

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

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In Re:) **Case No. 19-34054-sgj-11**
) Chapter 11
)
HIGHLAND CAPITAL) Dallas, Texas
MANAGEMENT, L.P.,) Tuesday, March 29, 2022
) 1:30 p.m. Docket
Reorganized Debtor.)

ELLINGTON,) **Adversary Proceeding 22-3003-sgj**
)
Plaintiff,)
) SCOTT ELLINGTON'S MOTION
v.) TO ABSTAIN AND REMAND [3]
)
DAUGHERTY,)
)
Defendant.)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

APPEARANCES:

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1 APPEARANCES, cont'd.:

2 For Highland Capital
3 Management and Highland
4 Claimant Trust:

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1 DALLAS, TEXAS - MARCH 29, 2022 - 1:37 P.M.

2 THE COURT: All right. We will begin our setting
3 today in Ellington versus Daugherty, Adversary 22-3003.

4 First, who do we have appearing for Ellington?

5 MS. SMITH: Good afternoon, Your Honor. Frances
6 Smith with Ross & Smith and Michelle Hartmann with Baker &
7 McKenzie on behalf of Mr. Ellington.

8 THE COURT: All right. Thank you. Who do we have
9 appearing to Mr. Daugherty?

10 MR. YORK: Good afternoon, Your Honor. It's Drew
11 York from Gray Reed. On the line with me today is Jason
12 Brookner.

13 THE COURT: All right. Good afternoon. I presume
14 those are all the formal appearances we have. Is there anyone
15 else out there who felt the need to appear?

16 MR. DEMO: Your Honor, this is Greg Demo from
17 Pachulski Stang Ziehl & Jones on behalf of Highland Capital
18 Management and the Highland Claimant Trust. We are not a
19 party to this adversary. We haven't filed papers. Nobody's
20 asked our opinion prior to filing papers in this case. And
21 honestly, Your Honor, we do believe that this is just another
22 facet of the feud between Mr. Daugherty and Mr. Dondero and
23 honestly want nothing to do with this hearing.

24 That said, Your Honor, we would like to reserve the right
25 to reply if anything is said at this hearing that impacts our

1 affects Highland or if any factual assertions or implications
2 are made that could impact or affect Highland.

3 THE COURT: All right. That is fine.

4 MR. DEMO: Thank you.

5 THE COURT: Any other appearances?

6 (No response.)

7 THE COURT: All right. Well, this is, of course, a
8 removed action, and we are here today on Mr. Ellington's
9 motion for abstention or remand. Who will be making the
10 argument for Mr. Ellington?

11 MS. SMITH: Your Honor, Ms. Hartmann will be making
12 the argument for Mr. Ellington. But as a housekeeping matter,
13 we did have five exhibits that I believe were filed under
14 Docket No. 22, and I would like to move for the admission of
15 those five exhibits. It's the petition -- I'm sorry, Your
16 Honor.

17 THE COURT: Okay. All right. I see -- I see the
18 five exhibits at Docket Entry 22. Is there any objection from
19 Daugherty's counsel?

20 MR. YORK: No, Your Honor. And I believe that, as a
21 housekeeping matter, we also have exhibits which were filed
22 at, I believe, Docket 24. And we'd move to admit those as
23 well, PD 1 through 17.

24 THE COURT: All right. Any objection --

25 MS. SMITH: Your Honor, --

1 THE COURT: -- objection to those?

2 MS. SMITH: Your Honor, this is Frances Smith on
3 behalf of Mr. Ellington. Actually, Mr. Daugherty's exhibits,
4 I believe, are at Docket 23. We have no objection to Mr.
5 Daugherty's Exhibit 10 or Exhibits 13 through 17. We object
6 to Exhibits 1 through 9 and --

7 THE COURT: Okay. Okay. Slow -- slow down. Or,
8 actually, if you could repeat yourself. The connection is a
9 little garbly, so -- I don't know why. If you could repeat
10 again. I'm pulling them up. You have no objection --

11 MS. SMITH: Yes, Your Honor.

12 THE COURT: You have no objection to -- and you're
13 right, they're at 23. You have no objection to what exhibits?

14 MS. SMITH: To Exhibit PD 10.

15 THE COURT: Okay.

16 MS. SMITH: PD 13.

17 THE COURT: Okay.

18 MS. SMITH: PD 14.

19 THE COURT: Okay.

20 MS. SMITH: PD 15.

21 THE COURT: All right.

22 MS. SMITH: 16. And PD 17. So that's, to recap, 10,
23 and then 13 through 17.

24 THE COURT: Okay. But you're objecting to all other
25 exhibits?

1 MS. SMITH: Yes. On relevance. And can you hear me
2 better now? I've moved closer to the mic.

3 THE COURT: I can hear you a little better.

4 So I am admitting 10, 13, 14, 15, 16, and 17 of Mr.
5 Daugherty's. But you're going to ask that Mr. Daugherty move
6 to admit the others the old-fashioned way with a prove-up?

