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Trustee of the Highland Litigation Sub-Trust*

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS**

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,¹
Reorganized Debtor.

Chapter 11

Case No. 19-34054-sgj11

MARC S. KIRSCHNER, AS LITIGATION
TRUSTEE OF THE LITIGATION SUB-TRUST,

Plaintiff,

v.

JAMES D. DONDERO; MARK A. OKADA;
SCOTT ELLINGTON; ISAAC LEVENTON;
GRANT JAMES SCOTT III; STRAND
ADVISORS, INC.; NEXPOINT ADVISORS,
L.P.; HIGHLAND CAPITAL MANAGEMENT
FUND ADVISORS, L.P.; DUGABOY
INVESTMENT TRUST AND NANCY
DONDERO, AS TRUSTEE OF DUGABOY
INVESTMENT TRUST; GET GOOD TRUST
AND GRANT JAMES SCOTT III, AS
TRUSTEE OF GET GOOD TRUST; HUNTER
MOUNTAIN INVESTMENT TRUST; MARK &
PAMELA OKADA FAMILY TRUST –
EXEMPT TRUST #1 AND LAWRENCE
TONOMURA AS TRUSTEE OF MARK &

Adv. Pro. No. 21-03076-sgj

¹ The last four digits of the Reorganized Debtor’s taxpayer identification number are (8357). The Reorganized Debtor is a Delaware limited partnership. The Reorganized Debtor’s headquarters and service address are 100 Crescent Court, Suite 1850, Dallas, TX 75201.



PAMELA OKADA FAMILY TRUST – EXEMPT TRUST #1; MARK & PAMELA OKADA FAMILY TRUST – EXEMPT TRUST #2 AND LAWRENCE TONOMURA IN HIS CAPACITY AS TRUSTEE OF MARK & PAMELA OKADA FAMILY TRUST – EXEMPT TRUST #2; CLO HOLDCO, LTD.; CHARITABLE DAF HOLDCO, LTD.; CHARITABLE DAF FUND, LP.; HIGHLAND DALLAS FOUNDATION; RAND PE FUND I, LP, SERIES 1; MASSAND CAPITAL, LLC; MASSAND CAPITAL, INC.; AND SAS ASSET RECOVERY, LTD.,

Defendants.

LITIGATION TRUSTEE’S MOTION FOR ENTRY OF AN ORDER APPROVING SETTLEMENT WITH THE OKADA PARTIES AND AUTHORIZING ACTIONS CONSISTENT THEREWITH

TO THE HONORABLE STACEY G. C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE:

Marc S. Kirschner (the “Litigation Trustee”), as the Litigation Trustee of the Litigation Sub-Trust (the “Trust”) established pursuant to the Fifth Amended Plan of Reorganization (as Modified) (the “Plan”) of Highland Capital Management L.P. (“HCMLP” or the “Reorganized Debtor”) [Docket No. 1493-1], files this motion (the “Motion”) for entry of an order, substantially in the form attached hereto as **Exhibit A**, pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), approving a settlement agreement (the “Settlement Agreement”),² a copy of which is attached as Exhibit 1 to the *Declaration of Robert S. Loigman in Support of the Litigation Trustee’s Motion for Entry of an Order Approving Settlement with the Okada Parties and Authorizing Actions Consistent Therewith* filed simultaneously with this Motion (“Loigman Dec.”), that, among other things, fully and finally

² All capitalized terms used but not defined herein shall have the meanings given to them in the Settlement Agreement.

resolves the claims asserted by the Litigation Trustee against Mark Okada, Mark & Pamela Okada Family Trust – Exempt Trust #1 and Lawrence Tonomura as Trustee, and Mark & Pamela Okada Family Trust – Exempt Trust #2 and Lawrence Tonomura as Trustee (collectively, the “Okada Parties”). In support of this Motion, the Litigation Trustee represents as follows:

JURISDICTION

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for the relief sought herein are sections 105(a) and 363 of title 11 of the United States Code (the “Bankruptcy Code”), and Rule 9019 of the Bankruptcy Rules.

