CASE NO. 3:21-01295-X

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

HIGHLAND CAPITAL MANAGEMENT LP

(Debtor)

THE DUGABOY INVESTMENT TRUST AND
GET GOOD NONEXEMPT TRUST

(Appellants)

v.

HIGHLAND CAPITAL MANAGEMENT LP

(Appellee)

On appeal from the United States Bankruptcy Court for the Northern District of Texas, Dallas Division

REPLY BRIEF FILED ON BEHALF OF THE DUGABOY INVESTMENT TRUST AND THE GET GOOD NONEXEMPT TRUST

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At the outset, it should be noted that the Appellee Brief is replete with misrepresentations, strawmen, and red herrings which are intended to distract the Court from the real issues on appeal. What matters is that the Bankruptcy Court approved a settlement between two non-debtors, which it did not have the jurisdiction to do. The Debtors arguments about the benefits of the settlement to the Debtor or even to Multi Strat cannot be used to deter the Court from the gating issue which is whether the Bankruptcy Court has the constitutional authority to approve a settlement between two non-non debtors

Assuming the Court can get past the fundamental constitutional hurdle, the Settlement Agreement presented obvious conflicts of interest between the Debtor and Multi-Strat (the company, not the individual investors) and was not fair and equitable to Multi-Strat.

Lastly, Appellants rest on the arguments in their original Brief [Dkt. No. 26] for the assertion that the Settlement Agreement constitutes an improper plan modification.

I. ISSUES ON APPEAL

Appellee's characterization of Appellants' statement of issues on appeal is so misconstrued that it hardly warrants a response. Nonetheless, Appellee's assertion to avoid the jurisdictional infirmity that the Debtor did not seek and the Bankruptcy Court did not approve a settlement between UBS Securities LLC and

UBS AG London Branch (together, "UBS") and Multi Strat is directly contradicted by the record. A simple examination of the Bankruptcy Court's Order makes it clear that the Bankruptcy Court, in fact, did approve the settlement between UBS and Multi-Strat. "The Settlement Agreement, attached hereto as **Exhibit 1**, is approved ***in all respects*** pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure."[1]

Furthermore, that is exactly what the Appellee asked for in its Motion. Appellee requested "entry of an order … substantially in the form attached hereto as **Exhibit A**, approving a settlement agreement … entered into between the Debtor and certain related parties (sic Multi-Strat), on the one hand, and UBS Securities LLC and UBS AG London Branch (collectively "UBS"), on the other hand."[2]

The request for approval for the Debtor to take action as the investment manager of Multi-Strat under section 363(b) was only requested as alternative relief and "to the extent that the Settlement Agreement is viewed as requiring the Debtor to take action outside the ordinary course of business as the investment manager of Multi-Strat."[3] To the extent that the Bankruptcy Court's Order was

[1] *Order Approving Debtor's Settlement with UBS Securities LLC and UBS London Branch and Authorizing Actions Consistent Therewith* (the "Order") at p. 3, ROA Vol. 1, p. 0006 (emphasis added).

[2] *Debtor's Motion for Entry of an Order Approving Settlement with UBS Securities LLC and UBS AG London Branch and Authorizing Actions Consistent Therewith* (the "Motion") at p. 1, ROA Vol. 2, p. 0652.

[3] Motion at 17, ROA Vol. 2, p. 0668.

solely granting authority to the Debtor to act under section 363(b) of the Bankruptcy Code and finding that the Debtor was exercising sound business judgment, that is absolutely on appeal as well as it goes to the overall fairness of the Bankruptcy Court's approval of the Settlement Agreement. In fact, one of the very issues that the Appellants spent much time on in the Appellants' Brief was showing how the Settlement was not in the best interests of Multi-Strat and the Debtor's alleged "business judgment" that it was in Multi-Strat's best interest was wrong, unfounded, and based upon the view of a conflicted party. This argument may have some merit if Multi-Strat had in fact been represented or advised by separate independent counsel (as was misrepresented by the Debtor in the Settlement Agreement). The Settlement Agreement was fairly one-sided in that it provided a great amount to UBS. However, "there must be some articulated business justification, other than appeasement of major creditors, for using, selling or leasing property out of the ordinary course of business before the bankruptcy judge may order such disposition under section 363(b)." *In re Lionel Corp.*, 722 F.2d 1063, 1070 (2d Cir. 1983). The business justification must be that of the non-debtor and the benefits and business justification of the settlement for the Debtor cannot serve as the business judgment for the separate legal entity.