7 MS. SMITH: Yes, Your Honor.

8 THE COURT: All right. Well, we shall see what Mr.
9 Daugherty wants to do on that front.

10 (Plaintiff's five exhibits at Docket 22 are received into
11 evidence.)

12 (Defendant's Exhibit 10, as well as Exhibits 13 through
13 17, at Docket 23 are received into evidence.)

14 THE COURT: All right. Ms. Hartmann, I'll hear your
15 arguments.

16 MS. HARTMANN: Thank you, Your Honor. I'm going to
17 try to share my screen.

18 THE COURT: Okay.

19 MS. HARTMANN: I think this is better. That's fine.
20 Michelle Hartmann, Baker & McKenzie, on behalf of Scott
21 Ellington. And may it please the Court. As Your Honor
22 stated, we're here today on an emergency motion to abstain and
23 remand.

24 Turning to the state court action on the next slide, this
25 case relates to purely state law and involves nondebtors.

1 We appreciate Your Honor's comments during the status
2 conference, and we don't want to get into the merits of this
3 case, but it was filed by Lynn Pinker & Hurst. We do believe
4 that the case has significant merits.

5 And based on Your Honor's comments, we did want to just
6 put a couple of allegations in. Part of the reason why Mr.
7 Ellington felt the need to file this case related to his
8 family. And as you see in the state court petition, Mr.
9 Daugherty has been observed clearly parking in front of his --
10 Mr. Ellington's sister's house -- she has two minor daughters
11 -- filming, including them going to school. She lives in
12 Murphy, Texas, nowhere near where Mr. Ellington lives.

13 Mr. Daugherty has also been observed, again, parking in
14 front of Mr. Ellington's elderly father's house, filming and
15 -- for long periods of time. He, again, lives in Parker,
16 Texas.

17 The same action was taken as to Mr. Ellington's fiancée,
18 who has a minor son, filming, including the minors, which is
19 why this action was brought.

20 Turning to the next slide, this is brought, as Your Honor
21 correctly noted in the status conference, under the stalking
22 statutes and privacy common law, and it relates, really, to
23 claimant's fear of the safety of a member of the claimant's
24 family. That was the impetus for this, much more so than
25 anything related to Mr. Ellington himself.

1 And you can see just a couple of the pictures where Mr.
2 Daugherty is literally just parking outside family members'
3 houses. It had escalated recently in December, which led to
4 the filing, where packages, anonymous packages and letters are
5 being left as well.

6 Turning to the next slide, one day after the case was
7 filed, Judge Williams in the 101st Court entered a temporary
8 restraining order. And Your Honor can see that it relates not
9 just to Mr. Ellington but to his girlfriend, his sister, and
10 to his elderly father.

11 Turning to the issue at hand, Your Honor, case timeline,
12 we wanted to include this more than anything just to show that
13 the removal was on January 18, 2022. That's at Docket 1. And
14 Mr. Ellington timely filed for abstention and remand, which is
15 what we're asking for today.

16 Before the Court are two questions. Assuming there is
17 subject matter jurisdiction, whether mandatory abstention is
18 warranted as the claims exclusively involve state law claims
19 against two nondebtors. And we'll talk about Your Honor's
20 precedent in that. We believe that it is warranted here. And
21 alternatively, to fashion a permissive abstention.

22 Turning to Mr. Daugherty's response, as Your Honor I'm
23 sure noted, the first 14 pages of the 25-page response are
24 really an introduction and factual background that have
25 nothing to do with either the state court case or the question

1 on abstention before the Court. There is long recitation of
2 Daugherty's employment at Highland, his disputes with Mr.
3 Dondero, and other actions that were pending in state court in
4 Dallas County and in Delaware. Again, there's no relevance of
5 that to the state court action or the question of mandatory or
6 permissive abstention.

7 There's a long history of HERA, the escrow agreement, and
8 HCMLP-related lawsuits in Texas and Delaware. Again, no
9 relevance to the state court action or the question of
10 mandatory or permissive abstention.

11 And then there's a section that -- a docket that really is
12 just intended to cast irrelevant aspersions at Mr. Ellington
13 in an attempt to justify the stalking.

14 We don't, again, want to get into the merits of this. We
15 think that this is a question that you can answer without
16 getting into some of these irrelevant allegations. But a
17 couple of them we saw as material either omissions or
18 misstatements, and we wanted to make sure that the record was
19 accurate on this.

20 Mr. Daugherty represents that the jury found for him and
21 against the Highland -- Highland and Dondero and attained a
22 judgment against HERA of \$2.6 million. That is true, but when
23 you look at the final judgment, there's also \$2.8 million
24 against Daugherty, and all the claims against the executives
25 were dismissed. You can see that they -- there was a

1 take-nothing judgment.

2 Another argument, turning to the next slide, that Mr.
3 Daugherty spends quite a bit of time on is trying to argue
4 that Mr. Ellington appears to be fraudulently transferring his
5 own personal assets. And that'll be the next slide. And the
6 basis for that is that Mr. Ellington purportedly signed on to
7 his video deposition on February 16, 2021 -- the next one --
8 purportedly using an alias. It's perhaps the worst alias
9 ever. It's his fiancée, and he's taking a deposition from his
10 fiancée's house. Of course, it's a woman, Stephanie Archer,
11 and he immediately told the court reporter who -- what his
12 name was and why Stephane Archer was the identifier. Mr.
13 Daugherty began stalking Ms. Archer and her minor son shortly
14 after this.

