

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

In re:	§	Chapter 11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Case No. 19-34054-sgj11
	§	
Debtor.	§	
	§	
In re:	§	
	§	
JAMES DONDERO, <i>et al.</i> ,	§	
	§	
Appellants,	§	
	§	
v.	§	Case No. 3:21-cv-00879-K
	§	
HON. STACEY G. C. JERNIGAN,	§	
	§	
Appellee.	§	

APPELLANTS’ MOTION FOR EXPEDITED APPEAL

Appellants James Dondero (“Mr. Dondero”), Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., The Dugaboy Investment Trust, The Get Good Trust, and NexPoint Real Estate Partners, LLC, f/k/a HCRE Partners, LLC, a Delaware limited liability company¹ (collectively, “Appellants”) file this Motion for Expedited Appeal pursuant to Federal Rule of Bankruptcy Procedure 8013(a)(2)(B).

As the Court is aware, Appellants are appealing the Bankruptcy Court’s denial of their motion to recuse (the “Recusal Motion”). The Bankruptcy Court denied the Recusal Motion because: (1) it found the Recusal Motion was untimely (which Appellants dispute);² (2) the

¹ Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., The Dugaboy Investment Trust, The Get Good Trust, and NexPoint Real Estate Partners, LLC, f/k/a HCRE Partners, LLC, a Delaware limited liability company, Highland Income Fund, NexPoint Strategic Opportunities Fund, and NexPoint Capital, Inc. shall be collectively referred to as the “Affected Entities.”

² R. 37.



Bankruptcy Court’s subjective belief that it was not biased (“[t]he Presiding Judge does not believe she harbors, or has shown, any personal bias or prejudice against the Movants”); and (3) criticism of counsel (which was not a ground asserted for recusal in the Recusal Motion) did not justify recusal (the “Recusal Order”).³

Appellants’ Recusal Motion was made pursuant to 28 U.S.C. § 455(a). Under section 455(a), recusal is required whenever a judge’s partiality might reasonably be questioned, ***even if the judge does not have actual personal bias or prejudice***.⁴ The test under section 455(a) is ***not*** whether the judge believes he or she is capable of impartiality⁵ and ***not*** whether the judge actually has a bias (or actually knows of grounds requiring recusal).⁶ Instead, the test is simply whether the “average person on the street who knows all the relevant facts of a case” might ***reasonably question*** the judge’s impartiality.⁷ As Congress recognized when enacting section 455, litigants “ought not have to face a judge where there is a reasonable question of impartiality.”⁸ At its core, this statutory provision is “designed to promote public confidence in the impartiality of the judicial process.”⁹ “[J]ustice must satisfy the appearance of justice”¹⁰ and the Fifth Circuit has held that ***“[i]f the question of whether § 455(a) requires disqualification is a close one, the balance tips in favor of recusal.”***¹¹

The words “prejudice” and “bias” mean a favorable or unfavorable disposition or opinion that is somehow wrongful or inappropriate, either because: (1) it is undeserved; (2) it rests upon

³ R. 40.

⁴ *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 n. 8 (1988); *Andrade v. Chojnacki*, 338 F.3d 448, 454 (5th Cir. 2003).

⁵ *Burke v. Regalado*, 935 F.3d 960, 1054 (10th Cir. 2019) (citations omitted).

⁶ *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 805 (2001).

⁷ *In re Kan. Pub. Emps. Ret. Sys.*, 85 F.3d 1353, 1358 (8th Cir. 1996).

⁸ H. Rep. No. 1453, 93d Cong., 2d Sess. 1 (1974), reprinted in 1974 U.S. Code Cong. & Admin. News 6351, 6355.

⁹ *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2d Cir. 1988) (quoting H.R. Rep. No. 1453, 93d Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 6351, 6354–55); *Liljeberg*, 486 U.S. at 859–60.

¹⁰ *Id.* (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

¹¹ *In re Chevron U.S.A., Inc.*, 121 F.3d 163, 165 (5th Cir. 1997) (emphasis added).

knowledge that the holder of the opinion ought not to possess; or (3) it is excessive in degree.¹²

Despite holding that “judicial rulings alone *almost* never constitute a valid basis for a bias or partiality motion,” the Supreme Court has also recognized that predispositions developed during the course of a trial may suffice.¹³

Importantly, there are at least nine Adversary Proceedings currently pending before the Bankruptcy Court, which are being litigated. The claims in those Adversary Proceedings include various tort, breach of contract, and claw-back claims, as well as *alter ego* claims seeking to hold Mr. Dondero and the Affected Entities liable for any recovery ordered as to other entities.

