Docket #0043 Date Filed: 2/19/2025

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

In Re:	**Case No. 19-34054-sgj-11**
	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	Dallas, Texas
	February 10, 2025
	2:30 p.m. Docket
Reorganized Debtor.	
CHARITABLE DAF FUND, L.P.,	**Adversary Proceeding 24-3073-sgj**
Plaintiff,	
v.	MOTION TO STAY PENDING APPEAL FILED BY PLAINTIFF CHARITABLE DAF FUND, LP [30]
ALVAREZ & MARSAL CRF MANAGEMENT, LLC,	
Defendant.	

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

APPEARANCES:

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Proceedings recorded by electronic sound recording; transcript produced by transcription service.

DALLAS, TEXAS - FEBRUARY 10, 2025 - 2:44 P.M.

THE CLERK: All rise. The United States Bankruptcy Court for the Northern District of Texas, Dallas Division, is now in session, the Honorable Stacey Jernigan presiding.

THE COURT: All right. Good afternoon. Please be seated.

All right. We will get started now on our 2:30 setting in Charitable DAF Fund, LP versus Alvarez & Marsal. This is Adversary 24-3073. And we have an emergency motion for a stay pending interlocutory appeal. I'll begin by getting lawyer appearances, please.

MR. MCCLEARY: Your Honor, this is Roger McCleary representing Movant, Charitable DAF Fund, LP. And I'm with Parsons McEntire McCleary, and we appreciate the Court making itself available today for this motion. Thank you.

THE COURT: All right. You had technical problems connecting, I heard. Is that correct?

MR. MCCLEARY: That is correct, Your Honor. I apologize for that.

THE COURT: Okay. Anything you can report? We always like to know if something is going on, by chance, at our end versus your end versus something we can report to IT. So why don't you tell me.

MR. MCCLEARY: Your Honor, it was probably my end because I had, you know, I had to put in my email address and

join here and there and some things that I just had difficulty finding at first. So I would imagine it was all on my end, and I apologize for that.

THE COURT: Okay. All right.

I'll now take appearance for Respondent.

MR. KING: Yes, Your Honor. It's Marshall King and Andrea Calhoun from Gibson, Dunn & Crutcher on behalf of the Defendant, Alvarez & Marsal.

THE COURT: All right. Thank you.

All right. I see Mr. McEntire has now joined. Were you also wanting to make an appearance?

(No response.)

THE COURT: All right. Well, I don't know if he could hear me or not, but there must be --

MR. MCCLEARY: He may not. Sawnie, can you hear?

MR. KING: That seems like --

MR. MCCLEARY: Sawnie, can you hear me?

MR. KING: That seems like a no.

THE COURT: It seems like a no.

MR. MCCLEARY: I can try to, Your Honor, I can try to call him real quickly and see if he can hear and just let us know.

THE COURT: Well, let's go ahead and get started. It looks like you're probably going to be the one to make the presentation. I don't think I -- well, he's gone now. I

didn't see a jacket on Mr. McEntire, so my guess is he was going to defer to you, Mr. McCleary.

So, anyway, let's go ahead and begin. You may make your presentation, Mr. McCleary.

MR. MCCLEARY: Your Honor, thank you. Is it possible for me to do a share screen?

THE COURT: Absolutely. Go ahead.

MR. MCCLEARY: Thank you so much. Let me -- okay, Your Honor. Hopefully, you can see the PowerPoint program I have up.

THE COURT: Yes. I can.

MR. MCCLEARY: Okay. Thank you. Your Honor, we appreciate, again, you taking the time to see us here today. This motion concerns a stay of adversary proceeding pending appeal from your order denying my client's motion for remand to state court.

I want to emphasize, Your Honor, the only parties to this action are my client, the Plaintiff, DAF, Charitable DAF Fund, LP, which I'll refer to as DAF. And DAF's mission, Your Honor, is a charitable mission, and they have supporting organizations that have committed over $42 million to nonprofit organizations and funded over approximately $32 million of commitments. And those causes, those charitable causes, include education, veterans benefits, health and medical research, and economic and community initiatives,

among others.

DAF, Your Honor, is a limited partnership which owns a partnership interest in one of the Crusader Funds -- specifically, the Highland Crusader Fund II, Ltd., which I'll refer to as Offshore Fund II.

The only other party in this action, Your Honor, is Defendant Alvarez & Marsal CRF Management, LLC, which is referred to, well, in my presentation, as A&M or Alvarez. Your Honor, Alvarez was the investment manager for the Offshore Fund II at all times relevant to my client's claims in the state court lawsuit.

I'd note that obviously Highland Capital is not a party to this lawsuit. James Seery is not a party to the lawsuit. The Redeemer Committee is not a party to the lawsuit. It's only DAF and Alvarez, A&M.

The underlying state court action, Your Honor, were the petition that was filed on August 15th of 2022, which was over two years prior to the removal of this case by A&M. We, of course, in our motion for leave to appeal, to file the interlocutory appeal, which is incorporated into our motion for stay, note and address that A&M sought to implicate the HCM or Highland Capital bankruptcy way back in March of 2023 in discovery responses, also in a motion to abate it filed in August of 2023.

And, but it failed to remove within 30 days after the

initial pleading. So we assert, of course, and we've briefed that the removal in this case is untimely, which, of course, goes to the likelihood of success of the motion for leave for interlocutory appeal.

Our second amended petition, Your Honor, DAF's second amended petition in the state court action, alleges claims that are solely against A&M. It's premised on A&M's wrongful conduct regarding the Offshore Fund II. We -- DAF alleges A&M improperly refused to make timely distributions to DAF and deprived DAF of those distributions. It treated DAF's interest in Offshore Fund as canceled. Offshore Fund II; pardon me, Your Honor.

We allege DAF's preferred interest of other Crusader Fund II interest holders over DAF, and failed to ensure fair treatment of all interest holders, of course, including DAF, and failed to maximize the interest holders' recovery, including DAF's.

The causes of action pled, Your Honor, are breach of fiduciary duties against A&M, conversion, and tortious interference.

In regard to the removal and the motion to dismiss that is now pending, A&M filed a notice of removal on September 13th of -- let me make sure I've got -- okay, September 13th of 2024. And in that, they alleged related to jurisdiction, related to the Highland bankruptcy case under 28 U.S.C. §

1452(a).