RELEVANT BACKGROUND

A. Procedural Background

3. On October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Court”). On December 4, 2019, the Delaware Court entered an order transferring venue of the Debtor’s case to this Court [Docket No. 186].

4. On February 22, 2021, this Court issued its Order confirming the Plan and granting related relief [Docket No. 1943].

5. The Plan established a Claimant Trust to, among other things, manage and monetize Claimant Trust Assets for the benefit of the estate and its creditors. *Id.* at 5. The Claimant Trust Agreement named James P. Seery, Jr. as the Claimant Trustee.

6. The Plan also established the Litigation Trust. The Litigation Sub-Trust Agreement named Marc S. Kirschner as the Litigation Trustee. *Id.* at 34. Certain of the Claimant Trust Assets were transferred to the Litigation Trust pursuant to the Litigation Sub-Trust Agreement. *Id.* at 31.

7. Among the assets transferred to the Litigation Sub-Trust were the Estate Claims. *Id.* at 67. The Litigation Trustee was tasked with investigating, pursuing, or otherwise resolving the Estate Claims. *Id.* at 67-68.

8. As defined in the Notice of Final Term Sheet [Docket No. 354, Exhibit A at 4], the Estate Claims are defined as “any and all...causes of action against Mr. Dondero, Mr. Okada, other insiders of the Debtor, and each of the Related Entities...” The proceeds of litigation related to the Estate Claims are to be distributed to the Claimant Trust for distribution to its beneficiaries.

9. On October 15, 2021, the Litigation Trustee filed an adversary proceeding against, among others, the Okada Parties (the “Adversary Proceeding”). [Adv. Proc. Docket No. 1.]

10. On May 19, 2022, the Litigation Trustee filed an amended complaint in the Adversary Proceeding. [Adv. Proc. Docket No. 158.]

11. Each of the Defendants, including the Okada Parties, moved to dismiss the Amended Complaint. [Adv. Proc. Docket No. 185 and 186.] The Litigation Trustee opposed dismissal. [Adv. Proc. Docket No. 210.] The motions have been fully briefed, but the Adversary

Proceeding has been stayed since April 4, 2023, when this Court issued its order granting the Litigation Trustee's *Motion to Stay the Adversary Proceeding*.³ [Adv. Proc. Docket No. 338.]

B. Overview of the Adversary Proceeding Claims Against the Okada Parties

12. The Litigation Trustee's claims stem out of misconduct perpetrated by James Dondero, the founder and former Chief Executive Officer and President of HCMLP, and multiple entities owned by and/or affiliated with Dondero.

13. Okada was the co-founder of HCMLP and its Chief Investment Officer from the time of its founding until 2019. After Dondero, Okada was the largest owner of HCMLP and beneficiary of the distributions made to its limited partners. Okada held his interests in HCMLP directly and through various trusts, including the Mark and Pamela Okada Family Trust – Exempt Trust #1 and #2. Eventually, Okada and Dondero transferred their interests in HCMLP to another trust, the Hunter Mountain Investment Trust, which is indirectly owned by entities affiliated with Dondero and Okada.

14. The Amended Complaint alleges that the Okada Parties were the ultimate beneficiaries of distributions from HCMLP amounting to more than \$18 million during periods when HCMLP was insolvent, inadequately capitalized, and/or intended to incur debts beyond its ability to pay, and that in making these distributions, HCMLP intended to hinder, delay, and/or defraud its creditors by siphoning value to HCMLP's limited partners that should have been

³ This Motion is not intended to lift the stay of the Adversary Proceeding. The Litigation Trustee believes that the Court can hear and determine this Motion without any such modification. To the extent the Court believes that modification of the stay is required to address this Motion, or if any party in interest contends that such modification is required, the Litigation Trustee requests that the stay be lifted for the limited purpose of hearing and adjudicating this Motion.

preserved for the creditors' benefit. The Litigation Trustee asserts claims against the Okada Parties related to these transfers.

