or administration of the Plan or property to be distributed under the Plan, the wind down of the Debtor's or Reorganized Debtor's business, the administration of the Claimant Trust or the Litigation Sub-Trust, or the transactions relating thereto to first seek leave from the Bankruptcy Court to pursue such alleged claims and present evidence as to why it believes they are colorable. If the Bankruptcy Court determines the claim is colorable, it will determine if it

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[37] Appx. 6, 31:17 – 33:6.

[38] *Highland Capital Management, L.P. v. Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., Highland Income Fund, NexPoint Strategic Opportunities Fund, NexPoint Capital, Inc., and CLO Holdco, Ltd.*, Adv. Proc. No. 21-03000-sgj (Bankr. N.D. Tex. 2021) (the "CLO Adversary") (Appx. 14).

[39] Appx. 3, Plan Art. IX.F, ¶ 4.

has jurisdiction to adjudicate the merits, and the claimant will then either file the litigation in the Bankruptcy Court or be permitted to file in such other court of appropriate jurisdiction.

29. Appellants make two principal arguments why the Court erred in approving the Gatekeeper Provision.

- *First*, Appellants argue the Gatekeeper Provision is a permanent injunction similar to an exculpation provision and effectuates a non-consensual release of non-debtor third parties in violation of *Pacific Lumber*.[40] *Pacific Lumber* does not deal with a gatekeeper provision, and a provision that merely directs a party who wants to sue to a specific court is not equivalent to a permanent injunction.

- *Second*, Appellants argue that the Bankruptcy Court does not have jurisdiction to act as the gatekeeper for post-confirmation ordinary course transactions. Again, Appellants misconstrue the actual impact and intent of the Gatekeeper Provision and the scope of the Bankruptcy Court's post-confirmation jurisdiction.

30. The Bankruptcy Court determined that the Gatekeeper Provision was important to the success of the Plan based upon the evidence presented at the confirmation hearing and the Bankruptcy Court's extensive knowledge of the facts and circumstances surrounding the case, including the extensive history of substantial, costly, time-consuming, and sometimes frivolous, litigation. Appx. 2, ¶¶ 77, 78. Thus, the Bankruptcy Court determined the Gatekeeper Provision would "prevent baseless litigation designed merely to harass the post-confirmation entities charged with monetizing the Debtor's asset for the benefit of the economic constituents" as well as prevent abuse of the court system. *Id.*, ¶ 79.

31. The Fifth Circuit has recognized that in appropriate circumstances, a federal court can enjoin or issue other appropriate sanctions against vexatious litigants – persons who have a history of filing repetitive and spurious litigation for the purposes of harassment and intimidation. *See* ALL WRITS ACT, 28 U.S.C. §1651; *Carroll v. Abide (In re Carroll)*, 850 F.3d 811 (5th Cir. 2017). Such provisions balance the due process rights of both the parties protected

[40] Appx. 1, ¶¶ 32, 35.

by it and any potential litigants. *See Baum v. Blue Moon Ventures, LLC*, 513 F.3d 181, 189 (5th Cir. 2008) (injunction required party with history of filing vexatious, abusive and harassing litigation to seek consent of the district court before filing additional litigation.); *see also Safir v. United States Lines, Inc.,* 792 F.2d 19, 25 (2d Cir. 1986) (court agreed litigant's conduct warranted a pre-filing injunction, but narrowed scope such that litigant had to seek permission from district court before filing certain types of additional actions). Based upon the evidence presented at confirmation, the Gatekeeper Provision is a legitimate tool for the Bankruptcy Court to have approved as part of confirmation of the Plan. Appellants will not be able to demonstrate on appeal that these factual findings were clearly erroneous.

