

Case No. 3:21-cv-01585-S

**THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

In re: HIGHLAND CAPITAL MANAGEMENT, L.P.

Debtor,

THE CHARITABLE DAF FUND, L.P., and
CLO HOLDCO, LTD.,

Appellants,

v.

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Appellee.

On Appeal from the United States Bankruptcy Court
for the Northern District of Texas, Case No. 19-34054-sgj11
Hon. Stacey G. C. Jernigan

**APPELLEE'S RESPONSE TO APPELLANTS'
OPPOSED MOTION TO STAY OR ABATE APPEAL**

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Highland Capital Management, L.P., the reorganized debtor and appellee in the above-captioned case (“Highland”), submits this response (the “Response”) to *Appellants’ Opposed Motion to Stay or Abate Appeal* (the “Motion”).¹ In support of its Response, Highland states as follows.

PRELIMINARY STATEMENT²

The Motion is the latest installment of James Dondero’s coordinated litigation strategy against Highland, its stakeholders, and its judicially-approved fiduciaries to waste resources, delay adjudication of pending disputes, and impede the wind-down of Highland’s estate pursuant to the terms of its confirmed Plan.

The Court should deny the Motion because it is based on a false premise: that the issues involved in this Appeal are subject to another appeal pending before the Fifth Circuit. This idea is demonstrably false.

In the Appeal, Mr. Dondero’s “charitable” trust, the Charitable DAF Fund, L.P. (the “DAF”), and the DAF’s wholly-owned subsidiary CLO Holdco, Ltd. (“CLOH” and together with the DAF, “Appellants”), challenge the Bankruptcy Court’s denial of Appellants’ Motion for Reconsideration, which sought to modify the Appointment Order – an order entered on *July 16, 2020*, appointing James P.

¹ Concurrently herewith, Highland is filing the *Appendix in Support of Highland Capital Management, L.P.’s Response to Appellants’ Opposed Motion to Stay or Abate Appeal* (the “Appendix”). Citations to the Appendix are notated as follows: Ex. #, Appx. #. The Motion is Ex. 1, Appx. 1-13.

² All capitalized terms used but not defined in this Preliminary Statement have the meanings given to them below.

Seery, Jr., as Highland's chief executive officer and chief restructuring officer. The Bankruptcy Court determined Appellants were barred by *res judicata* from re-litigating the propriety of the Appointment Order and had not demonstrated sufficient grounds for reconsideration of the Appointment Order under Federal Rule of Civil Procedure ("FRCP") 60(b).

The Appointment Order is not subject to the pending Fifth Circuit appeal of the Confirmation Order nor does the Fifth Circuit appeal address the issues relevant to this Appeal. Instead, the Fifth Circuit appeal – an appeal to which Appellants are not a party – addresses, *inter alia*, whether the Bankruptcy Court erred in confirming the Plan, which included a provision exculpating various parties for negligence relating to, *inter alia*, the administration of the bankruptcy estate and implementation and consummation of the Plan. The Fifth Circuit's decision on that issue and the other issues on appeal will not be dispositive in any way to Appellants' Appeal.

Specifically, the issues before this Court are whether Appellants' failure to appeal the Appointment Order and meet their burden of proof under FRCP 60(b) are fatal – not the underlying justification for the Appointment Order. However, even if this Court assesses the jurisdictional predicate for the Appointment Order, the issues will still differ from those before the Fifth Circuit. This Court will decide whether the Bankruptcy Court had the authority to (i) set a standard of care for an

independent officer³ appointed by the Bankruptcy Court, as a condition of his employment, for *prospective* actions he might take in furtherance of his employment and (ii) establish related procedures for asserting claims against him. In contrast, the Fifth Circuit will decide whether there is a *per se* prohibition on exculpation provisions in a plan of reorganization that retroactively exculpate independent directors, court-appointed officers, and others for negligent actions taken during the bankruptcy case and in connection with implementation and consummation of a plan.

For these reasons, the Court should deny the Motion and require Appellants to proceed with their Appeal.

RESPONSE

A. Background to the Motion and Appeal

On July 16, 2020, the Bankruptcy Court entered the *Order Approving Debtor's Motion under Bankruptcy Code Sections 105(a) and 363(b) Authorizing Retention of James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative Nunc Pro Tunc to March 15, 2020* (Ex. 3, Appx.