15 Turning to the next slide, which I think was the previous
16 one in your deck. There we go. And the last one, we just
17 wanted to highlight. Again, Mr. Daugherty states, and this is
18 at Paragraph 30, Docket 15, that Ellington swears under
19 penalty of perjury that he feared Daugherty so much he moved
20 residences three times in the last year. Nothing like that is
21 said in the state court petition, and we've added for Your
22 Honor as an exhibit SE 1, Mr. Ellington's actual declaration.
23 He does state that he moved three times January 2021 to today.
24 Nowhere does he say that it's because he feared Mr. Daugherty.
25 Again, this was for his family that he brought this

1 litigation. What he said is that his address was not
2 searchable and yet Mr. Daugherty continued to -- to show up at
3 these residences.

4 And just finally, Your Honor, the investigator is a former
5 Highland Park police officer. It is not Mr. Ellington's
6 personal assistant.

7 There are a lot of other allegations that are completely
8 incorrect, including storing high-end cars, when in fact Mr.
9 Daugherty must have been filming the warehouse next to Mr.
10 Ellington's warehouse, where there are no high-end cars but
11 some Gold's Gym equipment that he used during COVID. But,
12 again, we don't think it relates to the facts and the matter
13 before Your Honor.

14 So, turning to the next slide and shoring up these
15 irrelevant allegations, the legal issue before Your Honor
16 relates to mandatory abstention and permissive abstention.
17 Mr. Daugherty, and this is Paragraph 39 of his response, he
18 acknowledges that the first and third factors are not in
19 dispute. So that there's no independent basis for federal
20 jurisdiction other than Section 1334(b), and that they had
21 removed the state court action to this Court, leaving only
22 Factors 2 and 4, whether the claim is a noncore proceeding and
23 whether the action could be adjudicated timely in state court.

24 With regard to the noncore proceeding, and turning to the
25 next slide, Mr. Daugherty argues under the catchall provision

1 of Section 157(b) (2) (A) and (O). And he really focuses on
2 three arguments that we'll address for Your Honor.

3 Number one, he states that Mr. Ellington's objection to
4 the settlement agreement somehow transforms the state court
5 case to a core proceeding.

6 Number two, that a litigation hold letter again somehow
7 transforms the state court case to a core proceeding.

8 And three, that Daugherty's status as a creditor does the
9 same.

10 And we'd note for Your Honor the case law, which Your
11 Honor certainly is aware of, about defining core proceedings
12 narrowly.

13 But turning to the first bucket, the settlement agreement
14 and Ellington's objection to the Daugherty settlement
15 agreement. So, Daugherty's response states that Ellington was
16 using the state court action in an attempt to alter the
17 proposed settlement between Daugherty and Highland.

18 First, if Ellington's sole purpose was to use the state
19 court action as a tactical advantage, he would have done so
20 after that settlement was announced back in February 2021.
21 Again, we thought that this would end. Instead, going into
22 December in particular, it escalated again with the delivery
23 of these packages and these anonymous letters.

24 More importantly on this point, as was stated in the
25 objection, Ellington states he has no reason to believe that

1 HCMLP was aware of the alleged activities of Daugherty or the
2 allegations raised in the Ellington action at the time that
3 HCMLP entered into the settlement agreement. So we
4 specifically state in this objection that Ellington didn't
5 have reason to believe that the Debtor had anything to do with
6 this.

7 Turning to the next slide, Ellington's objection -- and
8 Your Honor knows this because you presided over the hearing --
9 was limited to really challenging two provisions, the observer
10 status and then the assignment of any HERA or ERA claims.

11 One thing that Daugherty focuses on is a letter that was
12 sent to the Debtor in an effort to confer on the objection
13 before the objection was filed. In these discussions and the
14 conferral process, it became clear that the Debtor's counsel
15 lacked knowledge of Daugherty's conduct but also didn't
16 believe the two provisions would contribute to any further
17 stalking.

18 Conferring with the Debtor on a limited objection to two
19 noneconomic terms before filing an objection does not
20 transform the state court action involving nondebtor parties
21 into a core proceeding.

22 On this point -- and again, Mr. Demo is here -- but
23 neither the Debtor nor the Litigation Trustee had filed
24 anything with this Court, notwithstanding that the responsive
25 deadline for taking a position had passed. There may be

1 something that is said today, but thus far no claims have been
2 brought against the Debtor, nor does Mr. Ellington intend to,
3 and there hasn't been a position that has been lodged with
4 regard to either the Debtor or the Litigation Trustee.

