

No. 21-10219

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

In re James D. Dondero,
Petitioner.

On Petition for Writ of Mandamus to the
United States District Court for the Northern District of Texas
Civil Action No. 3:21-CV-00132-E
Hon. Ada Brown, Judge

**MOTION TO STAY PERMANENT INJUNCTION PROCEEDINGS PENDING
RESOLUTION OF MANDAMUS**

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT:

COMES NOW, Petitioner James D. Dondero (“Mr. Dondero”), and
files this *Motion to Stay Permanent Injunction Proceedings Pending
Resolution of Mandamus*, and would show this Court as follows:



CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Highland Capital Management, L.P.
2. James D. Dondero
3. Pachulski Stang Ziehl & Jones LLP, 10100 Santa Monica Blvd., 13th Floor, Los Angeles, CA 90067, counsel for Highland Capital Management, L.P.
4. Hayward PLLC, 10501 N. Central Expy, Ste. 106, Dallas, TX 75231, counsel for Highland Capital Management, L.P.
5. Bonds Ellis Eppich Schafer Jones LLP, 420 Throckmorton Street, Suite 1000, Fort Worth, TX 76102, counsel for James D. Dondero

/s/ Matthew Stayton
Matthew Stayton,
Counsel for Petitioner

SUMMARY OF GROUNDS OF MOTION

Due to the pending Mandamus, this Court should enter a stay of the permanent injunction before a May 10, 2021 docket call and trial scheduled to begin on the week of May 17, 2021. Three primary reasons necessitate the serious need for a stay before this time. See 5th Cir. R. 27.4.

First, this Court should issue a stay to protect its jurisdiction over the pending Mandamus.

Second, this Court should exercise its inherent discretion to stay an injunction trial involving the same dispositive legal issues as the pending Mandamus and preserve the effectiveness of its Mandamus ruling. Indeed, as detailed in Mr. Dondero's Mandamus petition, the bankruptcy court's preliminary injunction is so overbroad that it infringes upon his due process rights and subjects him to contempt for otherwise lawful acts.

Third, and alternatively, this Court should stay the injunction trial because Mr. Dondero has shown one or more of the following guidepost factors for staying an injunction: a likelihood of success on the merits,

irreparable injury, no prejudice to other parties, and public interest in due process and judicial economy.

BACKGROUND FACTS

On March 8, 2021, Dondero filed a Petition for Writ of Mandamus (the “Mandamus”) with this Court to (i) dissolve the bankruptcy court’s *Order Granting Debtor’s Motion for a Preliminary Injunction Against James Dondero* (the “Preliminary Injunction”) and (ii) overturn the District Court’s *Memorandum Opinion and Order*, ruling Mr. Dondero did not have a right to appeal the Preliminary Injunction and that discretionary leave to appeal would not be granted. Alternatively, Mr. Dondero asked that his Mandamus be treated as an interlocutory appeal.

On March 9, 2021, this Court ordered a response to the Mandamus by March 16, 2021 from Highland Capital Management, L.P. (“Highland”). At that time, the bankruptcy court had already scheduled Highland’s motion for contempt against Mr. Dondero for allegedly violating the TRO issued on the same grounds as the subsequent Preliminary Injunction.

On March 10, 2021, Mr. Dondero filed a motion for continuance of the March 22, 2021 setting on the contempt motion, arguing, among other things, that the bankruptcy court should continue to the contempt hearing until the Mandamus is decided due to the overlapping issues between the contempt proceedings, the TRO, and the Preliminary Injunction. The bankruptcy court declined to continue the contempt hearing, and after the conclusion of the hearing, took the contempt motion under advisement. As of the filing of this Motion, the bankruptcy court has not issued a ruling on the contempt motion—ostensibly waiting on this Court’s ruling in the Mandamus.

Meanwhile, the bankruptcy court’s setting for the Permanent Injunction Trial remained for a May 10, 2021 docket call and trial setting for the week of May 17, 2021 (the “Permanent Injunction Trial”).

On April 30, 2021, Mr. Dondero moved in the bankruptcy court to stay or continue the Permanent Injunction Trial on grounds that a Mandamus was pending before this Court on the same dispositive issues, among others, and asked for an emergency hearing. Highland opposed the stay motion, but not the emergency hearing request.

Nevertheless, the bankruptcy court did not set an emergency hearing on Mr. Dondero's motion to stay or continue the Permanent Injunction Trial—instead, setting the matter along with a May 10, 2021 docket call hearing.