Again, that removal was filed August 15th, 2022, over -- or over two years after the filing of the state court lawsuit, Your Honor. The removal was filed September 13th, but over two years after the August 15th filing of the lawsuit.

Also, Your Honor, we of course have asserted the position that the removal is premised on the -- kind of a straw man argument that the state court action aims to discover and pursue claims against Mr. Seery. Again, Mr. Seery is not a party to the state court action at all. That's a straw man argument on the part of A&M. A&M admits that the petition filed by DAF does not even expressly refer to James Seery.

So, on October 14th of 2025, DAF filed its motion to remand. That was timely filed. We argued there was no subject matter --

THE COURT: I think you mean 2024, but --

MR. MCCLEARY: Oh, I apologize. You're right. 2024. Excuse me. Thank you. Thank you.

In 2024, that no subject matter jurisdiction exists and the state court lawsuit is not related to the Highland Capital Management bankruptcy and that the notice of removal was untimely. And we also, of course, have asserted principles of abstention under 1334(c) and 1452 in our motion for leave to file an interlocutory appeal.

On November 15th, A&M filed its motion to dismiss for lack

of standing and judgment on the pleadings in a brief in support that contends that DAF lacks standing to bring its fiduciary duty claim only. This motion does not extend to the conversion or the tortious interference claims. And they allege that there was -- does not -- that we don't satisfy the requirements that would permit DAF to maintain a derivative claim under the bankruptcy procedure or Bermuda law with respect to the fiduciary duty claim.

They also allege that we fail to state a fiduciary duty claim against A&M for matters related to the handling of the bankruptcy claim.

On January 14th, this Court entered its memorandum opinion and order denying DAF's motion for remand. On January 28th, DAF filed a notice of appeal of the order. I'll refer to the memorandum opinion and order denying the motion to remand as the Order.

Then, on January 28th, DAF filed a motion for leave to file interlocutory appeal. That's Document 29, which we've incorporated into our motion to stay.

Tomorrow, Your Honor, is the current deadline for my client to file a response to A&M's motion to dismiss relating to the fiduciary duty claims, and the Court has set a hearing on February 27th on A&M's motion to dismiss.

In regard to what we're considering here, DAF has asked the Court to consider whether to grant a stay here of this

case. And under the *Plaquemines* decision that we've briefed for the Court, there are four factors that are to be considered in regard to the pending motion, Your Honor.

The first is whether the stay applicant has made a strong showing of likelihood to succeed on the merits.

The second is whether the applicant will be irreparably harmed absent a stay.

The third being whether issuance of a stay will substantially injure the other parties interested in the proceeding.

And fourth and finally, where the public interest lies.

Your Honor, we submit that all four of those factors weigh in favor of granting our motion to stay, as we've briefed in our motion for leave to file interlocutory appeal and our motion for stay.

With respect to the likelihood of success on the merits, Your Honor, we cite the *Trend Intermodal* case, noting that the likelihood of success on the merits also can be met when the party presents a substantial case on the merits, when a serious legal question is involved that shows that the balance of equities weighs heavily in favor of granting a stay, and that a serious legal question has far-reaching effects or is a matter of public concern going beyond the interests of the parties.

Here, with respect to the element of likelihood of success

on the merits, Your Honor, we have a very strong case of likelihood of success on the merits, we submit, Your Honor. We realize, of course, we're appealing from your order, and in a sense, kind of addressing you're grading your own paper here. But, of course, we, in representing our client, we'll make our case to the court of appeals.

And here, we've asserted that the Court lacked post-confirmation bankruptcy jurisdiction over the underlying lawsuit, which is between a nondebtor investor against a nondebtor investment advisor, with no effect on the implementation or execution of the amended plan, the Fifth Amended Plan of Reorganization, as Modified, or administration of the bankruptcy.

We also, of course, have briefed and assert, Your Honor, that the order denying remand is premised on a presumption that there will be a claim in the state court action against Mr. Seery, who was CEO of Highland Capital Management at one time in the underlying case, or that we'll be obtaining discovery from Seery that will somehow impact the Highland Capital estate.

We assert, Your Honor, there's simply no basis in the record to support that, frankly. And that -- and also, frankly, if there is not remand, we're kind of faced with a scenario where, if there's ever discovery, frankly, requested from Seery, it would somehow necessarily be subject to

gatekeeping orders, where it would necessarily implicate the bankruptcy estate, Your Honor.

We reassert those assumptions concern and address very serious legal questions that militate in favor of the motion for leave for interlocutory appeal and a motion for stay in this case.

We also, of course, have asserted that the removal is untimely. It was not filed within 30 days of the filing of the initial pleading, as we again briefed in our motion for interlocutory appeal and remand motion.

So, in this case, Your Honor, part of the relevant inquiry is we're looking at whether the potential outcomes of DAF's claims may have any impact on the interpretation or implementation of the confirmed plan of reorganization. Obviously, we assert in the brief that it does not. We assert that the opinion that denied the motion to remand was based on kind of a hypothetical future action against a third party to the litigation, Mr. Seery, and that we've distinguished the various bases for the Court's holding with authorities in support of our arguments in our briefing relating to the motion to remand, the motion for leave to appeal, and the motion for stay.

We assert, Your Honor, that there is a very serious legal question presented here with respect to the ability of the Court -- and the bankruptcy courts in general -- to look

beyond the actual claims pled and asserted in the pleading in the state court action to determine subject matter jurisdiction, and note that that has very profound, wide-reaching consequences on expansion of what is limited Article III jurisdiction in the forums involving the litigants.

Right now, Your Honor, with respect to the irreparable harm consideration, --

THE COURT: Okay. Mr. McCleary, before you go to the second requirement, I did not hear you address what I considered my most significant reason for determining there was bankruptcy subject matter jurisdiction, and that was this Court concluded that DAF's claims might be estopped by prior bankruptcy court orders in prior bankruptcy litigation. Okay? And regardless of pre-confirmation/post-confirmation, a bankruptcy court -- and a trial court, frankly -- always has the ability to enforce its prior orders. So you did not address that basis for bankruptcy subject matter jurisdiction in --

MR. MCCLEARY: Your Honor?