5 And finally on the settlement point -- there you go -- on
6 the settlement point, a hearing was held on the Daugherty
7 settlement, including Ellington's objection, March 1, 2022.
8 The appeals are exhausted on May 23, 2022. This was not
9 appealed. And as the Court is aware, the Court denied
10 Ellington's objection, finding a lack of standing, without
11 needing to resort to any issues related to the state court
12 action.

13 So, on this main argument, then, that Mr. Daugherty has as
14 to the objection to the Daugherty settlement, we see it as
15 fully resolved and really moot to the motion before the Court
16 on mandatory abstention.

17 The second bucket or argument that Mr. Daugherty makes is
18 that a litigation hold that was sent by counsel in the state
19 court action, Michael Hurst, to preserve communication somehow
20 makes the state court action core. And they point to No. 6 on
21 the litigation hold for documents and communications with any
22 other party, person, or entity (audio gap) is requested to be
23 preserved.

24 Nowhere does this litigation hold seek documents from the
25 Debtor. And even if it had, it didn't bring claims against

1 the Debtor. This is merely asking to preserve communications
2 related to the -- what we call the stalking actions.

3 Again, a mere litigation hold notice doesn't transform the
4 dispute into a core proceeding.

5 And then the last argument that Mr. Daugherty makes as a
6 basis for the state court proceeding being core is that
7 Daugherty is a creditor. Again, creditor status, without
8 more, doesn't make a dispute core. If Ellington -- Mr.
9 Ellington were to succeed in the state court action, it
10 wouldn't make and shouldn't make a difference to the Debtor's
11 estate. And if somehow Mr. Daugherty would be found not
12 liable, again, there shouldn't be a difference made to the
13 Debtor's estate.

14 So there should not be any kind of financial impact, and
15 creditor status alone should not be enough.

16 The next element that is challenged, Your Honor, is the
17 timely adjudication element. Mr. Ellington put forth the pace
18 at which Judge Williams in the 101st had already been moving,
19 and also pled that, had they not removed the action on January
20 18, the state court would have continued its timely
21 adjudication, and had already set deadlines for the
22 preliminary injunction.

23 What Mr. Daugherty argues is that the impact of COVID-19
24 on the timely adjudication analysis makes a difference. And
25 in particular, he cites to and focuses exclusively on jury

1 trials and the backlog of jury trials. But the timely
2 adjudication here involves injunctive relief, scheduling,
3 discovery, and other issues. And although the brief, Mr.
4 Daugherty's brief cites to the Dallas County COVID-19 risk
5 level as red during COVID, we note that it is now down to a
6 yellow COVID-19 risk level.

7 And finally, on the existence of jury trial, we think that
8 matters, since Mr. Daugherty has focused on these jury trial
9 statistics. Daugherty recognizes -- and this is the Docket
10 15, Paragraph 53(k) -- that both Ellington and Daugherty are
11 entitled to a jury trial and have requested a jury trial. And
12 we cite Your Honor to your case in *In re Senior Care*. You
13 state that if a party requests a jury trial this matter could
14 take far longer to adjudicate in this Court than state court,
15 because unless the parties were to agree to this Court
16 conducting a jury trial, the case would need to be withdrawn
17 to the district court.

18 We believe, based on the record before Your Honor,
19 Ellington -- Mr. Ellington has met the low threshold for
20 timely adjudication.

21 So with regard to mandatory abstention, we know Your Honor
22 is aware that if the requirements are met the federal court
23 has no discretion but must abstain. We feel that's what
24 should be done here.

25 Alternatively, we believe that permissive abstention

1 should be found.

2 All fourteen factors here, we believe, favor permissive
3 abstention and remand, or at least are neutral, but in any
4 event tip in favor of Mr. Ellington.

5 We'd note that of these fourteen factors, seven of them
6 related to and were the subject of arguments in Mr.
7 Daugherty's response dealing with the settlement and the
8 objection to the settlement. As the settlement has already
9 been entered and the objection has been denied, we believe
10 those are moot and tip in favor of Mr. Ellington.

11 Number three, the difficult or unsettled nature of the
12 applicable law is probably neutral.

13 The presence of a related proceeding commenced in state
14 court or other nonbankruptcy proceeding, frankly, neutral,
15 although we'd note that Mr. Daugherty spends a lot of his
16 brief making the argument that either the Delaware state
17 action or the former Dallas County state action are somehow
18 related.

19 Number eight, Mr. Daugherty admits that this factor is
20 inapplicable.

21 The burden on the Court's docket, again, is neutral.

22 And then eleven, twelve, and fourteen we would say tip in
23 favor of Mr. Ellington.

24 The existence of a jury trial, we've already discussed.

25 The presence in the proceeding of nondebtor parties. The

1 opposite is the case here. All -- Mr. Ellington and Mr.
2 Daugherty are both nondebtor parties.

3 And then the possibility of prejudice to other parties in
4 the action. There will be nonparty witnesses in the state
5 court litigation. And of course, as Mr. Ellington is the
6 Plaintiff here, he chose to be in state court in this matter.

7 I want to turn just briefly, unless Your Honor has any
8 questions, to the case law. Mr. Daugherty's response fails to
9 cite any factually-similar cases. Let me just focus on the
10 ones that he does cite to.