II. OTHER MISREPRESENTATIONS IN THE APPELLEE'S BRIEF

A. The Distinction Between Multi-Strat LTD and Multi-Strat LP Is a Red Herring

Appellee asserts that there is no "meaningful or legally significant distinction" between Multi-Strat LTD and Multi-Strat LP. The Debtor put on no evidence at trial to show the separate legal existence of Multi-Strat LTD and Multi-Strat LP or that the distinction should be disregarded under an "alter ego" theory or one of "single business enterprise." They are, under black letter law, separate juridical entities in the eyes of the law. In fact, in the *Debtor's Omnibus Reply in Support of Debtor's Motion for Entry of an Order Approving Settlement with UBS Securities and UBS AG London Branch and Authorizing Actions Consistent Therewith* (the "Debtor's Omnibus Reply"), the Debtor attached a corporate structure diagram showing that Multi-Strat Ltd. is, in fact, a separate legal entity from Multi-Strat LP.[4] Specifically, Multi-Strat LTD is a limited partner of Multi-Strat LP. A limited partner in a company is not the same entity as the company itself.

Regardless, Appellee's description of Appellants' argument is yet another mischaracterization meant to distract the Court. The distinction that the Appellants draw is not solely between Multi-Strat LTD and Multi-Strat LP. Rather, the

[4] ROA Vol. 4, p. 0964.

distinction is between the Highland Multi Strategy Credit Fund GP, L.P. ("MSCF GP") (the general partner of Multi-Strat LP and a wholly owned subsidiary of the Debtor), the Debtor (the investment manager of Multi-Strat), and Multi-Strat (both Multi-Strat LTD and Multi-Strat LP). Just because Multi-Strat's general partner is the Debtor's wholly owned subsidiary and has its investments managed by the Debtor does not make it equivalent to the Debtor. In fact, Multi-Strat has separate financial and legal interests from the Debtor. The distinction is not a fiction. It is a very real distinction that cannot be ignored absent the Debtor putting on proof that the two entities should be merged together in the eyes of the law.

The Appellee also ignores the fact that the plain language in the Settlement Agreement states, unequivocally, that each party to the Settlement Agreement received independent legal counsel—a statement that is directly contradicted by the sworn testimony of Mr. Seery.[5]

B. The Conflict is Between the Debtor and Multi-Strat (not the individual investors) and Derives From the Debtor's Fiduciary Duty that Cannot be Waived

In yet another mischaracterization, the Appellee makes much noise over the fact that the Debtor, as investment advisor to Multi-Strat, does not owe a fiduciary duty to the individual investors, such as the Dugaboy Trust. The Appellants do not dispute this nor did they argue that there was such a duty owed. The conflict that

[5] *See* Appellants' Brief [Dkt. No. 26] at p. 11, quoting Seery Testimony, ROA, Vol. 22, p. 5282–83.

Appellants raised in their Brief is between the Debtor and Multi-Strat. That conflict was never waived by Multi-Strat nor could it have been waived because the conflict arises out of the fiduciary duty owed to Multi-Strat by the Debtor pursuant to the Investment Advisor's Act (15 U.S.C § 80b-1 – 80b-21), which duty cannot be waived.

The statement in the Appellee's Brief that the Debtor, as investment manager to Multi-Strat, does not owe a fiduciary duty to Multi-Strat's investors[6] is a distinction without a difference in this case and should not be seriously considered by this Court. It is nothing more than an attempt to distract the Court from the real issue that the Debtor breached its fiduciary duty to ***Multi-Strat***. The Debtor would rather spend more time attacking the strawman argument that the investors are not owed a fiduciary duty than discussing the very real fiduciary duty that it owes to Multi-Strat because it does not want to deal with the inconvenient truth that: a) there is a fiduciary duty owed to Multi-Strat (the company); and b) it breached that duty by acting against Multi-Strat's best interest when it approved the Settlement Agreement.

Of course an investment manager owes a fiduciary duty to the fund that it manages. To say otherwise is simply absurd. Aside from this, the *Goldstein v. SEC*, 451 F.3d 873, 879 (D.C. Cir. 2006), case relied upon by the Appellee does

[6] Appellee Brief [Dkt No. 30] at p. 11.

not stand for the proposition that an investment advisor does not owe a fiduciary duty to the individual investors. Rather, the case stands for the proposition that the individual investors are not classified as "clients" of the advisor for purposes of registering as a public fund under the Investment Company Act. *Id.* at 877. Regardless, the fact is that the settlement is not good for Multi-Strat (or its investors, for that matter) and a very real conflict exists between Multi-Strat (the company) and the Debtor—a conflict that was not waived by Multi-Strat. An issue that could have been handled through separate legal counsel and obtaining a fairness opinion.

To support its argument that the conflict of interest was waived, Appellee relies upon Subscription Agreements and other "Governing Documents" to support its contention that the "Limited Partners have no right or power to take part in the management of the Fund." Appellee Brief at 15. Again, the issue is not the conflict between the individual investors (i.e. the limited partners) and the Debtor. Rather, the issue is the conflict is between Multi-Strat and the Debtor. As such, any disclosures that the individual investors may have been given that could constitute a waiver of any conflict does not apply to Multi-Strat, the company. The Debtor in fact tried to satisfy its duty in misrepresenting in the Settlement Agreement that Multi-Strat had separate advise. If no duty existed or no potential conflict existed why did the Debtor include in the Settlement Agreement a material

misrepresentation that Multi-Start received separate advice. It was a blatant attempt hide the duty owed to the entity or claim it was satisfied.