32. Appellants' argument that the Gatekeeper Provision is an impermissible expansion of the Bankruptcy Court's post-confirmation jurisdiction is also incorrect. The Gatekeeper is a legitimate exercise of the Bankruptcy Court's powers under sections 105, 1123(b)(6), and 1141(a), (b) and (c) of the Bankruptcy Code. Gatekeeper provisions are utilized by many courts to provide a single clearing court to determine whether a claim is colorable or appropriate under the applicable facts of the main case.[41] Nothing in the Gatekeeper Provision determines the jurisdiction of the Bankruptcy Court over any particular claim or cause of action. The Gatekeeper only requires the court to determine ***if a claim is colorable***. Gatekeeper or channeling provisions similar to this one have been approved by other courts in this District.[42]

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[41] *See, e.g., In re Motors Liquidation Co*., 541 B.R. 104 (Bankr. S.D.N.Y. 2015) (discussing bankruptcy court's gatekeeper function over GM ignition switch cases); *In re Motors Liquidation Co*., 568 B.R. 217 (Bankr. S.D.N.Y. 2017) (same).

[42] *See, e.g., In re Pilgrim's Pride Corp.*, 2010 Bankr. LEXIS 72 (Bankr. N.D. Tex. Jan. 14, 2010) (bankruptcy court channeled to itself exclusive jurisdiction to hear claims against debtors' management (including their boards of directors and chief restructuring officer) and the professionals based upon their conduct in pursuit of their responsibilities during the chapter 11 cases.); *see also In re CHC Group, Ltd.* (Case No. 16-31854, Bankr. N.D. Tex.) *Debtors' Fourth Amended Joint Chapter 11 Plan of Reorganization* [D.I. 1671-1, attached to *Findings of Fact and Conclusions of Law, and Order Confirming the Debtors' Fourth Amended Joint Chapter 11 Plan of Reorganization*], Section 10.8(b) at p. 57 (court retained ***exclusive*** jurisdiction to hear claims against any "Protected Party," including any claims "in connection with or arising out of . . . the administration of this Plan or the property

33. Similarly, section 1142(b) provides that post-confirmation, a bankruptcy court may direct any parties to "perform any act" necessary for the consummation of the plan. The Fifth Circuit has determined that a bankruptcy court retains jurisdiction if post-confirmation acts impact the reorganized debtor's ability to perform under the plan or recoveries.[43] Thus, the Bankruptcy Court has jurisdiction to determine if a claim is colorable as any litigation brought by Appellants will have a serious impact on the ability of the Debtor to effectuate the Plan.

34. Appellants erroneously conflate the Bankruptcy Court's authority to act as a gatekeeper with the Bankruptcy Court's authority to adjudicate the underlying merits of any claim allowed to pass through the gate. The fact that the Bankruptcy Court may not have jurisdiction to adjudicate a claim once it is determined to be colorable, does not prevent it from having jurisdiction to determine if it is colorable in the first instance.[44] *See Villegas v. Schmidt*, 788 F.3d 156, 158-59 (5th Cir. 2015) (litigant must still seek authority from the bankruptcy court that appointed the trustee before filing litigation even if the bankruptcy court may not have authority to adjudicate the underlying claim under *Stern v. Marshall*[45]). Thus, the gatekeeper

to be distributed under this Plan, . . . or the transactions in furtherance of the foregoing, ...") (emphasis added).

[43] *See In re United States Brass Corp.*, 301 F.3d at 305 (bankruptcy court had jurisdiction to determine whether arbitration could be used to liquidate claims post-effective date; while the plan had been substantially consummated, it had not been fully consummated, the dispute related directly to the plan, the outcome would affect the parties' post confirmation rights and responsibilities and the proceeding would impact compliance with, or completion of the plan; specifically referencing section 1142(b)); *Bank of La. v. Craig's Stores of Texas, Inc. (In re Craig's Stores of Tex., Inc.)*, 266 F.3d 388, 390 (5th Cir. 2001) (post-confirmation bankruptcy jurisdiction continues to exist for "matters pertaining to the implementation or execution of the plan."); *EOP-Colonnade of Dallas Ltd. P'ship v. Faulkner (In re Stonebridge Techs., Inc.)*, 430 F.3d 260, 266-67 (5th Cir. 2005) (bankruptcy court had jurisdiction over lawsuit brought by post-confirmation trustee against landlord over letter of credit draw where trustee was assignee of bank claim against landlord).