11 In the response, Docket 15, Paragraph 40, he cites to *In*
12 *re Directory Distributing Associates* for the proposition that
13 the state court action is core because its state law claims
14 concern the administration of a bankruptcy estate. That case
15 is highly distinguishable. It involved a -- the decision
16 involved motion to transfer Texas and California proceedings
17 involving the debtor. These were a Fair Labor Standards Act
18 class action, so they were going to be in federal court no
19 matter what, which is quite different from the purely state
20 court claims here involving two nondebtors. Again, the
21 question in this case was not abstention; it was transfer.

22 The response at Docket 15, Paragraph 34, *In re Ritchey* is
23 cited for the proposition that the matter of the state court
24 action is core because it involves the Court's enforcement of
25 its own gatekeeping orders. Here we have purely state law

1 claims brought to stop a behavior. We do not think that that
2 implicates the Court's gatekeeping injunction. But, again,
3 this *Ritchie* case involved a sanction motion for violating a
4 discharge order, but, again, did not have to do with
5 abstention.

6 And finally, the response, Docket 15, Paragraphs 53(a) and
7 (d), the *Sabre* case is cited, *Sabre Technologies v. TSM*
8 *Skyline*, for the proposition that Ellington's transparent
9 purpose in filing the state court action is to thwart the
10 Court's efficient administration of the Debtor's estate. This
11 argument and the case citation I believe really relate to the
12 objection to the settlement agreement, which, again, we see
13 it's a moot point.

14 In any event, the *Sabre* case, the plaintiff there sued the
15 owner of the debtor and an affiliate of the debtor, alleging
16 fraudulent transfers from the debtor to the affiliate. So you
17 were dealing with core matters here, not the state law claims
18 that you have before Your Honor.

19 And the two last cases that are cited by Mr. Daugherty, *In*
20 *re Brook Mays Music Company* -- your decision, Your Honor --
21 for the proposition cited that evidence favored retention
22 where the Court has familiarity with the parties and the
23 disputes.

24 What we see on this case, though, is that the plaintiff
25 sued Chase in its capacity as the debtor's lender and TRG in

1 its capacity as the financial advisor to the debtor. As Your
2 Honor noted in the decision, diversity jurisdiction existed,
3 making mandatory abstention inapplicable. And Your Honor
4 states that the Court agreed in that case that the debtor was
5 likely to be a necessary party. Again, that case, to us, does
6 not seem factually similar.

7 And the final case cited is *In re Doctors' Hospital*. It's
8 cited for the proposition that plaintiff is forum shopping to
9 escape the bankruptcy court. That's just not the case here.
10 These are state laws claims that are brought in state court.
11 In that case, there were clear forum shopping -- there was
12 clear forum shopping evidence. Number one, the abstention
13 motion was not timely filed. The state court case was removed
14 pre-plan confirmation, and then the abstention motion was
15 filed only after a preliminary injunction request was denied.
16 And the plaintiff has already agreed and expressly consented
17 to the bankruptcy court jurisdiction.

18 If there's any forum shopping here, we would submit to the
19 Court that it is by Mr. Daugherty.

20 And Your Honor, citing to another case of Your Honor, we
21 think that the *In re Senior Care Centers* is factually similar
22 to the case before the Court and the question before the
23 Court. As Your Honor will recall, the plaintiff-landlord
24 sought to enforce a lease guaranty against the defendant-
25 guarantor. The Court noted in the decision that the defendant

1 sought to characterize the matter as core on the grounds that
2 it's going to seek reconsideration of this Court's
3 determination that the defendant-guarantor was not released by
4 a settlement agreement. Again, relating to a settlement
5 agreement. Your Honor stated three points that we think are
6 directly on point here.

7 Number one, the defendant-guarantor's assertions are red
8 herrings that distract from the fact that the removed action
9 concerns a noncore breach of contract claim made by one
10 nondebtor against a non -- against another nondebtor. The
11 same situation we have here, where it's a state -- state --
12 purely state law claim between two nondebtors.

13 Secondly, that state law issues do not really predominate
14 if they overwhelm. The exact situation we have here.

15 And that any doubt concerning removal must be resolved
16 against removal and in favor of remanding the case back to
17 state court.

18 We believe that *In re Senior Care Center* precedent is
19 similar or should -- should follow these in the case before
20 the Court and the question before the Court, as the facts are
21 similar and the Court's well-reasoned analysis applies equally
22 in this case.

23 So, respectfully, Your Honor, we request that the Court
24 grant the motion to remand on the basis of mandatory
25 abstention, or alternatively, permissible abstention.

1 THE COURT: All right. Thank you, Ms. Hartmann. Mr.
2 York?

3 MR. YORK: Thank you, Your Honor. Mr. Ellington may
4 claim that this lawsuit he has filed is about stalking, but it
5 is -- that's not what it's about at all. It's not what it has
6 been about. It's not what it is about at the end of the day.

7 As we indicated in our response that we filed, you need to
8 understand the context of the ten-plus years of litigation
9 that's involved Mr. Daugherty with Highland, Highland-related
10 entities, and Highland executives, to get the context for why
11 we are at where we are at today.