THE COURT: -- likelihood of success on the merits.

MR. MCCLEARY: Thank you.

THE COURT: Okay?

MR. MCCLEARY: Thank you, Your Honor. Thank you, Your Honor. Let me point out that we simply don't believe and don't assert -- well, we assert that our claims don't

implicate the prior bankruptcy orders. They're not related to the prior orders. So there would be no estoppel here.

And, of course, with respect to many of those prior orders, or at least some of those prior orders, as we've briefed, my client was not a party to some of the adversary proceedings or matters that went on in the underlying bankruptcy court --

THE COURT: Okay. Well, again, your client was an active party during the bankruptcy case and did get notice and opportunity to object to the 9019 settlement of the Redeemer Committee/the Crusader Funds' proofs of claim during the bankruptcy case. So that was one order that I was worried about this might be relitigation of things that could have been litigated there.

And then, as I pointed out in my ruling on denying the motion for remand, that settlement was, again, addressed in the confirmation order.

And then, last but not least, my remand order addressed the different litigation we've had regarding what I will call the claims trading.

So, again, that was my main reason, I think, for determining bankruptcy subject matter jurisdiction existed. We might have estoppel issues. We might have preclusion issues based on prior orders of the bankruptcy court. And a court always can enforce its prior orders.

MR. MCCLEARY: Yes, Your Honor. Let me respond briefly to that. I appreciate you bringing that point up. And first, we do not believe there are any estoppel issues here. We don't believe implications of the Court's prior orders are involved. And our claim is specifically and directly against A&M for its conduct as the manager of this fund.

I'd also point out, Your Honor, in addition to the briefing that we filed on these points, that the order that the Court entered approving the settlement agreement with respect to the underlying claims, not the -- certainly not the state court claims, but the claims in the bankruptcy, that settlement agreement referenced an exhibit that was a confidential exhibit in the underlying bankruptcy that identified this specific claim -- or I should say interest, excuse me -- and that's DAF's interest in the Offshore Fund II.

That was a confidential document that my client did not have at any time relevant to all those -- the arbitration, the order approving the settlement agreement -- my client didn't have those. So my client was not even aware that its interest in this Offshore Fund II was, frankly, at risk. So for this and the other --

THE COURT: Your client? What human being would have been in control of your client during those relevant times?

MR. MCCLEARY: That would have been Mark Patrick.

THE COURT: No. No.

MR. MCCLEARY: Or his predecessor -- pardon me?

THE COURT: I know it wasn't Mark Patrick because I've heard him testify on the stand --

MR. MCCLEARY: Or -- yes.

THE COURT: -- when he became the person in control of DAF.

MR. MCCLEARY: Yes. And I was going to say, or his -- his immediate predecessor. And, frankly, well, I'm blanking on his name at this moment. However, I know the Court has expressed concerns about her views about James Dondero. James Dondero was not in control of DAF during any time relevant to our claims in the underlying state court action. So I just want to emphasize that. It was not James Dondero.

THE COURT: Okay. So you can continue.

MR. MCCLEARY: Thank you, Your Honor.

With respect to the irreparable harm element of the factors and considerations, again, practically, of course, we believe we're correct and that the appellate court will determine that there isn't subject matter jurisdiction here. And practically, we're looking at trying to stay activities and litigation as to avoid --

THE COURT: Yes. Your screen is showing your email,

by the way. I'm not looking at the emails, but they're there.

MR. MCCLEARY: Well, let me try to correct that. Thank you. (Pause.) Technology is wonderful unless it isn't. Let me try to -- here we go. Does this now -- does that fix it, Your Honor?

THE COURT: Okay. That fixed it. And I --

MR. MCCLEARY: Thank you.

THE COURT: Before you go on, there's another issue you did not address on likelihood of success on the merits. And Alvarez & Marsal pointed this out, actually, in their response they filed a few days ago. You didn't address likelihood of the motion for interlocutory appeal being granted. Isn't that part of what you have to address here?

MR. MCCLEARY: Well, that is the point, that the motion for interlocutory appeal is likely to be granted because of the -- what we've pointed out, of course, in our -- in that motion and in our motion for stay here, that the underlying order does not -- it relies on and finds facts and relationships that, frankly, are not based on the underlying pleadings, and finds subject matter jurisdiction that doesn't properly lie, based on the allegations and pleadings in the underlying case.

THE COURT: What do you mean by that? What do you mean?

MR. MCCLEARY: And further, that the lack of --

THE COURT: I didn't make findings of fact.

MR. MCCLEARY: -- timeliness --

THE COURT: I didn't make findings of fact. Okay? I made determinations.

MR. MCCLEARY: Yes, Your Honor.

THE COURT: I made determinations.

MR. MCCLEARY: Yes, Your Honor.

THE COURT: What do you mean, though, I looked outside the pleadings?

MR. MCCLEARY: With respect to -- the Court's order, of course, referred to James Dondero's involvement quite substantially. In particular, though, it referred to the presumption that there would be claims sought against Mr. Seery --

THE COURT: No. No. No.

MR. MCCLEARY: -- as the CEO --

THE COURT: No. No. I keep going back to my main reason was I thought claims were being raised that might be precluded by prior litigation in the bankruptcy court and prior orders of the bankruptcy court.

MR. MCCLEARY: Yes, Your Honor.

THE COURT: How is that going outside your petition?

MR. MCCLEARY: Well, because the petition only alleges claims against A&M for its conduct with respect to being the manager of the fund as to my client. It doesn't

relate to Highland Capital Management or Mr. Seery.

And the Court's determinations, frankly, that implicate the bankruptcy, we frankly don't agree with, respectfully, and believe that that's not something implicated by our pleadings in this case.

