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

In re:	§	Chapter 11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Case No. 19-34054-sgj11
	§	
Debtor.	§	
	§	
CHARITABLE DAF FUND, L.P. AND CLO HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§	
	§	
Plaintiffs,	§	Adversary Proceeding No.
	§	
vs.	§	21-03003-sgj11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P., HIGHLAND HCF ADVISOR, LTD., AND HIGHLAND CLO FUNDING LTD., NOMINALLY	§	
	§	
Defendant.	§	
	§	

PLAINTIFFS' AMENDED MOTION TO STAY ALL PROCEEDINGS

I.

NECESSITY OF MOTION

Plaintiffs submit this Motion as a result of the effective date, August 11, 2021, of Defendant Highland Capital Management L.P.'s Chapter 11 plan of reorganization (the "Plan"). The Plan

purports to exculpate Defendants from liability and enjoin Plaintiffs from pursuing actions against them. It also contains an assertion of exclusive jurisdiction by the bankruptcy court.

An appeal of the Plan, which the Fifth Circuit certified for direct appeal under 28 U.S.C. § 158(d), is now before the Court of Appeals and captioned *In re Highland Capital Management, L.P.*, No. 21-10449 (the "Fifth Circuit Appeal"). Each of the issues noted above is raised in the appeal. If successful, the appeal will overturn the exculpation, injunction, and assertion of exclusive jurisdiction in the Plan, allowing Plaintiffs to proceed with this action.

In the meantime, however, Plaintiffs are enjoined from participating further in this pending case and therefore ask that it be stayed pending the outcome of the Fifth Circuit Appeal.

II.

BACKGROUND

On August 9, 2021, Plaintiffs received notice that the Plan was now effective. *In re Highland Capital Management, L.P.*, No. 19-34054, Doc. 2700. Although one condition precedent to the effectiveness of the Plan is finality of the confirmation order, which can only happen once all appeals are resolved, that and all other conditions are waivable by the Debtor. *Id.*, Doc. 1943 at pdf 142-43 (Art. VIII at pp. 45-46). The Debtor's notice, which waived finality and any other unsatisfied conditions, makes the Plan's exculpation provisions and injunctions immediately effective. Plaintiffs respectfully submit that the Final Plan permanently enjoins this lawsuit. It provides:

> Except as expressly provided in the Plan, the Confirmation Order, or a separate order of the Bankruptcy Court, **all Enjoined Parties are and shall be permanently enjoined, on and after the Effective Date, with respect to any Claims and Equity Interests, from directly or indirectly (i) commencing, conducting, or continuing in any manner any suit, action, or other proceeding of any kind (including any proceeding in a judicial, arbitral, administrative or other forum) against or affecting the Debtor or the property of the Debtor**, (ii) enforcing, levying, attaching (including any prejudgment attachment), collecting, or otherwise recovering, enforcing, or

> attempting to recover or enforce, by any manner or means, any judgment, award, decree, or order against the Debtor or the property of the Debtor, (iii) creating, perfecting, or otherwise enforcing in any manner, any security interest, lien or encumbrance of any kind against the Debtor or the property of the Debtor, (iv) asserting any right of setoff, directly or indirectly, against any obligation due to the Debtor or against property or interests in property of the Debtor, except to the limited extent permitted under Sections 553 and 1141 of the Bankruptcy Code, and (v) acting or proceeding in any manner, in any place whatsoever, that does not conform to or comply with the provisions of the Plan.
>
> The injunctions set forth herein shall extend to, and apply to any act of the type set forth in any of clauses (i)-(v) of the immediately preceding paragraph against any successors of the Debtor, including, but not limited to, the Reorganized Debtor, the Litigation SubTrust, and the Claimant Trust and their respective property and interests in property.

(the "Final Plan Injunction") *Id.* at pdf 147-48 (ART. IX.F at pp. 50-51 (underlining and emphasis added)). "Enjoined Parties" is a defined term in the Plan that includes Plaintiffs. *Id.* at pdf 105 (Art. I; ¶ 56 at p.8).

Because these provisions are currently in force and prohibit Plaintiffs from continuing this action, and because the Fifth Circuit Appeal includes direct challenges to the enforceability and validity of these very provisions, Plaintiffs respectfully submit that the most efficient course of action is for this Court to stay this action until the Fifth Circuit Appeal is resolved.