ARGUMENT & AUTHORITIES

I. A stay is necessary to protect this Court's Mandamus jurisdiction.

This Court should issue a stay to protect its jurisdiction over the pending Mandamus.

The All Writs Act, providing that this Court may issue all writs necessary or appropriate in aid of their respective jurisdictions, “authorize[s] a federal court to ‘issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained.’” 28 U.S.C. § 1651(a); *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34, 40 (1985) (quoting *United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977)).

This Court should order a stay of the bankruptcy court's Permanent Injunction Trial, pending resolution of the Mandamus, to protect its

own jurisdiction and prevent frustration of its orders. This Court already ordered Highland's response to the Mandamus. Other orders of this Court may be forthcoming on the dispositive legal issues raised in the Mandamus. This Court should stay the Permanent Injunction Trial to protect and aid its own mandamus jurisdiction.

II. A discretionary stay is warranted to ensure the Mandamus is resolved before the Permanent Injunction Trial.

This Court should use its inherent discretion to stay injunction proceedings in the bankruptcy court while the Mandamus is pending on the same dispositive legal issues—including whether the requested injunction is overbroad, unspecific, and subjects Mr. Dondero to due process violations and unjust contempt violations.

A stay is an equitable remedy committed to this Court's discretion. *Nken v. Holder*, 556 U.S. 418, 433, (2009) (Kennedy, J., concurring); *Ruiz v. Estelle*, 666 F.2d 854, 856 & n.4 (5th Cir. 1982).

Multiple courts have recognized this Court's discretion to stay lower court proceedings pending a mandamus petition. *Woodson v. Surgitek, Inc.*, 57 F.3d 1406, 1416 (5th Cir. 1995). One court noted: "In fact, the

Fifth Circuit has simply explained that a stay pending a mandamus petition may be granted in the court's discretion.” *Intellectual Ventures II LLC v. FedEx Corp.*, 2017 U.S. Dist. LEXIS 211367, 2017 WL 6559172 at fn 1 (E.D. Tex. 2017) (recognizing the standard for granting a stay in a mandamus is different from a traditional appeal).

“Mandamus petitions request an extraordinary remedy that is only appropriate in exceptional circumstances. . . . If the district court or the court of appeals finds it appropriate to stay proceedings while a petition for mandamus relief is pending, such a stay may be granted in the court's discretion.” *Woodson*, 57 F.3d at 1416 (granting stay and mandamus).

For all the reasons briefed in the Mr. Dondero’s Petition for Writ of Mandamus, which is hereby incorporated by reference, Mr. Dondero has shown he is entitled to the extraordinary mandamus relief. This Court should stay the bankruptcy court’s attempt to try the same dispositive issues pending before this Court.

III. Alternatively, the stay request meets the traditional factors for staying injunctive relief.

The Court should alternatively issue a stay because its request meets one or more of the critical factors for staying an injunction pending appellate relief.

Although Mr. Dondero agrees with other courts that “the Fifth Circuit has simply explained that a stay pending a mandamus petition may be granted in the court’s discretion” without using additional factors or guideposts, *Woodson*, 57 F.3d at 1416; *Intellectual Ventures*, 2017 U.S. Dist. LEXIS 211367 at fn.1; the traditional factors in assessing a stay are equally satisfied here.

This Court traditionally evaluates four factors to determine whether a stay of injunctive relief is warranted pending appellate review:

- (i) Whether the movant has made a showing that there is a likelihood of success on the merits;
- (ii) Whether the movant has made a showing of irreparable injury if the stay is not granted;
- (iii) Whether the granting of the stay would substantially harm the other parties; and

(iv) Whether the granting of the stay would serve the public interest.

In re First South Sav. Ass'n, 820 F.2d 700, 704 (5th Cir. 1987).

These factors should not be applied “in a rigid ... [or] mechanical fashion.” *United States v. Baylor Univ. Med. Ctr.*, 711 F.2d 38, 39 (5th Cir. 1983). The first two factors are the “most critical.” *Nken*, 556 U.S. at 436. Of those two factors, “[t]he sine qua non [of the stay pending appeal standard] is whether the [movants] are likely to succeed on the merits.” *Hall v. Dixon*, CIV.A. H-09-2611, 2011 WL 767173, at *1 (S.D. Tex. Feb. 25, 2011) (quoting *Acevedo–Garcia v. Vera–Monroig*, 296 F.3d 13, 16 (1st Cir. 2002)).