THE COURT: Okay. I'm looking at Paragraph 21 and 22 of the Second Amended Petition. I've got it in front of me. I pulled it out before walking in here. And if you've got them handy, you'll see Paragraph 21, A&M and the Redeemer Committee then entered into a settlement with Highland Capital Management which reduced the claims to the allowed amount of $136.7 million in favor of the Redeemer Committee and $50,000 in favor of the Crusader Funds. A motion to approve the claims was filed in the bankruptcy court by Highland Capital -- you give a docket reference to the settlement motion -- which confirms that A&M allowed the Redeemer Committee to control negotiations concerning funds to which the Crusader Funds asserted entitlement. You cite a specific paragraph in the settlement motion filed in the bankruptcy court. In doing so, the Redeemer Committee became one of the largest creditors in Highland's bankruptcy estate and held a position on the Unsecured Creditors' Committee, while A&M effectively sat on the sideline, abdicating its responsibilities. In effect, A&M abdicated to the Redeemer Committee its duties to manage Crusader Fund II's assets, thereby failing to ensure fair

treatment of all interest holders and maximization of recovery.

Now, and then when you go on and assert the breach of fiduciary duty claim, you use that same language again about Alvarez abdicating its responsibility.

That, in my mind -- and let's put the claims trading aside, which I think there's another order that concerns me that we might be relitigating things -- but this language suggests that your claim seeks to look behind a settlement motion and a contested evidentiary hearing this Court had on the settlement and an order this Court entered, which was appealed by a billion-dollar creditor, UBS, and look at one of the professionals involved, their role in this. And I held, over an objection to a billion-dollar creditor that wasn't your client, UBS, that the compromise was fair and equitable and in the best interests of all creditors.

So, what I'm getting at is I might be wrong at the end of the day in thinking that there is preclusion, but this at least seems related to an order of the bankruptcy court and a collateral attack of an order. Again, who knows at the end of the day if I'll find that preclusion applies. But we're talking about bankruptcy subject matter jurisdiction right now. And doesn't a bankruptcy court have the ability to interpret and enforce its own orders forever? Didn't the U.S. Supreme Court say that in the *Travelers* case? There, it was a

20-year-old order.

MR. MCCLEARY: Your Honor, certainly, the Court has the ability to interpret and enforce its orders in accordance with the law. We would respectfully submit that's not what is implicated in this lawsuit, Your Honor.

As argued before, what we are asserting here isn't going behind or interpreting the Court's orders. This is -- this is a straightforward claim against A&M for its own tortious conduct that we allege in the petition. It doesn't seek to go behind or change or modify any of your orders. It doesn't seek to affect the bankruptcy estate by any means.

So that would -- I would assert that's the difference here, Your Honor. At least one of the differences.

THE COURT: Okay. And what --

MR. MCCLEARY: May I proceed?

THE COURT: What about the claims trading aspect of this? I mean, clearly, there's a theme in here that, by participating in the trading of the Redeemer Committee claims, Alvarez breached fiduciary duties. And, again, I know it was Hunter Mountain, not DAF. But if the Court has good reasons to think there might be some privity between Hunter Mountain and DAF, haven't I looked at that issue and whether there could be a colorable claim extensively in my Hunter Mountain orders that are on appeal?

MR. MCCLEARY: Your Honor, again, there's, we would

respectfully submit, no basis in the record to consider any privity between Hunter Mountain and DAF, much less Hunter Mountain, DAF, and James Dondero. So we respectfully disagree with that.

And then, again, I would point out that we're not trying to undo the claims trade. We're -- we're relying on the fact that it's a fact and, because of A&M's conduct -- again, not the conduct of the estate or the Redeemer Committee or Mr. Seery -- that there were breaches and tortious conduct by A&M. And it does not implicate the Court's orders, though.

THE COURT: Okay.

Do we know why the picture's frozen?

MR. MCCLEARY: Let me -- let me -- is I may need to probably pull up my chart again here. Let me do that.

THE COURT: Okay.

MR. MCCLEARY: I don't --

THE COURT: Yes. Can everyone pause for just a moment? We've got frozen screens at the moment in our courtroom, and we're going to --

MR. MCCLEARY: Yes, ma'am.

THE COURT: Just hold on a moment.

MR. MCCLEARY: Yes, ma'am.

(Pause.)

THE COURT: Okay. We've got you back. Do you hear us and see us clearly?

MR. MCCLEARY: Yes, Your Honor. Can you hear me?

THE COURT: Yes.

MR. KING: Yes, Your Honor. I can hear and see.

THE COURT: Good deal.

MR. MCCLEARY: We're good.

THE COURT: We're back in business here in the courtroom, so you may proceed, Mr. McCleary.

MR. MCCLEARY: Thank you, Your Honor.

On the second consideration, the irreparable harm to DAF absent a stay, A&M, of course, as you pointed out, has this pending motion to dismiss. Our deadline is to respond tomorrow. The hearing on the motion to dismiss is set on February 27th of this year.

Practically speaking, again, any orders we think the Court may enter while this appeal is pending will be void. We think that we -- the Court does not have subject matter jurisdiction. If course, if we're correct in establishing that, we're wasting the Court's resources, which we don't want to do, in addition to my client's resources, in filing -- in preparing and filing tomorrow a response and having a hearing on the motion to dismiss as to just one issue in the case.

And so our stay motion is calculated to avoid waste of resources that are not recoverable by my client. And that's very important. We're not talking about just the normal expenses of litigation that parties sometimes have an

opportunity to recover. We have no opportunity to recover them in this case, and A&M doesn't even assert otherwise.

So, DAF will incur legal fees in defending against the motion to dismiss with respect to filing a response, with respect to a hearing. None of those expenses are recoverable. And absent a stay, Your Honor, whichever side wins this motion to dismiss, DAF or A&M will be expending resources to litigate a case where we believe jurisdiction is lacking, only to have to relitigate on remand to the state court.

Also, DAF would be prejudiced by having to prosecute multiple ongoing appeals based on subject matter jurisdiction in the unlikely event litigation proceeds and the Court grants A&M's motion to dismiss. Were there to be an appeal from the motion to dismiss, we have this pending appeal, and then we of course have this ongoing litigation which, depending on the result in that, itself could be the subject of an appeal.

So the decision on subject matter jurisdiction is just a fundamental ruling that would enable the Court and all the parties to avoid this harm and irreparable harm to my client.

We would be able to avoid additional expenditure and litigation resources where we'd, you know, arguably, just end up in the same spot, depending on all the rulings here, without DAF having any ability to recoup expenses.