12 As the Court is aware, Mr. Daugherty has filed a lawsuit
13 in Delaware against Mr. Ellington as well as Mr. Dondero and
14 some of Highland's former outside counsel, alleging
15 constructive -- excuse me, alleging fraudulent transfers and
16 conspiracy to commit fraud relating to the escrow agreement
17 that had been entered into as part of the underlying first
18 Texas state court lawsuit between Mr. Daugherty and Highland.

19 And Your Honor, I want to correct a couple of things that
20 Ms. Hartmann said. You know, she mentioned that we omitted
21 some aspects of the judgment in the Texas state court case.
22 What she omitted as part of that discussion was that, as part
23 of that lawsuit, Mr. Daugherty also obtained a defamation
24 verdict against Highland and Mr. Dondero in that case.

25 What happened, Your Honor, after this bankruptcy was filed

1 and as Mr. Daugherty was proceeding in Delaware is that Mr.
2 Dondero came to this Court and admitted during a contempt
3 hearing that he had destroyed his phone, and it had come out
4 in that litigation or in that hearing that apparently Mr.
5 Ellington had as well, which piqued Mr. Daugherty's interest
6 that perhaps there was something more nefarious going on here,
7 which led him to conduct further investigation.

8 That is -- that investigation is what has led to these
9 bogus stalking claims that Mr. Ellington has filed against Mr.
10 Daugherty.

11 And I think it's important to remember several things.
12 Number one, as Ms. Hartmann mentioned, the alleged contacts,
13 or at least when Mr. Daugherty was driving past Mr.
14 Ellington's home or office, began in February of 2021. It
15 took Mr. Ellington eleven months to file his lawsuit against
16 Mr. Daugherty, even though Mr. Ellington had been aware of and
17 purportedly feared Mr. Daugherty driving past his home and his
18 office during that eleven-month period.

19 Ms. Hartmann mentioned that there were photographs and
20 videos being taken of minor children. If you look at Mr.
21 Ellington's declaration, as well as the declaration of the
22 private investigator, which were attached to Mr. Ellington's
23 lawsuit and are exhibits, I believe it's SE 1, there was no
24 mention of any of that. There was no mention of any of these
25 videos. There was no mention anywhere of anonymous packages

1 or letters. There is no indication that any of those packages
2 or letters have come from Mr. Daugherty.

3 All of this is a ruse because Mr. Ellington became unhappy
4 when he finally realized in the fall of 2021 that the
5 potential settlement agreement between Highland and Mr.
6 Daugherty in this bankruptcy was not going to release Mr.
7 Daugherty's claims against Mr. Ellington. And once that
8 settlement agreement became public, he then filed his lawsuit
9 against Mr. Daugherty.

10 So, despite having had months and months of that alleged
11 harassment, he waited, because he wanted to use it in order to
12 try to thwart the settlement agreement. And in fact, it was
13 the only basis for him to go to Highland and complain that
14 they shouldn't move forward with the settlement. And then,
15 Your Honor, it was the only basis for his objection to the
16 proposed settlement, and he was the only one who filed an
17 objection.

18 So he has been attempting to use the lawsuit to prevent
19 the settlement agreement from going through.

20 Now, Ms. Hartmann mentioned that there's been no storage
21 of high-end cars. I was surprised to hear that. And,
22 frankly, I have, Your Honor, if I may show the Court, I have
23 some photographs, a photograph of a Porsche that Mr. Daugherty
24 took outside of Mr. Ellington's office, and the license plate
25 is tied to Mr. Ellington as the owner of the vehicle.

1 Now, I'm going to -- I'll only show that if the Court
2 really believes that the issue of whether there's stalking
3 that has occurred or not is dispositive of the Court's
4 decision today. I don't think it is. But I can certainly
5 show that, because I think it -- this shows the ridiculousness
6 of the claims that have been asserted in this case.

7 THE COURT: I don't need to see a picture of a
8 Porsche.

9 MR. YORK: All right. Thank you, Your Honor.

10 So let's move, then, to the issues that have been raised.
11 First, the issue of mandatory abstention. I do agree with Ms.
12 Hartmann that at least the settlement agreement has been
13 approved by this Court and there was no appeal that was filed.

14 However, Your Honor, I am not aware of any case -- I have
15 not found one yet -- that has held that the mere fact of a
16 subsequent event after a removal removes a case from the core
17 to a noncore proceeding. In other words, the fact that the
18 settlement agreement was approved and that it has -- the
19 appeal time has passed, that that somehow moots whether that
20 is a core proceeding or not.

21 But more importantly, Your Honor, Mr. Ellington has not
22 proved that this meets the -- all four elements for mandatory
23 abstention, because he has not shown that the state court can
24 timely adjudicate this case.

25 His only argument is that the state court entered the TRO

1 and set an application for temporary injunction for hearing
2 fourteen days later, which, as the Court is well aware, that's
3 the time period that's required under the Texas Rules of Civil
4 Procedure.

