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

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Reorganized Debtor.

SCOTT BYRON ELLINGTON,

Petitioner,

v.

PATRICK DAUGHERTY,

Respondent.

Chapter 11
Case No. 19-34054-sgj11

Adv. Pro. No. 22-03003-sgj
*Removed from the 101st Judicial
District Court of Dallas County,
Texas Cause No. DC-22-0304*

SCOTT ELLINGTON’S EMERGENCY MOTION TO ABSTAIN AND TO REMAND

Pursuant to Federal Rule of Bankruptcy Procedure 5011 and 28 U.S.C. §§ 1334 and 1452, Scott Ellington (“*Ellington*”) files this emergency opposed motion to (1) abstain from hearing issues related to the above-captioned adversary proceeding (the “*Removed Action*”) and



(2) remand the Removed Action to the state court in which it originally was filed (the “*Motion*”).

In support of the Motion, Ellington respectfully states as follows:

I. PRELIMINARY STATEMENT¹

1. The gravamen of Ellington’s state court claims focuses on Daugherty’s personal conduct in stalking Ellington and other individuals closely associated with Ellington (including Ellington’s girlfriend, father, sister, and at least three of their minor children). In the State Court Action, Ellington seeks to stop such conduct through issuance of a suit seeking damages and injunctive relief in the State Court. After the filing of the State Court Action, the State Court promptly entered a Temporary Restraining Order (“*TRO*”) against Daugherty. Notably, the State Court set a temporary injunction hearing for January 26, 2022, the same date the TRO expires. Daugherty’s removal of the State Court action already has prejudiced Ellington by allowing the TRO to expire without further protection for Ellington and his family.

2. Immediately after issuance of the TRO, Daugherty removed the State Court Action to this Court on the stated basis that the stalking claims against Daugherty were somehow “related to” HCMLP’s chapter 11 case. Such action is nothing more than a transparent attempt to forestall the inevitable judgment of a court upon Daugherty’s actions.

3. Ellington seeks to have a court of competent jurisdiction hear his stalking and invasion of privacy claims, render a final judgment, and issue a permanent injunction against Daugherty. This Court, however, must abstain from hearing disputes related to this case and remand the Removed Action to the State Court. First, abstention is mandatory under 28 U.S.C. § 1334(c)(2) as the Removed Action exclusively involves Texas state law and does not even “relate to” the chapter 11 case. Second, and in the alternative, abstention is permissive and necessary

¹ Capitalized terms used but not otherwise defined in this Preliminary Statement shall have the meaning ascribed to them in the Motion.

under 28 U.S.C. § 1334(c)(1) as no basis for federal jurisdiction over the Removed Action exists. That Daugherty and Ellington are both former employees of HCMLP who each have his own separate, and often contentious, history with HCMLP does not create “related to” jurisdiction. For these reasons, this Court must abstain from this dispute and remand the Removed Action under 28 U.S.C. § 1452(b) to the State Court.

II. FACTUAL BACKGROUND

4. Ellington was, until January of 2021, the general counsel of Highland Capital Management, L.P. (“*HCMLP*”).

5. Defendant Patrick Daugherty (“*Daugherty*”) previously worked for HCMLP.

6. On January 11, 2022 in the 101st Judicial District Court in Dallas County, Texas (the “*State Court*”), Ellington filed suit against Daugherty, Cause No. DC 22-00304 (the “*State Court Action*”). In the State Court Action, Ellington asserts claims against Daugherty for stalking and invasion of privacy by intrusion, and Ellington requests the State Court to issue a permanent injunction against Daugherty to protect Ellington and Ellington’s friends and family. Doc. 1-1 at 5-15. The Petition filed by Ellington in the State Court Action includes declarations from a private investigator and Ellington, both of whom recount a pattern of Daugherty following Ellington and certain of Ellington’s family and friends (including his father), as well as Daugherty appearing outside of locations such as Ellington’s office and home and Ellington’s sister’s home. *Id.* at 16–21 and 45–48. Daugherty’s stalking began no later than January 2021 and has been verified as recently as December 2021. *Id.* at 3–4, ¶¶ 11–13. Daugherty has been observed outside Ellington’s office, or the residences of Ellington, his girlfriend, sister, and father, no less than **143 times**, often taking photographs or video recordings while either parked or driving slowly by. *Id.* On April 21, 2021 alone, the private investigator observed Daugherty driving by Ellington’s office at least nine