And we've cited the Court to the *FTC v. Educare* case in our brief, 20 U.S. Dist. LEXIS 135341, at *11, in which the

court noted that the Fifth Circuit recognizes monetary injuries are irreparable when they arise in the absence of an available remedy by which the movant can later recover monetary damages.

We have no such remedy here, Your Honor, and A&M doesn't argue otherwise.

On the third consideration, whether it was --

THE COURT: Okay. Okay. Will you at least acknowledge that it's extremely rare for expense, monetary harm like this, to be irreparable harm?

MR. MCCLEARY: Not like this, Your Honor, because it's -- it's certainly rare in the cases I saw in which the litigant had an opportunity to recover those expenses. And that's the distinguishing factor here, Your Honor.

THE COURT: Okay. In the *FTC* case you cited, I've got it right here in front of me, that was a sovereign, okay, an agency of the U.S. Government. So, zero chance the other litigant is going to have any recovery of fees and expenses. I don't know what the underlying agreements provide here or any other statute, but I know that Alvarez & Marsal is not a sovereign. Okay?

And then there was another case -- I've looked to see what case *FTC v. Educare* was citing in the Fifth Circuit, and it was a case involving the EPA, where the interim order, the cost of compliance to the counterparty was going to be

enormous and overwhelming.

I mean, these both seem like very extraordinary examples, but this is your chance to tell me that it's more common than I realize to say irreparable harm is some legal expenses for a few weeks.

MR. MCCLEARY: Well, Your Honor, I would say that the principle and the proposition laid out in the *FTC* case, which is a Western District of Texas case within the Fifth Circuit, stands here. And regardless of whether you have a sovereign involved or whatever other circumstances may apply, the principle stands in this case. And that is, if you're incurring monetary injuries and expenses and costs that you can't recover in the case, then that qualifies under *FTC* as irreparable injury.

I don't have a litany of cases, you know, for the specific amounts we have, but I would submit, Your Honor, that the cases I read actually didn't talk about the amounts. They focused more on the premise on whether the costs and expenses were recoverable or not. And here, they're not.

THE COURT: Okay. So the brief or the response to the motion to dismiss and brief, your timetable showed me is due tomorrow. So you haven't already done 90 percent of the work on that?

MR. MCCLEARY: Well, Your Honor, --

THE COURT: That's hard for me to believe.

MR. MCCLEARY: Your Honor, we certainly have done work on it. I am not in a position where I can accurately tell you what percentage we are from being completed, to be honest.

THE COURT: Okay. You've had the motion to dismiss, though, since some date in, I'm guessing, early January. Right? Maybe sooner than that.

MR. MCCLEARY: Yes, Your Honor. Yes, Your Honor. But we still also have the hearing scheduled on the 27th of this month, Your Honor.

THE COURT: Uh-huh. Okay.

MR. MCCLEARY: Okay. If I may proceed?

THE COURT: You may.

MR. MCCLEARY: Thank you, Your Honor.

With respect to the third consideration on substantial injury and balancing that injury, any injury from A&M, there just is no prejudice to A&M here. They haven't really demonstrated or suggested that they have any injury, certainly substantial injury, or prejudice of any kind.

Of course, they suggest they want to have their motion heard, but they haven't suggested that a stay would somehow prejudice any substantive right that they have, or interest. So, given the injury that is established by DAF, the balance weighs in favor of granting the motion to stay, Your Honor.

And then, finally, with respect to the public interest

element, the public interest weighs in favor of staying the proceedings because, as we -- as the *Trend* case indicated that we cited at 711 F.Supp.3d 627 at 641, there's a strong public interest in not having to have a court exercise authority over parties over whom the court lacks jurisdiction.

I'm prepared to kind of address some of A&M's response, unless the Court would like me to wait until A&M and its counsel respond.

THE COURT: Well, I mean, you get the last word in rebuttal today. It's up to you whether you want to use that.

MR. MCCLEARY: Well, I certainly would like to have rebuttal time, Your Honor, yes.

THE COURT: Okay. Well, it's up to you, if you want to say this now or just wait and see what you want to say after rebuttal.

MR. MCCLEARY: I'll wait. I'll wait until they finish, Your Honor. Thank you.

THE COURT: Okay. Thank you.

Will it be Mr. King or Ms. Calhoun?

MR. KING: It will be me, Your Honor.

THE COURT: All right.

MR. KING: Marshall King from Gibson, Dunn & Crutcher.

THE COURT: Thank you.

MR. KING: I don't know, can Mr. McCleary take his

slides down? I can't -- you know, Your Honor is very small on my screen.

THE COURT: Oh. Well, maybe that's good.

MR. MCCLEARY: There you go.

THE COURT: Okay.

MR. KING: There we go. Thank you.

THE COURT: All right.

MR. KING: Thank you, Mr. McCleary.

MR. MCCLEARY: Yes, Mr. King.

MR. KING: Your Honor, I didn't come here today thinking that we were going to be relitigating the motion to remand for roughly 45 minutes. I came here to address the motion for a stay pending appeal. And I think, notwithstanding Mr. McCleary's disagreements with Your Honor's ruling, Your Honor has ruled and made findings that Your Honor has jurisdiction, related to jurisdiction, and that the elements of mandatory abstention were not met here.

In light of that, he's got to show not just that he has a meritorious appeal -- and I don't think he's even done that -- but leaving that aside, he's got to show a likelihood that the district court is going to accept the appeal and disregard the usual circumstances and procedures in cases that defers appellate review until the end of the case. And I think he's really -- other than disagreeing with Your Honor's ruling -- made no showing whatsoever on that basis.

The gist of his argument is, well, this concerns subject matter jurisdiction, so there's reason to think they'll care about the authority of the Court to hear it, and if they rule our way -- but only if they rule our way, is the subtext of his argument -- then the old case will go away and everything else will be for naught.

That argument could be made in literally every case where there is a threshold issue challenged on a motion to dismiss or a motion to remand, like the one here. There is nothing exceptional about this case that would suggest that the district court is going to reach out on a very unique set of factual circumstances to take an interlocutory and immediate appeal of this case as opposed to any other case. And if one opens the door to hearing every single jurisdictional issue on an interlocutory basis, then the exceptional nature of interlocutory appeals will disappear entirely.