C. The Parties' Pleadings and Positions Concerning the Claims against the Okada Parties

15. The Okada Parties have maintained they have defenses to the asserted claims. The Okada Parties argued in their motion to dismiss [Adv. Proc. Docket No. 186] that: (1) the HCMLP Limited Partnership Agreement, and/or Dondero's domination of HCMLP, precluded the Litigation Trustee's breach of fiduciary duty claim; (2) the Litigation Trustee did not adequately plead insolvency in support of its claims for fraudulent transfer; and, (3) certain of the Trustee's claims are time-barred by the applicable statutes of limitations.

16. The Litigation Trustee's opposition to the Okada Parties' motion to dismiss [Adv. Proc. Docket No. 210] asserts that: (1) the HCMLP Limited Partnership Agreement does not preclude a breach of fiduciary duty claim, Dondero's domination of the company did not relieve anyone of any fiduciary duties they would otherwise hold under the law, and Okada owed fiduciary duties to the limited partnership by virtue of his officer position in the company; (2) the Amended Complaint adequately pleads insolvency; and (3) the applicable statutes of limitations have been tolled by Texas's discovery rule and the adverse domination doctrine, each of which is properly alleged in the Amended Complaint.

D. Settlement Discussions

17. In November and December 2023, the Litigation Trustee and the Okada Parties discussed the possibility of settling the claims in the Adversary Proceeding against the Okada Parties.

18. Initially, counsel to the parties discussed potential approaches to settlement. In early December, discussions were expanded to include the parties directly. Thereafter, counsel to the parties engaged in a several further calls and exchanges of potential settlement terms.

19. While, in early discussions, counsel to the parties addressed differing views of the strength of the Litigation Trustee's claims against the Okada Parties, later discussions focused on pragmatic approaches to achieving a resolution that is acceptable to both parties. Through a series of direct, arm's-length, telephonic and written negotiations, the parties ultimately reached the settlement incorporating the terms summarized below.

E. Summary of Settlement Terms

20. The Settlement Agreement contains the following material terms, among others:

- The Okada Parties will pay, in cash and in investment interests, approximately \$154,000 to the Claimant Trust. This will consist of \$100,000 in cash, and Okada's interest in the Highland Multi Strategy Credit Fund, Ltd.
- Any amounts that would otherwise be paid to Highland CLO Holdings, Ltd., Neutra Ltd., and Highland CLO Assets Holdings Limited for the benefit of Okada ("Acis 7 Proceeds") will be paid to the Highland Indemnity Trust. The Highland Indemnity Trust, in turn, will use these funds only on a "last out" basis, and Okada will retain a reversionary interest in the Acis 7 Proceeds such that he will receive the funds if they are not used for indemnification purposes.
- In the event that Okada receives funds on account of his Special Limited Partnership Interest in PetroCap Incentive Partners II, LP (the "PetroCap Proceeds"), the Highland Indemnity Trust will be entitled to demand from Okada the lesser of \$1 million or 50% of the PetroCap Proceeds. The Indemnity Trust Administrator may make such a demand only upon a written representation that all Indemnity Trust Assets have been or will imminently be exhausted. As with the Acis 7 Proceeds, the Highland Indemnity Trust will use these funds only on a "last out" basis, and Okada will retain a reversionary interest in any PetroCap Proceeds provided to the Highland Indemnity Trust such that he will receive the funds if they are not used for indemnification purposes.
- The Okada Parties affirm that all outstanding notes due to them from the Hunter Mountain Investment Trust ("HMIT") are subordinated to any valid notes due and owing by HMIT to HCMLP.
- The parties shall exchange broad mutual releases.

- The Litigation Trustee shall dismiss with prejudice the claims against the Okada Parties in the Adversary Proceeding.

BASIS FOR RELIEF REQUESTED

21. Bankruptcy Rule 9019 governs the procedural prerequisites to approval of a settlement, providing that:

On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

Fed. R. Bankr. P. 9019(a).