[44] The use of the gatekeeper structure in the *General Motors* cases is particularly apt to this point. The causes of action arising from defective ignition switches are based on state tort law – both product liability and personal injury – and are causes of action unquestionably outside the jurisdiction of a bankruptcy court to hear on the merits. Nevertheless, the *General Motors* bankruptcy court acted as the gatekeeper post-confirmation to determine whether such litigation should proceed against the estate of the old debtor or the asset purchaser under the confirmed plan.

[45] 564 U.S. 462 (2011)

court can determine if a lawsuit asserts colorable claims and, if it does, can then turn to the separate issue of whether it has jurisdiction over the merits.

35. The Bankruptcy Court has consistently stated that this is "not your garden variety" case, which is exactly why the Plan Protections are so critical. This case was precipitated by and continues to be an endless loop of litigation. Without the Plan Protections, the cycle of harassment, litigation, and specious delay tactics will continue. The Plan Protections are necessary and appropriate under the facts of this case and supported by applicable law.

B. Appellants Will Not Suffer Irreparable Harm

36. Appellants argue that they will be irreparably harmed if the Plan goes effective because: (1) their appeals may be moot; (2) they will be prevented from terminating the CLO Agreements; and (3) they will be prevented from bringing suits for mismanagement or breach of contract. These arguments lack merit. Appellants presented ***no*** evidence in support of their position to the Bankruptcy Court[46] and cannot carry their burden to justify a stay.

i. Mootness Is Not a Legally Cognizable Harm

37. Judge Boyle recently held in *SR Constr. Inc. v. Hall Palm Springs, LLC*, 2020 U.S. Dist. LEXIS 224334, at *7 (N.D. Tex. Dec. 1, 2020) that "[t]his Court agrees with the majority of courts in this circuit finding that the risk of mooting a bankruptcy appeal, standing alone, does not constitute irreparable harm warranting a stay.") (citing cases); *Scotia Dev. LLC*, 2008 Bankr. LEXIS 5127, *14-15 (same). The only relevant case[47] Appellants cite to the contrary is *In re Westwood Plaza Apartments*, 150 B.R. 163, 169 (Bankr. E.D. Tex. 1993). While

[46] Appx. 6, 70:15-17 ("[Appellants] simply have not shown they will suffer irreparable harm, certainly not because of a mere mootness risk, and that's really the only harm that I truly think has been plausibly presented or argued here by Appellants.").

[47] Specifically, Appellants cite *Alberta Energy Partners v. Blast Energy Services (In re Blast Energy Services)*, 593 F.3d 418 (5th Cir. 2010); *Thru, Inc.*; *Resolution Trust Corp. v. Best Prods. Co. (In re Best Prod. Co.)*, 177 B.R. 791 (S.D.N.Y. 1995); and *Pacific Lumber*. While these cases analyze when a case is moot, they do not find mootness to constitute irreparable harm.

Westwood did find mootness ***could*** constitute irreparable harm, it did so without analysis and is contrary to established case law within the Fifth Circuit.

ii. The Plan Does Not Impact Any Contractual Rights to Terminate

38. Appellants argue they will be irreparably harmed because the Plan prevents them from removing or advising their clients to remove the Debtor as the portfolio manager of the CLOs. This argument also fails. *First*, the Advisors do not have an interest in the CLOs[48] and, thus, have no right to terminate the Debtor.[49] *Second*, Appellants again ignore the impact of the January 9 Order, which prevents them from terminating the CLO Agreements,[50] not the Plan.[51] The issue of whether they should be permanently enjoined is the subject of the CLO Adversary.[52]

iii. Plan Does Not Unduly Interfere with Appellants' Right to Assert Claims

39. Appellants argue they will be irreparably harmed because the Confirmation Order will (i) prevent them from taking actions or advising their clients to take actions under the CLO Agreements and (ii) prohibit them from bringing claims or advising their clients to bring claims because the Debtor intends to liquidate the CLOs and will be exculpated, so effectively compromising Appellants' rights for good. None of these arguments has any merit.