³ In addition to the Appointment Order, the Bankruptcy Court entered an order on January 9, 2020, appointing an independent board of directors (the "Independent Directors") to manage Highland and its bankruptcy in lieu of appointing a chapter 11 trustee (Ex. 2, Appx. 14-19) (the "January Order"). Mr. Seery was one of the Independent Directors. Although not addressed in the Motion or Appeal, the January Order also exculpated Mr. Seery both as an Independent Director and, because of his role as chief executive officer and chief restructuring officer, an agent of the Independent Directors, and established gatekeeper procedures that were substantially the same as those included in the Appointment Order. Appellants – through Dondero – negotiated the terms of and consented to the January Order.

20-32) (the “Appointment Order”), which approved the appointment of Mr. Seery as Highland’s chief executive officer and chief restructuring officer. The Appointment Order contained a customary⁴ exculpation provision that set a standard of care for prospective actions taken in the performance of Mr. Seery’s duties during the bankruptcy case. The Appointment Order also contained a “gatekeeper” provision requiring any party seeking to sue Mr. Seery to first seek the Bankruptcy Court’s⁵ approval. Neither the Appellants nor any other party objected to the underlying motion or appealed the Appointment Order.

Mr. Seery specifically required the gatekeeper provision be included in the Appointment Order as a condition of his appointment. Mr. Dondero has a long and storied history as a “serial litigator” who will sue anyone who takes a position he does not agree with – and he will do so without regard to the merit of his suits. Ex. 4, Appx. 42, 55-58. Mr. Seery thus conditioned his acceptance of his officer position on the protections in the Appointment Order.

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* (Ex. 4, Appx. 33-194) (the

⁴ It is not uncommon for professional retentions of chief restructuring officers, financial advisors, and investment bankers in chapter 11 cases to contain provisions exculpating the professional for negligence.

⁵ “Bankruptcy Court” means the U.S. Bankruptcy Court for the Northern District of Texas, Dallas Division, which is overseeing Highland’s chapter 11 bankruptcy proceedings.

“Confirmation Order”),⁶ which confirmed the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* (Ex. 5, Appx. 195-261) (the “Plan”). The Plan became effective on August 11, 2021 (Ex. 6, Appx. 262-266).⁷

During Highland’s bankruptcy, it became apparent that Mr. Dondero’s negotiations with Highland and its official committee of unsecured creditors would not result in the plan Mr. Dondero wanted. As a result, Mr. Dondero told Mr. Seery he would “burn down” Highland if he did not get his way. Ex. 4, Appx. 86, 89.

True to his word, Mr. Dondero became an implacable opponent of Mr. Seery’s and the Independent Directors’ efforts to confirm a plan for the benefit of the entire bankruptcy estate. Consequently, the Independent Directors insisted Mr. Dondero resign as an employee of Highland and certain of its affiliates, which he did. Mr. Dondero and his controlled entities (including Appellants) then embarked on a campaign of destruction: (i) objecting to virtually every settlement between Highland and its major creditors, (ii) appealing nearly every (meaningful) order

⁶ The Confirmation Order is currently on appeal to the Fifth Circuit. The only parties appealing the Confirmation Order are Mr. Dondero and entities he owns and/or controls (collectively, the “Dondero Entities”). Ex. 4, Appx. 16-17, 53 (“[T]he Bankruptcy Court considers them all to be marching pursuant to the orders of Mr. Dondero”). Appellants did not object to the Confirmation Order and are not parties to the Fifth Circuit appeal.

⁷ The Dondero Entities sought a stay of the Confirmation Order from the Bankruptcy Court, the District Court (defined below), and the Fifth Circuit. Ex. 7, Appx. 267-301, Ex. 8, Appx. 302-322, Ex. 9, Appx. 323-368, Ex. 10, Appx. 369-374, Ex. 11, Appx. 375-408, Ex. 12, Appx. 409-413, Exh. 13, Appx. 414-447.

Each court denied their requests. Ex. 14, Appx. 448-451, Ex. 15, Appx. 452-455, Ex. 16, Appx. 456-458.

entered by the Bankruptcy Court, (iii) commencing or otherwise causing endless litigation, (iv) interfering with Highland's management; (v) canceling trades, and (vi) threatening Highland employees. Ex. 4, Appx. 55-56.

Mr. Dondero's strategy was to interfere with and delay or prevent the implementation and consummation of the Plan and the distributions to Highland's creditors (*Id.*) and harass Highland and Mr. Seery (*Id.*, Appx. 88).

Exhibit 17 (Appx. 459-473) to the Appendix lists the substantial litigation involving Mr. Dondero and Highland in furtherance of his strategy of harassment.