I think the other key element, Your Honor, is, as we pointed out in our papers, as Your Honor asked Mr. McCleary about, the work that DAF needs to do in opposing our motion to stay must be already done, or at least 90-plus percent of it is already done. His papers are due tomorrow. He's had our motion since November. So it's been three months, almost, that he's had our papers. There's no harm, no irreparable harm, certainly, in having him, you know, finish that up and serve the papers.

The other point I would make there is whatever work he's done and whatever work is yet to be done is not going to be for naught, even if -- even if an appellate court eventually finds that Your Honor erred on the subject matter jurisdiction question, because we'll just end up back in state court having to litigate the same questions of their standing and whether they've satisfied the elements of demand futility to bring a derivative claim the way they have brought in their second amended petition.

And so those are the key elements, Your Honor. We agreed back when we saw Your Honor in late November that it made sense to defer briefing and hearing on the motion to dismiss pending Your Honor's ruling on the jurisdictional issue, and it was put off at that point in time. Once Your Honor has made that decision and at least presumptively found subject matter jurisdiction here, it no longer makes sense to put that off until some appellate court -- and keep in mind, we're probably -- if they are unsuccessful in getting the district court to reverse Your Honor, one can pretty much bet, based on the past track record of DAF and other affiliated companies, that there might be a subsequent appeal to the Fifth Circuit, and we'll continue waiting for some court to put the final stake in that argument of theirs.

They will have an opportunity at the end of the case to take an appeal and challenge Your Honor's subject matter

jurisdiction rulings. The public interest is not served by encouraging interlocutory appeals, piecemeal appeals.

I thought it quite ironic that one of Mr. McCleary's arguments about how his client will be prejudiced and incur extra costs and expense is the need to take multiple appeals. Well, you know, I didn't tell them to file a motion for leave to take an interlocutory appeal. They could have saved their fire and done it all at once at the end of the case, with whoever prevails and whoever loses taking the appeal in this case.

For all those reasons, Your Honor, I think it's time to go forward with the motion to dismiss, and we ask that the motion to stay to be denied.

THE COURT: All right. I was trying to find in the statute -- Courtney, maybe you remember off the top of your head because we emailed about this -- I don't think you can appeal beyond the district court. 14 -- what is it? I don't think you can appeal beyond the district court a bankruptcy court decision to remand or not to remand.

MR. KING: Well, you couldn't -- you can't even appeal it to a district court, Your Honor. That's why he's had to move for leave to appeal. But maybe you're right, maybe there is a further restriction.

THE COURT: Well, yes, I'm not -- okay, hang on.

(Pause.)

THE COURT: Yes. I'm talking about the second sentence of 28 U.S.C. § 1452(b): An order entered under this subsection remanding a claim or cause of action or a decision to not remand is not reviewable by appeal or otherwise by the court of appeals under Section 158(b), 1291 or 1292 of this title, or by the Supreme Court of the United States under 1254 of this title.

So that's something entirely different from an interlocutory order of any kind. Any kind of interlocutory order, you have to get leave of court. But an order granting a motion to remand or denying a motion to remand is entirely unique under that sentence I just read. You can only appeal it to the district court and not any further.

MR. KING: You might be right, Your Honor, except I believe what the -- you might be right about this, but I think -- and I apologize for suggesting otherwise. Although, as I read this, this is -- if an order entered under this subsection is not reviewable. Is not reviewable. That's the subsection that deals with remand on equitable grounds.

So I think, on permissive abstention grounds, which Your Honor did deny remand on that basis, but their appeal here is not -- their attempt to appeal here is not from Your Honor's decision on the permissive abstention; it's only on the basis of the finding on related to jurisdiction and on the finding on mandatory abstention, as I understand their appeal.

THE COURT: Okay. You might --

MR. KING: So, --

THE COURT: You might be right about that and I might be wrong. This comes up so rarely that I don't think any of us are entitled to call ourselves experts on it. It's rare, in my experience, for sure, and maybe all of ours.

All right.

MR. KING: Regardless, Your Honor, I mean, my point stands, which is, to the extent their complaint is the need to prosecute multiple appeals, they've brought that on themselves. They could have waited and taken an appeal at the end of the proceedings before Your Honor.

Thank you.

THE COURT: Thank you.

All right. Rebuttal, Mr. McCleary?

MR. MCCLEARY: Thank you, Your Honor. Specifically with respect to Mr. King's argument that we've done whatever percentage of work we've done on the response and that it won't be wasted, presumably because they would have a motion in state court on these grounds, obviously, you have different law that applies and different research and expenditures that would be required to respond in federal court versus state court. So I make that point.

And then if I could also share my screen.

THE COURT: Okay.

MR. MCCLEARY: Okay. Can the Court see the screen?

THE COURT: I can.

MR. MCCLEARY: Thank you. In the response that A&M filed, their -- the response really somewhat can be summarized as a, you know, no, they didn't, that DAF purportedly didn't meet our burden considerations. And obviously, we disagree with that.

On the likelihood of success prong, A&M relies on two cases on Page 3 and 4 for the proposition that the Fifth Circuit has repeatedly denied leave to appeal orders concerning subject matter jurisdiction. Those cases are distinguishable on their facts, the circumstances, the issues.

The *In re Permian* case, which is No. MO:18-CV-00080-DC, at 219 WL 13254194, there, the appellants in that case argued there was no subject matter jurisdiction because the board member of the bankrupt entity purportedly did not have authority to file the bankruptcy petition and did not have authority to do so by all the required percentage interests of the company under the company agreement. And they asserted that the discretionary standard under 28 U.S.C. §§ 157 and 158 deprived the court unconstitutionally of the automatic right to review the bankruptcy court's order.

But the appellees in that case, Your Honor, argued there was no authority holding that the company agreement, with disputed terms and enforceability, was a basis to divest a

bankruptcy court of subject matter jurisdiction. And the court there found that 157 and 158 were not unconstitutional simply because they allowed the bankruptcy court to deny a motion to dismiss based on an alleged lack of subject matter jurisdiction without the litigant's automatic right to appeal. So that decision is just simply inapplicable.