Here, the factors weigh heavily in favor of staying all injunction proceedings pending resolution of the Mandamus.

A. Dondero has a likelihood of success on the merits

A party seeking a stay need only show a likelihood of success, not a probability. *Arnold v. Garlock, Inc.*, 278 F.3d 426, 438–39 (5th Cir. 2001). Instead, a “movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay.” *Id.*

Through the Mandamus, Mr. Dondero presented a substantial case on the merits and raised a number of legal questions regarding the legality and scope of the Preliminary Injunction (now requested as a permanent injunction), including that the injunction (i) is vague and overbroad; (ii) is not clear, definite, and specific; (iii) violates Mr. Dondero's legal and due process rights, and (iv) makes reference to source material outside the face of the injunction in violation of Rule 65(d).

Highland now seeks a permanent injunction on May 17, 2021, that would include substantially all of the exact terms contained in the Preliminary Injunction. This Court already ordered a response to Mr. Dondero's Mandamus and it remains pending as of the filing of this Motion—an indication that one or more of the aforementioned factors have been met.

The Mandamus will undoubtedly impact any determination as whether viable grounds exist to enter a permanent injunction and whether the requested injunction can, or should be, entered on the same terms as the Preliminary Injunction.

For this reason, Mr. Dondero has demonstrated a likelihood of success on the merits of his Mandamus and a stay is warranted.

B. Mr. Dondero will suffer an irreparable injury absent a stay.

Mr. Dondero will also suffer irreparable injury if the stay is not granted. First, if a stay is not granted, there is a significant chance that Mr. Dondero's legal and due process rights will be restricted or otherwise negatively impacted through a permanent injunction. A stay will ensure that Mr. Dondero is not permanently enjoined from potentially exercising his legal and due process rights while this Court considers whether these rights have been violated through the entry of the overbroad, unclear, and unlawful Preliminary Injunction.

Second, while Mr. Dondero does not believe trial on the permanent injunction will moot the Mandamus, staying these proceedings alleviates any potential mootness issues and also protects from the real risk of contradictory rulings and the duplication of proceedings, with no prejudice to any other party.

C. Granting of the stay would not harm Highland.

As to the third factor, the granting of the stay would not substantially harm Highland.

Primarily, the Preliminary Injunction remains in place—meaning Highland is not harmed. Further, May 17 is the first trial setting in this case and it has not been previously stayed or continued. And there have been several significant evidentiary hearings to date; it is anticipated that much of the same evidence will be used. Accordingly, a stay pending resolution of the Mandamus provides no prejudice to Highland, as the primary matters to be determined are legal questions on a complete evidentiary record.

D. Granting of the stay would serve the public interest.

Finally, the granting of a stay serves the public interest of protecting due process and judicial economy.

Because the Preliminary Injunction impermissibly infringes upon Mr. Dondero's legal and due process rights, a stay pending this Court's resolution of the Mandamus serves the public interest. A stay will ensure that Mr. Dondero is not permanently enjoined from exercising these due process and other lawful rights while this Court decides

whether these rights have been violated through the entry an overbroad, unclear, and unlawful Preliminary Injunction.

A stay also serves the public interest by promoting consistency and judicial economy. This Court's decision in the Mandamus may conflict with the forthcoming Permanent Injunction Trial and rulings. A stay, on the other hand, would allow for the Mandamus to be resolved without the risk of contradictory rulings and the duplication of proceedings, with no prejudice to any other party.

PRAYER

WHEREFORE, promises considered, Mr. Dondero prays that the Court (i) grant this Motion; (ii) enter an order staying all injunction proceedings pending resolution of the Mandamus, or enter an order commanding the District Court to stay all injunction proceedings pending resolution of the Mandamus; and (iii) provide Mr. Dondero such other and further relief to which he may be entitled.

Dated: May 6, 2021

Respectfully submitted,

/s/ Matthew D. Stayton

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**ATTORNEYS FOR PETITIONER
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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on May 6, 2021, the foregoing document was served via the Court's CM/ECF system upon counsel for Respondent Highland Capital Management, L.P. as listed below.

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CERTIFICATE OF CONFERENCE

I, the undersigned, hereby certify that, on May 6, 2021, undersigned counsel conferred with counsel for the Respondent regarding the relief requested herein. Counsel for Respondent indicated that Respondent opposes the relief requested herein, but did not indicate whether a response would be filed.

/s/ Matthew Stayton
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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 27 because this document contains 2,058 words.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century Schoolbook font.

/s/ Matthew Stayton
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