As part of Mr. Dondero's strategy, Appellants filed the *Original Complaint* (the "Complaint") (Ex. 18, Appx. 474-500) on April 12, 2021, in the U.S. District Court for the Northern District of Texas, Dallas Division (the "District Court"). In the Complaint, Appellants sought to hold Highland, among others, responsible for losses Appellants allegedly incurred as a result of a settlement between Highland and a prepetition creditor – a settlement previously approved by the Bankruptcy Court after notice, discovery, and an evidentiary hearing.⁸

⁸ On September 20, 2021, the District Court entered an order pursuant to 28 U.S.C. § 157 and Miscellaneous Order No. 33 (the order of reference) enforcing the order of reference and referring the Complaint to the Bankruptcy Court. *Order of Reference*, Case No. 3:21-cv-0842-B, D.I. 64 (N.D. Tex. Sept. 20, 2021). Ex. 19, Appx. 501-502.

On April 19, 2021, Appellants moved to amend their Complaint to add Mr. Seery as a defendant in clear violation of the terms of the Appointment Order.⁹ As a direct consequence, Highland filed a motion (Ex. 21, Appx. 514-523) (the “Contempt Motion”) to hold Appellants, Mark Patrick (their alleged control person), their law firm (Sbaiti & Co.), and Mr. Dondero (collectively, the “DAF Parties”) in contempt of court.¹⁰

In response to the Contempt Motion, and more than two months *after* the Bankruptcy Court confirmed the Plan and the Dondero Entities’ appeal to the Fifth Circuit¹¹ – Appellants filed the *Notice of Motion for Modification of Order Authorizing Retention of James P. Seery, Jr. Due to Lack of Subject Matter Jurisdiction* (Ex. 25, 537-585) (the “Motion to Reconsider”). The Motion to Reconsider challenged the Bankruptcy Court’s jurisdiction to have entered the Appointment Order – which had been entered almost ten months before and had not

⁹ See *Plaintiffs’ Motion for Leave to File First Amended Complaint in the District Court*, Case No. 3:21-cv-00842-B, D.I. 6 (N.D. Tex. Apr. 19, 2021). Ex. 20, Appx. 503-513.

¹⁰ On August 3, 2021, the Bankruptcy Court found each of the DAF Parties in contempt of court for violating the Appointment Order and assessed damages against them, jointly and severally. *In re Highland Capital Mgmt., L.P.*, 2021 Bankr. LEXIS 2074 (Bankr. N.D. Tex. Aug. 3, 2021). This was the second time the Bankruptcy Court found Mr. Dondero in contempt. *Highland Capital Mgmt., L.P. v. Dondero (In re Highland Capital Mgmt., L.P.)*, 2021 Bankr. LEXIS 1533 (Bankr. N.D. Tex. June 7, 2021).

¹¹ On March 16, 2021, the Bankruptcy Court entered an order granting direct appeal to the Fifth Circuit (Ex. 22, Appx. 524-526) and on May 4, 2021, the Fifth Circuit accepted the direct appeal (Ex. 23, Appx. 527-531; *see also* Ex. 24, Appx. 532-536).

been appealed by any party – and sought to remove any restrictions on Appellants’ ability to harass Mr. Seery via lawsuits in the District Court.

The Bankruptcy Court denied the Motion for Reconsider and entered an order to that effect (Ex. 26, Appx. 586-588). Appellants elected to appeal to this Court (the “Appeal”).

The Bankruptcy Court held there was no basis for reconsideration of the Appointment Order under FRCP 60(b) because:

- The Motion for Reconsideration – filed almost a year after entry of the Appointment Order – was not filed within a reasonable period of time as required by FRCP 60(c). Ex. 27, Appx. 696.
- Appellants did not satisfy FRCP 60(b)(1) and (2) because they presented *no* evidence of surprise or newly-discovered evidence as required by such rules. *Id.*, Appx. 697.
- The Appointment Order was not void under FRCP 60(b)(4) as there was no jurisdictional overreach with respect to the customary gatekeeper and exculpation provisions contained in the Appointment Order. *Id.*, Appx. 697-699.

The Bankruptcy Court also ruled that the Appointment Order, entered pursuant to 11 U.S.C. § 363, was final rather than interlocutory, and that even if the Appointment Order was interlocutory, it would be an abuse of discretion to modify the Appointment Order almost a year after it was entered. *Id.*, Appx. 696.