You cannot waive a fiduciary duty. Further, the inclusion of the statements in the Settlement Agreement that each party to the Settlement Agreement had received independent legal counsel undercuts the waiving of the conflict statement. Why would that statement be necessary if the conflict had been waived? The truth is that the statement was deemed necessary because, in fact, the appointment of Mr. Seery changed the dynamics between Multi-Strat and the Debtor and any previous waiving of the Debtor's fiduciary duty to Multi-Strat was undone. Again, Appellants maintain that the Debtor's fiduciary duty as investment manager is unwaivable to begin with and even if waived by the individual investors, was never waived by Multi-Strat.

Lastly, the argument that there was no evidence of "willful misconduct" is not true. The fact that the Settlement Agreement states that each entity had its own separate and independent legal counsel and that, in fact, Multi-Strat did not receive such separate and independent counsel is not mere negligence. These are sophisticated parties and knew what they drafted in the Settlement Agreement. The fact that a patently untrue statement like that was included is almost *per se* willful misconduct.

C. The Terms of the Settlement Agreement Were Not Fair to Multi-Strat

As the Appellants stated above, the argument that the Bankruptcy Court only permitted the Debtor to cause Multi-Strat to enter into the Settlement Agreement under section 363(b) is hair-splitting. It was all included within the Settlement Agreement, which the Bankruptcy Court approved "in all respects." Even assuming that the distinction is of importance, by allowing the Debtor to cause Multi-Strat to enter into the Settlement Agreement, the Bankruptcy Court, in effect, approved the Settlement Agreement on the part of Multi-Strat, a non-debtor, with UBS, another non-debtor.

The Appellee's reliance on the *Order Granting UBS's Motion for Temporary Allowance of Claims for Voting Purposes Pursuant to Federal Rule of Bankruptccy Procedure 3018*, is not only inapplicable, but is not even accurate. The Order referred to in the Appellee Brief actually states that the "UBS Claims are collectively **ALLOWED**, *on a temporary basis and for voting purposes only*, in the amount of $94,761,076."[7] The fact that the order specified that the claim was allowed "for voting purposes only" means that it was not, by any means, dispositive of what UBS was entitled to. Further, assuming that the Debtor's statement is correct, that does not determine what Multi-Strat owes to UBS inasmuch as that issue was never placed before the Court. This argument

[7] ROA Vol. 5, p. 1346 (emphasis added).

represents another attempt by the Debtor to obscure and deflect the Court's attention from the true issues in this appeal. The $23.2 million claim was against ***the Debtor*** and UBS had a 90% chance of recovering against ***the Debtor***. That is also part of the Appellants' assignment of error—i.e. that the Bankruptcy Court did not consider the fact that Multi-Strat, in fact, did not receive any financial benefit from UBS's asserted fraud claims.

D. The Settlement Agreement is Clear that Multi-Strat was Required to Have Independent Counsel and Did Not

Appellee tries to draw another distinction by arguing that the Settlement Agreement, while requiring "independent" counsel did not require "separate counsel." The Settlement Agreement says what it says. The words are plain and unambiguous. Further, since when do "separate" and "independent" not mean essentially the same thing when it comes to conflicts of interest. Counsel cannot be "independent" if it represents two parties to the same contract. Any argument to the contrary is absurd. Even if the distinction matters, by Mr. Seery's own admission, Multi-Strat did not receive even "separate" counsel.[8]

III. CONCLUSION

Appellee's Brief is a series of misrepresentations, strawmen, and red herrings meant to distract the Court from the actual issues. First, the Bankruptcy Court approved the Settlement Agreement "in all respects," which included the

[8] See Seery Testimony, ROA Vol. 22, p. 5282–83.

settlement between Multi-Strat and UBS. These are non-debtors and, as such, the Bankruptcy Court never had jurisdiction over them. The noise that Appellee makes by drawing a razor thin line between approval to force a non-debtor to enter into a settlement and approval of the actual settlement itself is a distinction with no practical difference and is incorrect. These issues could have been resolved by the Debtor merely obtaining separate and independent legal counsel for Multi-Strat and obtaining a fairness opinion.

Second, there was a blatant misrepresentation in the Settlement Agreement when it stated that Multi-Strat had independent counsel, when, in fact, it did not.

Third, the very real conflict of interest arising out of the Debtor's fiduciary duty to Multi-Strat (the company) was not and cannot be waived and makes the Settlement Agreement patently unfair.

Fourth, the Settlement Agreement is absolutely a plan modification for the reasons stated in Appellants' Brief.

This Court should reverse the Bankruptcy Court's *Order Approving Debtor's Settlement With UBS Securities LLC and UBS AG London Branch and Authorizing Actions Consistent Therewith* for legal error and abuse of discretion.

CERTIFICATE OF COMPLIANCE

In compliance with Rules 8014 and 8015, I hereby certify that:

1) This document complies with the type-volume limit of Fed. R. Bankr. P. 8015(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. Bankr. P. 8015(g), this document contains 2515 words.

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Dated November 29, 2021:

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