5 And what Ms. Hartmann focused on in her argument was that
6 the adjudication is, well, how long it will take to complete
7 discovery, potentially an injunction hearing. It has nothing
8 to do with whether a jury trial can occur timely or not.

9 Well, Your Honor, frankly, the definition of adjudication
10 is to complete and decide the matter. It's not just the
11 completion of discovery. And as we had pointed out in our
12 response and showed the Court, there are a huge backlog of
13 cases that were set for trial in the state court in March and
14 April, as many as 85 in one week. Some of those cases have
15 lasted more than three years. One's actually over four years
16 old.

17 So the fact of the matter is Mr. Ellington has not proved
18 that the state court can timely adjudicate the matter, and so
19 there is no mandatory abstention here.

20 And that then turns us to the issue of permissive
21 abstention, Your Honor. And if you look at the factors, as we
22 pointed out in our response, the factors weigh in favor of the
23 Court ultimately keeping this case and not deciding to remand
24 it or abstain.

25 These are not difficult or unsettled issues of applicable

1 law. The Court can handle that.

2 There is no related proceeding that would be applicable
3 here.

4 There would be normal burden on the Court to keep this
5 case and adjudicate it to its full extent.

6 Frankly, the forum shopping here was by Mr. Ellington by
7 filing his case originally in the state court, knowing full
8 well that his intention was to try to thwart the settlement
9 agreement.

10 As to Ms. Hartmann's argument on the right to jury trial,
11 Mr. Ellington stated in both his motion and in his reply that
12 he wants a jury trial. As we state in our response, Mr.
13 Daugherty also wants a jury trial. It appears the parties
14 agree to a jury trial. This Court could try that case. There
15 would be no reason to have to send the case to district court
16 for trial.

17 Although there are nondebtor parties involved here, both
18 Mr. Ellington and Mr. Daugherty have participated in the
19 bankruptcy extensively. There are no comity issues that have
20 been raised. And certainly there's been no evidence or
21 showing that anybody would be prejudiced by having this Court
22 adjudicate this case.

23 So, because the majority of the factors weigh in favor of
24 the Court retaining the case, we believe the Court should
25 reject the request for abstention and deny the motion

1 outright.

2 I'm happy to -- I'm sorry. Before I finish, Your Honor,
3 with respect to the exhibits that were objected to, the
4 objection as I understand it was on relevance grounds. The
5 exhibits are, we believe, relevant to understanding the
6 context of the underlying dispute that has been raised by Mr.
7 Ellington. They are also all documents that were filed of
8 record in either the state court in Texas or in Delaware, so
9 the Court could also take judicial notice of them. And
10 therefore we move to admit Exhibits PD 2 through 9 and I
11 believe it was 11, 12, and I think it was also 17 was the last
12 one.

13 THE COURT: 17 was admitted.

14 MR. YORK: Okay.

15 THE COURT: All right. I sustain the relevance
16 objection, and so I'm not going to admit those additional
17 exhibits.

18 All right. Ms. Hartmann, you get the last word.

19 MS. HARTMANN: Your Honor, actually, I'd yield my
20 time to Ms. Smith, if that's all right with Your Honor.

21 THE COURT: All right. Ms. Smith?

22 MS. SMITH: Thank you, Your Honor. Am I coming
23 through clearly?

24 THE COURT: You are. Uh-huh.

25 MS. SMITH: Okay. Your Honor, nothing that Mr. York

1 stated in his argument changed the facts that mandatory
2 abstention is required and also that permissive abstention
3 applies.

4 This settlement was announced in February 2021, during
5 plan confirmation. The lawsuit was filed not because of the
6 settlement, but because of the escalation in the stalking
7 behaviors.

8 Because Mr. Daugherty has already conceded the first and
9 third prongs of the mandatory abstention, I just want to
10 reiterate that, as to the second element, any small hook that
11 Mr. Daugherty may have had has now disappeared with the
12 Court's approval of the Daugherty settlement, the entry of
13 that order, and the passage of the appellate deadline.

14 Your Honor, this is a noncore action. The action, the
15 state court action does not alter the rights, obligations, or
16 choices of action of the Debtor. The action does not have any
17 effect at all on the administration of the bankruptcy estate.
18 There is no outcome of the state court action that will bring
19 assets into the estate, and the subject of a dispute is not
20 property of the estate.

21 The fact that an individual has a dispute with a creditor
22 of a debtor does not give rise to a core proceeding because it
23 is the relationship of the dispute to the estate, not to --
24 not the party, not to the relationship of the party to the
25 estate that establishes jurisdiction. And that is the Fifth

1 Circuit in *In re Bass*.

2 The Daugherty settlement was approved by Your Honor
3 without adjudication of any of the issues raised in the state
4 court action. The state court action claims for stalking,
5 invasion of privacy, and injunction relief all arise under
6 state law. They were asserted in the state court and could
7 have proceeded in the state court, had the matter not been
8 removed, without any impact on the bankruptcy.