The second one, the *Spencer* case, 210 WL 11618165, that concerned a debtor, a debtor's motion to modify a reorganization plan. That included a court-approved entry into and performance under what we'll refer to as standby purchase documents that permitted creditors the option to receive cash instead of common stock. And the movant sought review of the interlocutory order so that the threshold questions concerning subject matter jurisdiction and fraud in the initial filing could be considered and determined before rather than after implementation of the plan.

Of course, we have a plan that's already implemented here.

And there, the court found the movants had simply failed to address in their motion any of the factors governing discretion to grant the motion for leave to appeal. So that's not applicable here.

With respect to the likelihood of success element, in A&M's response they cite the *O'Donnell v. Harris County* case for an argument that a motion for stay should not be used to relitigate matters regarding a motion for remand and the

hypothetical future action against Seery. We assert, Your Honor, that is a misplaced argument in that what we have done is demonstrate the likelihood of success. We're not relitigating the underlying motion to remand.

So *O'Donnell* is taken out of context. There, there was a motion to stay an order of preliminary injunction against Harris County and policymakers from using bail on a secured instead of unsecured basis to detain misdemeanor defendants who were too poor to pay their financial -- their financial condition. And the defendants argued for the very first time there in their motion for stay that the relief the plaintiffs sought and that the court had ordered was unavailable under Section 1983 because the plaintiffs must first exhaust state law remedies.

And there, the court simply observed that a motion to stay shouldn't be used to relitigate matters or submit new evidence or raise arguments that could have and should have been raised before the judgment issue.

So that's not what is happening here, so that case is inapplicable.

With respect to the irreparable harm element, Your Honor, A&M in their response argues that we're only complaining about ordinary and necessary costs, but they ignore that we're raising avoidable costs and expenses for which we have no right to recover. They're ignoring the decision we briefed

and have discussed in this hearing, Your Honor, on the *FTC v. Educare Services* for the proposition that monetary injuries are irreparable when they arise in the absence of an available remedy by which the movant could later recover monetary damages. And then argues that the Fifth Circuit has denied a stay even when the plaintiff showed irreparable harm would occur, citing *In re Permian Producers Drilling*.

Your Honor, that's -- while that's correct, however, *In re Permian Producers* also found that there was a complete failure to show a likelihood of success on the merits. So, again, that's distinguishable and inapplicable here.

With respect to the balance of harms, A&M argues in their response only that A&M is entitled to have its motion to dismiss decided, they offer no argument that they're injured in any way by the request to stay, and the balance of harm strongly favors DAF, we submit, Your Honor, given the costs and expenses that are unrecoverable that we're faced with and the multiple appeals that are presented here. And also the waste of litigation efforts when there's no subject matter jurisdiction.

And then with respect to the public interest factor, A&M argues the *Trend Intermodal* case, a case that relies or cited a case outside of the Fifth Circuit. But in fact, that doesn't mean *Trend* is not valid authority. It's a Fifth Circuit case, or a case within the Fifth Circuit, that stands

for the proposition that we cited.

So, Your Honor, we do request the Court stay the adversary proceeding in its entirety until the issue of this Court's subject matter jurisdiction can be fully and finally resolved on the interlocutory appeal, and we certainly rely on the arguments we've asserted in our -- also in our motion for stay and in our motion for leave for -- to file interlocutory appeal.

Thank you, Your Honor.

THE COURT: Okay. Thank you.

All right. Well, as you would imagine, we've thoroughly read your papers and even gone back and reread the Court's very lengthy memorandum opinion and order denying motion for remand. And based on that, as well as the arguments today, the Court is going to deny the motion for stay pending interlocutory appeal.

The underlying adversary proceeding before the bankruptcy court is, of course, an action that was pending in Texas state court. Defendant Alvarez & Marsal removed it to this Court. Plaintiff Charitable DAF filed a motion to remand it promptly to the Texas state court. As we know, DAF argued primarily that this Court lacks bankruptcy subject matter jurisdiction. The Court, in denying the motion to remand, determined that the adversary proceeding is at least related to the bankruptcy case of Highland Capital Management.

Now, Bankruptcy Rule 8007 governs in this context of the DAF's motion seeking a stay while it pursues an interlocutory appeal to the district court.

When asked to consider a motion for stay of litigation, this Court, as with any trial court, must determine four factors, which have been eloquently argued here today. And the Court notes that it is the Movant who has the burden to establish the four factors.

And those four factors are, number one, whether the stay applicant has made a strong showing of likelihood to succeed on the merits. And as noted in argument, a likelihood of success on the merits also can be met if the movant presents a substantial case on the merits when a serious legal question is involved and shows that the balance of equities weighs in favor of the stay. That's the *Trend* case that was cited multiple times today. That case said, "A serious legal question has far-reaching effects or is a matter of public concern that goes well beyond the interests of the parties."

This Court does not believe DAF met its burden on that. I do not believe DAF has established a substantial case on the merits on a serious legal question. Of course, the question of subject matter jurisdiction is important, but it's a legal question that every federal court must confront. It's not something at all novel.

I want to emphasize once again what I said earlier today a

couple of times: This Court's main reason for concluding there was at least related to subject matter bankruptcy jurisdiction was this Court believes the claims may be estopped or precluded by prior bankruptcy court litigation and prior bankruptcy court orders. I don't believe this is a novel proposition. I believe bankruptcy courts frequently have to look at their subject matter jurisdiction post-confirmation. I've done it countless times in regard to the *Highland* case.

So, certainly it's an important question. Certainly, it's the first question that any trial court has to ask in any litigation. But I don't think the subject matter jurisdiction question here is what courts have in mind on the topic of is there a substantial case on the merits on a serious legal question.

As I said earlier, I may or may not find dismissal is appropriate based on some sort of preclusion argument. And I think -- I've not studied Alvarez & Marsal's motion to dismiss yet because it's still a few weeks away -- I think there are other arguments they've made. But this is about relatedness to the bankruptcy case. And yes, we're in a post-confirmation time period where subject matter jurisdiction is narrowed. But any time a court, a bankruptcy court or any trial court, feels like it is pressed to interpret and maybe enforce its prior orders or find preclusion because of its prior

litigation, there's going to be subject matter jurisdiction. So I don't find Factor #1 is met here.