22. Settlements in bankruptcy are favored as a means of minimizing litigation, expediting the administration of the bankruptcy estate, and providing for the efficient resolution of bankruptcy cases. *See Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996); *Rivercity v. Herpel (In re Jackson Brewing Co.)*, 624 F.2d 599, 602 (5th Cir. 1980). Pursuant to Bankruptcy Rule 9019(a), a bankruptcy court may approve a compromise or settlement as long as the proposed settlement is fair, reasonable, and in the best interest of the estate. *See In re Age Ref. Inc.*, 801 F.3d 530, 540 (5th Cir. 2015). Ultimately, “approval of a compromise is within the sound discretion of the bankruptcy court.” *See United States v. AWECO, Inc. (In re AWECO, Inc.)*, 725 F.2d 293, 297 (5th Cir. 1984); *Jackson Brewing*, 624 F.2d at 602–03.

23. In making this determination, the United States Court of Appeals for the Fifth Circuit applies a three-part test, “with a focus on comparing ‘the terms of the compromise with the rewards of litigation.’” *Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop. (In re Cajun Elec. Power Coop.)*, 119 F.3d 349, 356 (5th Cir. 1997) (citing *Jackson Brewing*, 624 F.2d at 602). The Fifth Circuit has instructed courts to consider the following factors: “(1) The probability of success in the litigation, with due consideration for the uncertainty of law and fact, (2) The complexity and likely duration of the litigation and any attendant expense,

inconvenience and delay, and (3) All other factors bearing on the wisdom of the compromise.”

Id. Under the rubric of the third factor referenced above, the Fifth Circuit has specified two additional factors that bear on the decision to approve a proposed settlement. First, the court should consider “the paramount interest of creditors with proper deference to their reasonable views.” *Id.*; *Conn. Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortgage Corp.)*, 68 F.3d 914, 917 (5th Cir. 1995). Second, the court should consider the “extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion.” *Age Ref. Inc.*, 801 F.3d at 540; *Foster Mortgage Corp.*, 68 F.3d at 918 (citations omitted).

24. There is ample basis to approve the proposed Settlement Agreement based on the Rule 9019 factors set forth by the Fifth Circuit.

25. First, although the Litigation Trustee believes he can prevail on his claims against the Okada Parties, there is no guarantee the litigation would be successful. The claims involve novel issues of fact and law, the resolution of which is difficult to predict, and which may be difficult to prove. Moreover, in order to carry his burden, the Litigation Trustee may be forced to rely, at least in part, on the credibility of witnesses whose integrity has already been called into question by this Court.

26. The second factor—the complexity, duration, and costs of litigation—also weighs heavily in favor of approving the Settlement Agreement. As this Court is aware, the events forming the basis of the Litigation Trustee’s claims against the Okada Parties proceeded for years in this Court and in multiple other forums, and has already cost the Debtor’s estate millions of dollars in legal fees. If the Settlement Agreement is not approved, then the parties will continue to expend significant resources litigating a host of fact-intensive issues including,

among other things, the Debtor's financial condition in the face of uncertain contingent litigation liabilities, and Mr. Okada's subjective awareness of those facts.

27. Third, approval of the Settlement Agreement is justified by the paramount interest of creditors. Specifically, the settlement will enable the Litigation Trust to avoid incurring additional litigation expenses by pursuing the Okada Parties, and result in (a) the immediate transfer of funds and investment interests to the Claimant Trust that can be distributed to creditors, and (b) a commitment to additional funding of the Indemnity Trust that may be used to fund the Claimant Trust's indemnification obligations as necessary.

28. Finally, the Settlement Agreement was unquestionably negotiated at arm's-length. The terms of the settlement are the result of numerous, ongoing discussions and negotiations between the parties and their counsel and represent no party's "best case scenario." Thus, the Settlement Agreement should be approved as a rational exercise of the Litigation Trustee's business judgment made after due deliberation of the facts and circumstances concerning the claims against the Okada Parties.

NO PRIOR REQUEST

29. No previous request for the relief sought herein has been made to this, or any other, Court.

NOTICE

30. Notice of this Motion shall be given to the following parties or, in lieu thereof, to their counsel, if known: (a) counsel for the Okada Parties and other parties the Litigation Trustee's Adversary Proceeding; (b) the Office of the United States Trustee; (c) the Office of the United States Attorney for the Northern District of Texas; and (e) parties requesting notice

pursuant to Bankruptcy Rule 2002. The Debtor submits that, in light of the nature of the relief requested, no other or further notice need be given.