times. *Id.* at 19, ¶ 14. As a result, in the State Court Action Ellington seeks an injunction prohibiting Daugherty from being near Ellington and his friends and family. *Id.* at 12, ¶ 35.

7. On January 12, 2022, the State Court issued a Temporary Restraining Order (“**TRO**”) against Daugherty, which prohibits Daugherty from communicating with or recording Ellington and being within 500 feet of Ellington, Ellington’s office, Ellington’s residence, and other specified locations such as those of Ellington’s family and friends. *Id.* at 57–58, ¶ 4. Because the TRO only lasts for 14 days or until the temporary order hearing, whichever is sooner, the State Court set the temporary injunction for hearing on January 26, 2022. *Id.* at 58, ¶ 5.

8. On January 18, 2022, Daugherty filed his notice of removal (the “**Notice of Removal**”) [Doc. 1]. In the Notice of Removal, Daugherty asserts that the Bankruptcy Court has jurisdiction pursuant to 28 U.S.C. § 1452(a) and Bankruptcy Rule 9027 because the State Court Action somehow “relates to” HCMLP’s chapter 11 case. *Id.* at 3. As a result of this barebones allegation, the Removed Action was automatically referred to the bankruptcy court upon removal.

III. ARGUMENTS AND AUTHORITY

A. This Court must abstain from hearing Ellington’s State Court Action.

9. Mandatory abstention in a bankruptcy proceeding is governed by 28 U.S.C. § 1334(c)(2), which states as follows:

Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

The Fifth Circuit has interpreted this provision to mandate federal abstention where “(1) [t]he claim has no independent basis for federal jurisdiction, other than § 1334(b); (2) the claim is a non-core proceeding,” *i.e.*, it is related to a case under title 11; “(3) an action has been commenced in

state court; and (4) the action could be adjudicated timely in state court.” *Edge Petroleum Operating Co. v. GPR Holdings, L.L.C. (In re TXNB Internal Case)*, 483 F.3d 292, 300 (5th Cir. 2007). “If the requirements for mandatory abstention are met, a federal court has no discretion—it must abstain.” *Lain v. Watt (In re Dune Energy, Inc.)*, 575 B.R. 716, 726 (Bankr. W.D. Tex. 2017).

10. Initially, the first and third factors are not controversial; no basis for federal jurisdiction is asserted other than § 1334(b), and the State Court Action was commenced in the State Court. At issue is whether the State Court Action is (at best) a non-core proceeding and whether it can timely be adjudicated in the State Court. Each of these factors demonstrates that the Court must abstain.

i. The State Court Action is, at best, a non-core proceeding.

11. In determining whether a proceeding is non-core, the Fifth Circuit Court of Appeals has explained that “[i]f the proceeding does not invoke a substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy it is not a core proceeding ... [I]t is an ‘otherwise related’ or non-core proceeding.” *Wood v. Wood (In re Wood)*, 825 F.2d 90, 97 (5th Cir. 1987). The State Court Action for claims of stalking, invasion of privacy by intrusion, temporary restraining order, temporary injunction, and permanent injunction against Daugherty all arise under Texas state law and do not invoke substantive rights in bankruptcy. The State Court Action does not make any reference to the Bankruptcy Code — nor is it applicable. Stalking Ellington and his family is not a substantive asset or right of HCMLP’s estate. Nothing in the administration of the estate can or should deny Ellington of his right to personal safety under Texas

law. Neither HCMLP's confirmed plan, nor any order of this Court, permits Daugherty to stalk Ellington and his family over 143 times. In short, the State Court Action is a non-core proceeding.²

ii. The State Court can timely adjudicate the State Court Action.