40. As discussed above, nothing in the Plan affects post-confirmation enforcement of rights under the CLOs by either Appellants or their clients. Similarly, nothing in the Plan affects

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[48] The only Dondero Entity with an interest in the CLOs is the Funds, and they have not sought a stay from this Court. As used herein, "Funds" means, collectively, Highland Income Fund, NexPoint Strategic Opportunities Fund, Highland Global Allocation Fund, and NexPoint Capital, Inc.

[49] *See, e.g.*, *Servicing Agreement*, dated December 20, 2007, by and among Greenbriar CLO, Ltd. and Highland Capital Management, L.P. (the "Greenbriar Agreement"), § 14 (Appx. 15).

[50] Generally speaking, the CLO Agreements cannot be terminated unless "cause" exists. *See, e.g.,* Appx. 15, § 14. "Cause" includes, among other things, willful or material breaches, fraud, and felony criminal convictions. *Id.*, §§ 14(a), (b), (e). No evidence has ever been presented on the existence of "cause." However, if it did exist in the future, nothing prevents Appellants from petitioning the Bankruptcy Court to terminate the Debtor as portfolio manager.

[51] *See* ¶ 27 *supra*.

[52] *See* ¶ 27 n.38 *supra*.

their ability to assert claims arising from the CLOs. It only requires that they present these claims first to the Bankruptcy Court to determine if they are colorable. To the extent that the Exculpation Provision is broader than the exculpation provisions in the January 9 and July 16 Orders and Appellants prevail on appeal, they will then have the opportunity to assert any such claims. Accordingly, none of these purported harms constitute irreparable harm.

C. The Debtor and Its Creditors Will Be Harmed by a Stay Pending Appeal

41. Appellants present no evidence to rebut Debtor's argument that a stay will cause substantial harm to the Debtor and its creditors.[53] Appellants' argument that a stay will not prevent the Debtor from liquidating during the appellate process ignores the harm that a stay will cause the Debtor and its creditors, including the following:

- A stay would increase the expenses of administering the chapter 11 case in an estimated amount of 16.8 million – the average monthly professional fees in chapter 11 compared to the estimated post-Effective Date fees over one year.[54]

- Mr. Seery credibly testified that his ability to monetize assets post-Effective Date will be enhanced by eliminating the burdens and restrictions of chapter 11.[55] Mr. Seery also testified that in his experience asset sales in bankruptcy generally result in a lower recovery than would be achieved outside of bankruptcy, and there was uncertainty whether potential purchasers will engage with the Debtor if the Confirmation Order is stayed, the strong likelihood that any sales will generate less value for creditors and the extended time line for the sale process that risks market fluctuations exposes the Debtor and its creditors to substantial harm if a stay were granted.[56]

- A stay will prevent Class 7 and 8 claimants from receiving distributions. Appellants argue a delay can be compensated by interest at the Federal Judgment Rate. However, creditors, many of whom have been litigating for years, deserve to be paid as soon as possible.

[53] "They cannot show there will ***not*** be substantial harm to the overall bankruptcy estate, when it undeniably will endure more administrative costs and burdens if the Debtor continues on as a debtor-in-possession in an already very lengthy case, by today's measure." Appx. 6, 71:14-15, 20-25 (emphasis added).

[54] The estimate of professional fees is conservative and does not include all professional fees in the case. It only includes the primary advisors to the Debtor and the Committee.

[55] *See* Appx. 9, 83:21-25; 84:1-7; 101:2-17; 107: 19-25; 108: 1-25; 109: 1-25; 110: 1-9; 112:21-22; 113: 7-25; 114: 1-25; 115: 1-25; 116: 1-25; 117: 1-25; 118: 1-10.

[56] *Id.*, 229:1-8; 244:6-12.

- A stay will necessitate court approval for asset sales outside the ordinary course, resulting in increased costs and lower values due to the uncertainty caused by the appeal and likelihood of continued objections to sales by the Dondero Entities. Delay will also threaten creditor recoveries.