9 This Court should narrowly construe core proceedings, as
10 the Fifth Circuit has warned, against a broad interpretation
11 of 157(b)(2) and prefers to deem a proceeding as core under
12 more specific examples. Daugherty's broad interpretation has
13 been repeatedly rejected by the Fifth Circuit.

14 Mr. Daugherty took the position that Mr. Ellington used
15 the state court action in an attempt to alter the proposed
16 settlement. Again, the Court resolved that settlement without
17 reaching any of those issues. The omission in the state court
18 action of any mention of the Daugherty settlement is not
19 surprising, as the Daugherty settlement has no bearing on the
20 merits of Ellington's stalking and invasion of privacy claim.
21 And that is -- I just wanted to put that order in our
22 exhibits, Your Honor.

23 Fourth, the Court should -- the fourth prong, the Court
24 should abstain from hearing Ellington's noncore state court
25 action because it can be timely adjudicated by the state

1 court. Mr. York's anecdotal recitation of the delay in the
2 state court on a few cases being a couple of years behind,
3 those -- those could be for any reason, including discovery
4 disputes between the parties or other reasons besides the
5 state court's ability to timely adjudicate.

6 The party moving for mandatory abstention need not show
7 that the action can be more timely adjudicated in state court,
8 only that the matter can be timely adjudicated in state court.
9 The state court moved quickly on a TRO. It moved quickly to
10 set a hearing on the preliminary injunction. And we believe
11 that that meets the standard for the low bar that we need to
12 show that the case can be timely adjudicated.

13 The action was filed January 11, 2022, the TRO was entered
14 January 12, '22, and the application for temporary injunction
15 was set for hearing on January 26th. So that state court was
16 moving very quickly.

17 We are not jury trial ready. None of the metrics
18 presented by Mr. Daugherty relate to non-jury trial
19 administration of the case. So the case can go ahead and
20 proceed under state court.

21 In the alternative, Your Honor, the Court should also
22 abstain under permissive abstention. All of the factors in
23 *Senior Care*, the *Senior Care* analysis, favor abstention, as
24 Ms. Hartmann went through and told the Court.

25 The Court should reject the Daugherty settlement as a

1 basis for hearing the removed action, and in doing so, that
2 tips seven of the fourteen favors in favor of abstention.
3 Daugherty already conceded that two of the favors -- factors
4 were neutral and, in other words, not applicable because all
5 the claims were state law claims.

6 Your Honor, once this Court finds that the state court
7 action is not core, it should immediately abstain and remand
8 the case. Even if Your Honor has any small doubts concerning
9 remand, it should favor remand, as doubts concerning removal
10 must be resolved against removal and in favor of remand.

11 Nothing on the face of the state court action implicates
12 the jurisdiction of the bankruptcy court. Mr. Daugherty has
13 failed to give you a compelling reason why this Court should
14 adjudicate issues that are prime for mandatory or at least
15 permissive abstention.

16 For these reasons, we request that the Court abstain from
17 hearing the removed action entirely and immediately remand the
18 removed action to state court.

19 Thank you, Your Honor.

20 THE COURT: All right. Thank you. Mr. Demo,
21 anything you wanted to add?

22 MR. DEMO: Nothing to add, Your Honor.

23 THE COURT: All right. The Court concludes it must
24 grant the motion to abstain and to remand. I do think that
25 the underlying action is, at most, a noncore related-to

1 proceeding, and frankly, probably not even noncore related-to.
2 So I find that mandatory abstention is appropriate pursuant to
3 1334(c) (2).

4 There's no independent basis in federal law for this
5 action other than maybe 28 U.S.C. 1334(b). It's, at most,
6 noncore, but that's even questionable. We have an action that
7 was already commenced in state court, and I have reason to
8 conclude the action could be adjudicated timely in state
9 court.

10 But even if mandatory abstention is not appropriate, I
11 believe it's appropriate to abstain under 28 U.S.C.
12 1334(c) (1), or even equitably remand under 28 U.S.C. 1452(b)
13 in the interests of comity with state courts and out of
14 respect for state law. I believe state law issues do
15 predominate here. There is a remoteness, extreme remoteness
16 to the bankruptcy case, and there would appear to be jury
17 trial rights, and Ellington says he would not consent to the
18 bankruptcy court having a jury trial.

19 In coming into today's hearing, the only possible hook, if
20 you will, if you want to call it a hook, for the bankruptcy
21 court or federal court jurisdiction was if this somehow
22 implicated the gatekeeping order -- that was dangled out in
23 the pleadings -- or if it involved interpretation,
24 implementation, or execution of the confirmed plan or
25 confirmation order, or if the estate was somehow going to be

1 impacted. And I just didn't find, based on the evidence or
2 argument, any of those things implicated.

3 So the motion is granted. If Ms. Smith or Ms. Hartmann
4 could please upload an order to that effect electronically.

5 (Proceedings concluded at 2:27 p.m.)

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CERTIFICATE

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I certify that the foregoing is a correct transcript from
the electronic sound recording of the proceedings in the
above-entitled matter.

23

/s/ Kathy Rehling

03/30/2022

24

25

Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

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