As set forth in the Recusal Motion, the Bankruptcy Court has already indicated, through comments, a predisposition against Mr. Dondero on pending claims, including, among other things, a predisposition to determine, without supporting evidence (and despite controverting evidence), that any entity affiliated with Mr. Dondero (*i.e.*, including the highly regulated Affected Entities, which are governed by independent boards) is his alter ego.

Mr. Dondero and all other non-debtors, like every litigant, are entitled to a full and fair opportunity to make their case in an impartial forum—regardless of their history with that forum.¹⁴ Beyond that, “fundamental to the judiciary is the public’s confidence in the impartiality of our judges and the proceedings over which they preside.”¹⁵

The Adversary Proceedings are not stayed. While the Bankruptcy Court has not made any substantive rulings, an increasing number of motions are being filed and those matters are rapidly proceeding toward trial in front of the Bankruptcy Court (and could be tried prior to the ruling on

¹² *Liteky v. United States*, 510 U.S. 540, 550 (1994).

¹³ *Id.* at 554.

¹⁴ *Miller v. Sam Houston State Univ.*, 986 F.3d 880, 893 (5th Cir. 2021) (citing *United States v. Jordan*, 49 F.3d 152, 155 (5th Cir. 1995)).

¹⁵ *Id.*

appeal).¹⁶ All parties, including the Debtor Highland Capital Management, L.P. (“Debtor”), continue to incur costs and fees. Moreover, Debtor continually seeks to benefit from the Bankruptcy Court’s “negative views”¹⁷ of Mr. Dondero, which Debtor previously referred to as “baggage.”¹⁸

Debtor has not yet designated the items to be included in the appellate record. The delay of a regular briefing schedule (and the time it will take to transmit the record) will permit a judge—whose partiality may be reasonably questioned—to issue substantive rulings and preside over trials affecting Appellants’ substantive rights before this Court can determine the issues raised in the Recusal Motion in this appeal.

Federal Rule of Bankruptcy Procedure 8013 provides that “[t]he district court . . . may rule on a motion for a procedural order”—including a motion to expedite various proceedings—“at any time without awaiting a response.”¹⁹ Consequently, for the reasons stated herein, pursuant to Federal Rule of Bankruptcy Procedure 8013, Appellants respectfully request the Court expedite the appeal of the Recusal Motion; accelerate the time to transmit the record and the resolution of the appeal; and award Appellants such other and further relief to which they may be entitled.

Dated: June 18, 2021

Respectfully submitted,

By: /s/ Michael J. Lang
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¹⁶ To the extent a Motion to Withdraw the Reference has not been granted or will not be granted in the future.

¹⁷ See R. 2459.

¹⁸ R. 2459.

¹⁹ FED. R. BANKR. P. 8013(b).

CERTIFICATE OF CONFERENCE

The undersigned certifies that, on June 15, 2021, Appellants conferred with opposing counsel who indicated that they are opposed to the relief requested.

/s/ Michael J. Lang
Michael J. Lang

CERTIFICATE OF SERVICE

The undersigned certifies that on June 18, 2021, a true and correct copy of the above and foregoing document was served on all parties of record via the Court's e-filing system.

/s/ Michael J. Lang
Michael J. Lang

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HON. STACEY G. C. JERNIGAN,	§	
	§	
Appellee.	§	

ORDER GRANTING APPELLANTS’ MOTION FOR EXPEDITED APPEAL

Before the Court is Appellants James Dondero, Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., The Dugaboy Investment Trust, The Get Good Trust, and NexPoint Real Estate Partners, LLC, f/k/a HCRE Partners, LLC, a Delaware limited liability company (collectively, “Appellants”)’ Motion for Expedited Appeal (the “Motion”). Having reviewed the Motion, the Court finds as follows:

1. The Motion is GRANTED.
2. The Court will issue a schedule governing this expedited appeal by separate order.

SO ORDERED.

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UNITED STATES DISTRICT JUDGE