- A stay will harm Class 8 creditors, of which 99.8% in amount voted for the Plan. Class 8 ***only*** rejected the Plan by number of creditors voting because certain employees loyal to Mr. Dondero voted to reject. The claims of these employees were contingent, and no longer exist as their employment has been terminated. *See* ¶ 6 n.7 *supra*. Their "no votes" should not supplant the rights of the ***real*** creditors that voted for the Plan.

D. A Stay Pending Appeal Is Contrary to the Public Interest

42. Finally, Appellants argue that a stay will protect (i) "innocent investors who have invested in the CLOs or funds that the Debtor manages" (Appx. 1, ¶ 44)[57] and (ii) the public by preventing "an illegal plan . . . [from being given] effect" (*Id.*, ¶ 45). As the Bankruptcy Court correctly found, this invocation of "thousands of innocent investors" is a smokescreen as Appellants are not trying to protect investors but rather, Mr. Dondero's parochial interests.[58] "The public interest requires bankruptcy courts to consider the good of the case as a whole, and not individual . . . investment concerns . . . the public interest cannot tolerate any scenario under which private agendas can thwart the maximization of value." *Yucaipa Corp. Initiatives Fund, ILP v. Piccadilly Rests., LLC*, 2014 U.S. Dist. LEXIS 64083, *14-15, 2014 WL 1871889 (W.D. La. May 6, 2014) (citations omitted). This case has been pending since October 2019. The public interest is served by creditors receiving distributions, not wasting resources on frivolous litigation. *See In re Metiom, Inc.*, 318 B.R. 263, 272 (S.D.N.Y. 2004) ("[t]his Court finds that

[57] Neither the Advisors nor their managed funds have ***any*** interest in any fund managed by the Debtor (although Dugaboy has a minority position in one fund). The Advisor-managed funds have interests in the CLOs, but there is no evidence that these interests total "well over $1 billion." On information and belief, the actual interests are substantially ***less*** than that amount. Further, their holdings are only a percentage of the total interests, the majority of which are owned by third parties. No third-party CLO investor has objected to the Plan, and the CLOs consented to the assumption of the CLO Agreements. Appx. 2, ¶ R.

[58] "And as far as the public interest factor, I do agree with one comment made today that this is more about Mr. Dondero's private agenda to get his company back, the company that he decided to file Chapter 11 back in October 2019, more than about protection of the public interest or the interests of retail investors that he or the Advisors or Funds purport to be acting to protect." Appx. 6, 72:5-11.

the public interest in the expeditious administration of bankruptcy cases as well as in the preservation of the bankrupt's assets for purposes of paying creditors, rather than litigation of claims lacking a substantial possibility of success, outweighs the public interest in resolving the issues presented here on appeal.").

III. A BOND OF NOT LESS THAN $200 MILLION SHOULD BE REQUIRED

43. Finally, Appellants argue that *if* a bond is warranted, it should be $3 million. That amount is insufficient to compensate the Debtor and its creditors for the harm from a stay. *Scotia*, 2008 Bankr. LEXIS 5127, *27-28 ("The purpose of a supersedeas bond is to preserve the status quo while protecting the non-appealing party's rights pending appeal."); *In re Weinhold*, 389 B.R. 783, 788 (Bankr. M.D. Fla. 2008) (same). A stay will require the Debtor to remain in chapter 11 for at least a year while the appellate process proceeds resulting in a material increase in professional fees due to, among other things, the continued existence of the Committee and its retained professionals. The Debtor estimates such cost at no less than $16.8 million[59] – an amount the Bankruptcy Court commented appeared to be low.[60] When added to the interest the creditors would forego (assuming a one year delay and $600,000 in interest (Appx. 1, ¶ 49)), the harm caused from additional administrative costs by a one year delay would be not less than $17.4 million.[61]

44. In addition, a stay would negatively impact the Debtor's ability to maximize value from the Debtor's assets. Aside from the additional costs attendant to seeking Bankruptcy Court approval of asset sales, Mr. Seery testified that monetizing assets in chapter 11 will likely

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[59] This estimated amount is based upon the difference between the $2,250,000 average monthly professional fee bill through the case and the post-Effective Date monthly projections of $850,000.