WHEREFORE, the Debtor respectfully requests entry of an order, substantially in the form attached hereto as Exhibit A, (a) granting the relief requested herein, and (b) granting such other relief as is just and proper.

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Dated: January 16, 2024
Dallas, Texas

Respectfully submitted,

**QUINN EMANUEL URQUHART &
SULLIVAN, LLP**

/s/ Robert S. Loigman

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Counsel for the Litigation Trustee

Exhibit A

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*Co-Counsel for Marc S. Kirschner, as Litigation
Trustee of the Highland Litigation Sub-Trust*

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS**

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,¹
Reorganized Debtor.

Chapter 11

Case No. 19-34054-sgj11

MARC S. KIRSCHNER, AS LITIGATION
TRUSTEE OF THE LITIGATION SUB-TRUST,

Plaintiff,

v.

JAMES D. DONDERO; MARK A. OKADA;
SCOTT ELLINGTON; ISAAC LEVENTON;
GRANT JAMES SCOTT III; STRAND
ADVISORS, INC.; NEXPOINT ADVISORS,
L.P.; HIGHLAND CAPITAL MANAGEMENT
FUND ADVISORS, L.P.; DUGABOY
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EXEMPT TRUST #1 AND LAWRENCE
TONOMURA AS TRUSTEE OF MARK &

Adv. Pro. No. 21-03076-sgj

¹ The last four digits of the Reorganized Debtor's taxpayer identification number are (8357). The Reorganized Debtor is a Delaware limited partnership. The Reorganized Debtor's headquarters and service address are 100 Crescent Court, Suite 1850, Dallas, TX 75201.

PAMELA OKADA FAMILY TRUST –
EXEMPT TRUST #1; MARK & PAMELA
OKADA FAMILY TRUST – EXEMPT TRUST
#2 AND LAWRENCE TONOMURA IN HIS
CAPACITY AS TRUSTEE OF MARK &
PAMELA OKADA FAMILY TRUST –
EXEMPT TRUST #2; CLO HOLDCO, LTD.;
CHARITABLE DAF HOLDCO, LTD.;
CHARITABLE DAF FUND, LP.; HIGHLAND
DALLAS FOUNDATION; RAND PE FUND I,
LP, SERIES 1; MASSAND CAPITAL, LLC;
MASSAND CAPITAL, INC.; AND SAS ASSET
RECOVERY, LTD.,

Defendants.

**ORDER APPROVING THE LITIGATION TRUSTEE’S SETTLEMENT WITH THE
OKADA PARTIES AND AUTHORIZING ACTIONS CONSISTENT THEREWITH**

Having considered the Litigation Trustee’s Motion for Entry of an Order Approving Settlement with the Okada Parties and Authorizing Actions Consistent Therewith (the “Motion”)² filed by the Litigation Trustee of the Highland Litigation Sub-Trust in the above-captioned adversary proceeding; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and this Court having found that venue of this proceeding and the Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the relief requested in the Motion is in the best interests of the Reorganized Debtor, its creditors, and other parties-in-interest; and this Court having found that the Litigation Trustee’s notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and that no other notice need be provided; and this Court having reviewed the Motion, any and all other documents filed in support of the Motion; and this Court having

² Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Motion.

determined that the legal and factual bases set forth in the Motion establish good cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is **HEREBY ORDERED THAT:**

1. The Motion is granted as set forth herein.
2. The Settlement Agreement, attached as **Exhibit 1** to the Loigman Declaration, is approved in all respects pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure.
3. The Reorganized Debtor and its agents are authorized to take any and all actions necessary or desirable to implement the Settlement Agreement without need of further Court approval or notice.
4. The Court shall retain jurisdiction with respect to all matters arising from or relating to the implementation, interpretation, and enforcement of this Order.

END OF ORDER