12. Although a naked assertion that a proceeding can be timely heard in state court will not satisfy the requirement that a proceeding be "timely adjudicated" in state court, courts recognize that this requirement is a relatively low hurdle to clear. *See WRT Creditors Liquidation Tr. v. C.I.B.C. Oppenheimer Corp.*, 75 F. Supp. 2d 596, 605-06 (S.D. Tex. 1999). "The issue is not whether a matter can be adjudicated more timely in state court than in federal court. Rather, the movant need only present evidence to show that the proceeding can be heard by the state court in a timely fashion." *In re Dune Energy*, 575 B.R. at 730.

13. The record to date makes clear that the State Court Action has been and can continue to be adjudicated timely in the State Court. Ellington filed the State Court Action on January 11, 2022. One week later, on January 18, 2022, the State Court issued a TRO against Daugherty and set the temporary injunction for hearing on January 26, 2022. In fact, the removal of the action to this Court delayed Ellington's efforts to obtain a temporary injunction and risks creating an unprotected gap between the expiration of the TRO and any temporary injunctive relief preventing Daugherty's ongoing stalking. If the Removed Action is remanded back to the State Court, the State Court will continue to adjudicate the claims and relief sought by Ellington in a timely manner.

14. Because all the elements of mandatory abstention under section 1334(c)(2) are satisfied, this Court must abstain from hearing the Removed Action. *See In re Dune Energy*, 575 B.R. at 726.

² Under established Fifth Circuit precedent, this Court does not even have "related to" jurisdiction, but the Court need not decide that issue to determine that mandatory abstention applies here.

B. In the alternative, this Court should exercise its discretion to permissively abstain or equitably remand the State Court Action.

15. In the alternative, if mandatory abstention is not found, this Court should exercise its discretion to permissively abstain and equitably remand the Removed Action. Permissive abstention is governed by 28 U.S.C. § 1334(c)(1), which states as follows:

Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

16. Equitable remand of a bankruptcy proceeding is likewise governed by 28 U.S.C. § 1452(b), which allows a court to remand a removed action “on any equitable ground.”

17. Because the permissive abstention and equitable remand statutes are “similar in purpose,” the same factors are usually weighed to determine if either is warranted. *In re Dune Energy*, 575 B.R. at 731. Courts have enumerated 14 factors to consider in determining whether to abstain or equitably remand a removed action:

“(1) the effect or lack thereof on the efficient administration of the estate if the court decides to remand or abstain;

(2) the extent to which state law issues predominate over bankruptcy issues;

(3) the difficult or unsettled nature of applicable law;

(4) the presence of a related proceeding commenced in state court or other nonbankruptcy proceeding;

(5) the jurisdictional basis, if any, other than § 1334;

(6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case;

(7) the substance rather than the form of an asserted core proceeding;

(8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court;

(9) the burden on the court’s docket;

(10) the likelihood that the commencement of the proceeding in the bankruptcy court involves forum shopping by one of the parties;

(11) the existence of a right to a jury trial;

(12) the presence in the proceeding of non-debtor parties;

(13) comity; and

(14) the possibility of prejudice to other parties in the action.”

Cedar Park Healthcare, LLC v. Harden Healthcare, LLC (In re Senior Care Ctrs., LLC), 611 B.R. 791, 802 (Bankr. N.D. Tex. 2019) (Jernigan, J.).