Finally, the Bankruptcy Court held that, even if there had been a jurisdictional overreach in approving the Appointment Order, *res judicata* bound Appellants and barred reconsideration of the Appointment Order. *Id.*, Appx. 699.

Yet, instead of prosecuting their Appeal, Appellants have asked this Court to delay ruling until after the appeal of the Confirmation Order has concluded. As discussed below issues in connection with the Fifth Circuit appeal of the Confirmation Order are distinct from the issues involved in this Appeal and will not impact this Appeal. More fundamentally, Appellants' request for a delay should be viewed against Mr. Dondero's broader strategy to harass Highland and delay the implementation of the Plan and the liquidation of Highland's assets. As set forth in Exhibit 28 to the Appendix (Appx. 712-715), the Motion is one of nearly twenty motions for a continuance, stay, or abatement filed by Mr. Dondero and his controlled entities, including Appellants, since the entry of the Confirmation Order – each of which seeks to delay final resolution of several pending lawsuits and appeals. In fact, Appellants just recently filed a motion seeking a sixty-day extension of time to file their opening brief in this Appeal, which is their own Appeal.¹² Ex. 29, Appx. 716-722.

B. There Is No Overlap Between the Confirmation Order and the Appeal

This Court's adjudication of this Appeal will not be affected by the appeal of the Confirmation Order, which involves, among other unrelated issues,¹³ the following provisions of the Plan:

¹² Consistent with its communications with this Court, Highland intends to file its opposition to that motion by October 5, 2021.

¹³ Appellants also argue that the Plan (i) violates the absolute priority rule (11 U.S.C. § 1129(b)(2)(B)(ii)) because it distributes property to former equity holders without paying creditors

- Whether the injunction provision in Article IX.F of the Plan is (i) overbroad and vague; (ii) restricts certain of the Dondero Entities' rights under contracts assumed via the Plan; and (iii) is an impermissible third-party release.
- Whether the exculpation provision in Article IX.C of the Plan setting the standard of care for the Independent Directors and other estate fiduciaries with respect to actions previously taken during the chapter 11 case or in connection with the implementation and consummation of the Plan is improper; and
- Whether the Bankruptcy Court has post-confirmation jurisdiction to act as a “gatekeeper” for post-confirmation actions against estate fiduciaries as authorized by Article IX.F of the Plan.

See generally Ex. 30, Appx. 723-777.

The issues involved in this Appeal, as outlined above, are not related to any issue subject to the appeals of the Confirmation Order.¹⁴ The Fifth Circuit appeal does not involve (i) whether the Appointment Order is *res judicata* as to Appellants, (ii) the proper application of FRCP 60(b), and (iii) whether the Bankruptcy Court was authorized to retain an officer subject to an exculpation for negligence and a procedure for asserting any claims in the Bankruptcy Court .

in full and (ii) cannot be confirmed because it does not comply with the “applicable provisions” of the Bankruptcy Code (11 U.S.C. § 1129(a)(2)) because Highland failed to make certain administrative filings during its bankruptcy.

¹⁴ One aspect of the appeal to the Fifth Circuit does, in fact, concern the Appointment Order. Specifically, the Fifth Circuit appellants contend that the Appointment Order and the January Order are not *res judicata* as to **them**. Ex. 30, Appx. 761-763. However, the determination of whether the Appointment Order is *res judicata* to the appellants in the Fifth Circuit is a different issue than whether *res judicata* applies to the Appellants in this Appeal. Moreover, this Court will not need to address the *res judicata* issue if it determines the Bankruptcy Court did not abuse its discretion in denying Appellants relief under FRCP 60(b).

Because there is no overlap in legal issues and abating this Appeal pending resolution of the Fifth Circuit Appeal will not assist the Court in deciding this Appeal, the Court should deny the Motion.

CONCLUSION

WHEREFORE, Highland respectfully requests that the Court (i) deny the Motion in its entirety and (ii) grant such other and further relief as the Court deems just and proper.

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Dated: October 1, 2021.

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CERTIFICATE OF COMPLIANCE WITH RULE 8013

The undersigned hereby certifies that this Response complies with the type-volume limitation set by Rule 8013(f)(3) of the Federal Rules of Bankruptcy Procedure. This Response contains 2,739 words.

/s/ Zachery Z. Annable

Zachery Z. Annable

CERTIFICATE OF SERVICE

I hereby certify that, on October 1, 2021, a true and correct copy of the foregoing Response was served electronically upon all parties registered to receive electronic notice in this case via the Court's CM/ECF system.

/s/ Zachery Z. Annable

Zachery Z. Annable