With regard to Factor #2, likewise, the Court does not believe Movant has met its burden in establishing that it will be irreparably harmed absent a stay. The argument, of course, is wasted litigation expense and efforts if it has to go forward in this action prior to a ruling on the interlocutory appeal. I think that argument rings hollow for numerous reasons.

One, as pointed out, the motion to dismiss was filed in November. We looked it up during the hearing. November 15th. So DAF has had almost three months to draft a response. And I agree with the notion that the litigation expenses that are going to be incurred more lie at the feet of DAF for deciding to pursue an interlocutory appeal when this issue could certainly be raised perhaps after a ruling on the motion to dismiss or another appropriate time. I don't think --

MR. MCCLEARY: Your Honor?

THE COURT: I don't think this is an extraordinary-enough situation where litigation expenses and efforts are enough to amount to irreparable harm absent a stay.

Third, the Court must look at whether issuance of a stay will substantially injure the other parties interested in the proceeding. Sort of a balance of harm, as the courts say. I don't think Movant DAF has met its burden of showing some sort

of injury. Again, it all boils down to the litigation expense, and I don't think that meets the burden of proof here.

Last, the public interest. I don't think Movant has met the public interest standard here.

And for all of these reasons, the motion for stay is denied.

All right. Anything else?

MR. MCCLEARY: Yes, Your Honor. I just wanted to let the Court know you'd asked who Mark Patrick's predecessor was, --

THE COURT: It was Grant Scott.

MR. MCCLEARY: -- and that was Grant Scott.

THE COURT: I know. I have a longer history in this *Highland* case and adversaries than anyone else, I fear. Grant Scott. He was Mr. Dondero's best friend growing up, college roommate, best man at his wedding. You know, what more. And he ultimately was replaced by Mr. Patrick, I believe in 2021, was Mr. Patrick's testimony on the witness stand.

And I have heard testimony that Mr. Dondero was the investment manager for DAF, and it was funded with Highland money, and there's lots of overlap. Whether people think it establishes privity will maybe be litigated and appealed one day. But I've heard enough in my many years to at least know there are strong ties between CLO Holdco, Charitable DAF,

Hunter Mountain, Mr. Dondero, and that's why this Court has concerns. Okay?

MR. MCCLEARY: Well, Your Honor, obviously, respectfully, the record will speak for itself. I haven't been involved as long as the Court, but I don't recall that Mr. Dondero was an investment manager for the DAF, certainly at any times if at all relevant to this matter. I just want to note that, that I'm certainly not agreeing with the characterizations of his role in this.

THE COURT: Okay.

MR. MCCLEARY: And just --

THE COURT: And if you want to know, among places I heard that was at a hearing where Charitable DAF, your client, then represented by a different law firm, the Sbaiti law firm, post-confirmation sued Highland in the district court, and they filed a motion for leave to add Seery, and then the district court *sua sponte* referred it to down to me, thinking it all sounded bankruptcy-related.

The argument there was in connection with the HarbourVest settlement that happened during the bankruptcy case, where the HarbourVest proof of claim, $300 million proof of claim, was settled in a 9019 settlement agreement, same sort of mechanism as we're talking about with regard to the Redeemer Committee settlement. Later, Charitable DAF sues in connection with, guess what, breach of fiduciary duty and numerous other torts

for Highland's acts and non-acts and nondisclosures and Mr. Seery's in connection with that settlement. Okay? Sounds all very similar. Again, with my long history, I can't help but think of same theory, different proof of claim, different defendant. And in that case, Judge Jane Boyle *sua sponte* sent it down to me, thinking there was bankruptcy subject matter jurisdiction.

So, anyway, perhaps I should have said that earlier. But, you know, --

MR. MCCLEARY: Your Honor?

THE COURT: -- the motion to dismiss was a different animal. And you can look it up to see what happened there. But, again, --

MR. MCCLEARY: Those are different parties, different claims, of course, Your Honor.

THE COURT: No.

MR. MCCLEARY: And different --

THE COURT: It was Charitable DAF. It was Charitable DAF --

MR. MCCLEARY: Well, --

THE COURT: -- as the plaintiff. But it was a different settlement --

MR. MCCLEARY: But --

THE COURT: -- and a different set of defendants. But it was the same, --

MR. MCCLEARY: But, Your Honor, --

THE COURT: -- same theory: Gosh, doesn't this all relate to a settlement the bankruptcy court approved? Okay? I'm just telling you this because, again, I think I used the term *déjà vu* all over again in the order denying the motion for remand. At least from my perspective, I feel like I am ruling on the same thing again and again. Okay?

MR. MCCLEARY: Your Honor, when I said different parties, I meant that Mr. Seery is not a party to our state court action, of course, in this case. And they are different claims. So that's what I was referring to.

The Court also had mentioned that the motion to dismiss was filed in November of last year. But, of course, your opinion, the memorandum opinion denying the motion to remand, it was just issued on January 14th. So I'll just make that note. We were obviously hopeful that we wouldn't have to respond to the motion to dismiss.

THE COURT: Okay. Well, understood. All right. And I apologize if my tone sounds just a little bit annoyed, but again, look through the record. Look through the record of the bankruptcy case. Look through all the case confirmation. Adversaries. And we're kind of seeing the same things get litigated with different parties, sometimes different settlements. But in finding that there's bankruptcy subject --

MR. MCCLEARY: We respectfully submit --

THE COURT: In finding that there's bankruptcy subject matter jurisdiction, I feel like we have been down this road in an extremely analogous situation, with your same client, different law firm, the Sbaiti law firm.

MR. MCCLEARY: Well, we'd respectfully submit that those other matters and issues are outside the instant allegations in this lawsuit. But understand the Court has ruled. And we appreciate your time.

THE COURT: All right. I will look for a short form of order denying the motion, and I'll get it signed as soon as I see it in my queue. And I'll see you on February 27th, unless the district court rules in such a way that I can't. All right. We're adjourned.

THE CLERK: All rise.

MR. KING: Thank you, Your Honor.

MR. MCCLEARY: Thank you, Your Honor.

(Proceedings concluded at 4:02 p.m.)

--oOo--

CERTIFICATE

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

/s/ Kathy Rehling **02/19/2025**

_____ _____

Kathy Rehling, CETD-444 Date

Certified Electronic Court Transcriber

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