18. Because “state law issues do not merely predominate; they overwhelm,” the Court should permissibly abstain from hearing the Removed Action and remand it to the State Court. *Id.* (permissibly abstaining and granting motion to remand when removed action “based entirely on state law”). Ellington is also entitled to, and intends to demand, a jury trial of his stalking and invasion of privacy claims brought in the State Court Action under Texas law, another factor that favors permissive abstention and remand. *Id.* Additionally, all the other factors identified in *In re Senior Care Ctrs.* support permissive abstention and remand in this case: (i) both parties are non-debtors; (ii) the resolution of the State Court Action will have no impact on the efficient administration of HCMLP’s estate and is unrelated to HCMLP’s chapter 11 case; (iii) no bankruptcy issues are raised in the State Court Action; (iv) the State Court Action does not raise any difficult or unsettled questions of law; (v) the sole alleged basis for federal jurisdiction is section 1334, and Daugherty has not even claimed that the State Court Action implicates the Court’s core jurisdiction; (vi) this Court already has a very busy docket; (vii) this case was already commenced in the State Court; and (viii) abstaining from hearing the State Court Action promotes comity with the State Court.

19. This Court should focus on the crux of Ellington's complaint: to (1) ensure the safety of himself and his family and (2) obtain damages against those that have imperiled their safety. Moreover, because the State Court was scheduled to have a hearing on January 26 to consider extending the injunction, Ellington and his family and friends will be harmed if that hearing does not go forward, and the TRO lapses before issuance of a longer injunction.

20. "Any doubts concerning removal must be resolved against removal and in favor of remanding the case back to state court." *In re Senior Care Ctrs., LLC*, 611 B.R. at 800. Here, however, no doubts exist. Not a single factor in the *Senior Care Ctrs.* analysis favors this Court presiding over the Removed Action.

21. In light of the foregoing, the Court should abstain from hearing the Removed Action entirely and instead remand the Removed Action to the State Court. *See* 28 U.S.C. § 1452(b).

WHEREFORE, Ellington respectfully requests that this Court enter an order (a) abstaining from hearing the Removed Action, (b) remanding the Removed Action to the State Court, and (c) granting Ellington such other and further relief as is just.

Dated: January 25, 2022

By: /s/ Frances A. Smith

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CERTIFICATE OF CONFERENCE

In compliance with L.B.R. 7007-1(b), I certify that a meet and confer was conducted with counsel for Patrick Daugherty on January 25, 2022 regarding the Motion. The parties were not able to resolve the issues raised in the Motion.

/s/ Debra A. Dandeneau

Debra A. Dandeneau

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 25th day of January 2022, a true and correct copy of the above and foregoing document was served on all known counsel via email as set forth below and by the Court's ECF filing system on those parties who have registered for receipt of electronic notice in this case.

/s/ Frances A. Smith

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

<p>In re:</p> <p>HIGHLAND CAPITAL MANAGEMENT, L.P.,</p> <p style="text-align: center;">Reorganized Debtor.</p>	<p>Chapter 11</p> <p>Case No. 19-34054-sgj11</p>
<p>SCOTT BYRON ELLINGTON,</p> <p style="text-align: center;">Petitioner,</p> <p style="text-align: center;">v.</p> <p>PATRICK DAUGHERTY,</p> <p style="text-align: center;">Respondent.</p>	<p>Adv. Pro. No. 22-03003-sgj</p> <p><i>Removed from the 101st Judicial District Court of Dallas County, Texas Cause No. DC-22-0304</i></p>

**ORDER GRANTING SCOTT ELLINGTON'S
EMERGENCY MOTION TO ABSTAIN AND TO REMAND**

This matter having come before the court on *Scott Ellington's Emergency Motion to Abstain and to Remand* in the above-captioned case; and this Court having considered all papers filed in support of or in opposition to the Motion, the oral argument of counsel, if any, and all other pleadings and papers on file herein, the Court finds as follows:

Scott Ellington's Emergency Motion to Abstain and to Remand is GRANTED; the Court abstains from hearing and trying this proceeding; and this action is remanded to the 101st Judicial District Court in Dallas County, Texas.

IT IS SO ORDERED

End of Order

Proposed form of order prepared by:

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