[60] *See* Appx. 6, 73:5.

[61] This amount is conservative as it does not account for (1) the Dondero Entities' anticipated pursuit of frivolous litigation and continued interference with the Estate or (2) actions by the Debtor (and possibly, the Committee) necessary to respond to the Dondero Entities' anticipated actions. The Debtor hopes this conduct would be curtailed if the Plan is effective.

generate less value than sales conducted after the Effective Date of the Plan. Some parties may be unwilling to transact business with the Debtor given the uncertainty caused by the stay and the potential for reversal of Plan confirmation on appeal. Also, the asset monetization process will likely take longer injecting additional risk into the process. Each of these issues injects material risk to the ultimate recovery for the Debtor's creditors. Accordingly, a bond that only takes into account the accrual of minimal interest on creditor claims and compensation for added costs of administration is insufficient.

45. Courts analyzing the bond required to support a stay attempt to quantify the monetary costs of staying a complex business debtor's exit from bankruptcy and the significant non-monetary costs and intangible harms a stay will impose.[62] Appellants are not entitled to a free "litigation option" to pursue their appeal without protecting the Debtor and its creditors against the substantial increased administrative costs and deterioration in asset value likely to result from a stay if the appeal does not succeed. This Court should condition any stay on a bond of not less than $200 million.

IV. CONCLUSION

For the reasons set forth herein, the Debtor respectfully requests that the Court deny the Motions.

[62] In *Scotia Dev. LLC*, the bankruptcy court did an in-depth analysis of the potential harms that would be incurred if a stay were granted because a stay could put at risk the very transactions from which all value flowed under the plan. The court assessed that there were two types of risks to the debtors: (1) loss of access to necessary cash and (2) loss of the restructuring transaction in the plan. *Scotia*, 2008 Bankr. LEXIS 5127 at *25-26. In monetizing these risks, the court considered the amount of all the debt being treated under the plan, including unsecured debt, administrative obligations, employee claims, and funding for the proposed litigation trust. *Id*. at *32-34. The court also considered the reduced value of the company if it were not able to exit bankruptcy and the increased interest risk on unpaid obligations. *Id*. Accordingly, although the court declined to grant the stay, the court indicated that if it were to consider a stay, it would condition the stay on a bond of $176 million plus a requirement that the appellant provide a total of $30 million in debtor-in-possession financing. *Id.* at *34. *See also In re Tribune Co.*, 477 B.R. 465, 479-82 (Bankr. D. Del. 2012); *In re W.R. Grace & Co*., 475 B.R. 34, 209 (D. Del. 2012); *see also In re Weinhold*, 389 B.R. 783, 788 (Bankr. M.D. Fla. 2008); *In re Calpine Corp*., 2008 Bankr. LEXIS 217, at *21-22 (Bankr. S.D.N.Y. 2008).

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PACHULSKI STANG ZIEHL & JONES LLP
Jeffrey N. Pomerantz (CA Bar No.143717) (*pro hac vice*)
Ira D. Kharasch (CA Bar No. 109084) (*pro hac vice*)
John A. Morris (NY Bar No. 266326) (*pro hac vice*)
Gregory V. Demo (NY Bar No. 5371992) (*pro hac vice*)
Judith Elkin (TX Bar No. 06522200)
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone: (310) 277-6910
Facsimile: (310) 201-0760
E-mail: jpomerantz@pszjlaw.com
ikharasch@pszjlaw.com
jmorris@pszjlaw.com
gdemo@pszjlaw.com
jelkin@pszjlaw.com

-and-

HAYWARD PLLC

/s/ Zachery Z. Annable
Melissa S. Hayward
Texas Bar No. 24044908
MHayward@HaywardFirm.com
Zachery Z. Annable
Texas Bar No. 24053075
ZAnnable@HaywardFirm.com
10501 N. Central Expy, Ste. 106
Dallas, Texas 75231
Tel: (972) 755-7100
Fax: (972) 755-7110

Counsel for the Debtor and Debtor-in-Possession