Plaintiffs expect that resolution of the Fifth Circuit Appeal will determine either that the Plan's exculpation and injunction provisions absolve Defendant Debtor of any liability (thus rendering moot the claims against the two non-debtor defendants) or, alternatively, that this action can proceed.

III.

ARGUMENT

This Court should stay all proceedings in the case until the Fifth Circuit Appeal is decided. The Fifth Circuit has long held that "[t]he district court possesses the inherent power to control its

docket." *Marine Chance Shipping v. Sebastian*, 143 F.3d 216, 218 (5th Cir. 1998). The exercise of that power is a discretionary one. *E.g., Petrus v. Bowen*, 833 F.2d 581, 583 (5th Cir. 1987) ("A trial court has broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined.").

Here, Plaintiffs ask this Court to exercise discretion in favor of common sense and efficiency and stay all proceedings. Plaintiffs respectfully submit that, until the appeal is resolved, there are several complex legal questions exist that may affect the viability of this action or the forum in which it should be litigated.

Those questions—including the validity of the Final Plan provisions quoted above—will in all likelihood be resolved by the Fifth Circuit Appeal. And therefore, Plaintiffs submit, judicial and party resources would be best preserved by simply staying all proceedings in this action pending that appeal.

Highland, on the other hand, contends that this Court should deny the stay, and decide its pending 12(b)(6) motion on the merits. This Court should not do so for a few reasons:

First, it would seem that the entire purpose of the Final Plan Injunction is to simply put all litigation against the debtor to an end—thus avoiding the necessity of litigating the merits (and the attend expenditures of time and money). "Article III of the Constitution limits federal 'Judicial Power,' that is, federal-court jurisdiction, to 'Cases' and 'Controversies.'" *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 395, 100 S. Ct. 1202 (1980). This Court's Final Plan Injunction has effectively disposed of the matter and this Court can simply enforce it irrespective of the merits of this dispute, rendering the 12(b)(6) motion, and the issues raised therein, moot. *Accord Powell v. McCormack*, 395 U.S. 486, 496, 89 S. Ct. 1944, 1951 (1969) ("Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in

the outcome."); *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 72-73 (1983) ("Because of the position that the University has taken irrespective of the outcome of this lawsuit, we conclude that the case is moot and that the Court of Appeals had no jurisdiction to decide it."). Indeed, were this Court to issue an opinion resolving the underlying claims on the merits, it would be an advisory opinion, which this Court lacks jurisdiction to issue. *See Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 880, 885 (N.D. Tex. 2008).

Second, this Court should not force Plaintiffs (or their counsel) to argue the 12(b)(6) motion because this Court has specifically enjoined them from "conducting or continuing in any manner" any claim against the Debtor. Plaintiffs and their Counsel are rightfully concerned that by arguing the 12(b)(6) motion in favor of non-dismissal, they would be violating the Final Plan Injunction and would be subject to sanctions.

Third, were this Court to deny the stay, Plaintiffs would respectfully submit that the merits of the 12(b)(6) motion must be decided by the district court under 15 U.S.C. § 157(d). While the district court referred this case to this Court for general proceedings under the standing order (*see* Doc. 64), because the 12(b)(6) Motion involves issues of federal securities laws and regulations, withdrawal of the reference is mandatory. Plaintiffs are again concerned, however, that by moving to withdraw the reference, that could be construed as "conducting or continuing" a claim against the Debtor, once again opening Plaintiffs and their counsel to potential sanctions for violations of the injunction. Accordingly, if this Court intends to deny the stay for any reason, Plaintiffs respectfully submit here, as an offer of proof, a proposed motion to withdraw the reference, which they would file were they not enjoined from conducting or continuing this litigation. The proposed motion is attached hereto as Exhibit A.

Finally, Highland's position is contrary to the position it has taken in two other matters. Specifically, there, Highland moved to lift the stays granted in those cases and have the cases dismissed based upon the Final Plan Injunction. *PCMG Trading Partners XXIII, L.P. v. Highland Capital Management L.P.*, No. 3:21-cv-01169-N (N.D. Dist. Tex.) (Docs. 8 through 13) and *The Charitable DAF Fund, L.P. v. Highland Capital Management L.P.*, No. 3:21-cv-01710-N (N.D. Dist. Tex.) (Docs. 8 through 13). That Highland requested dismissal pursuant to the Final Plan Injunction in those cases but not here is revealing. The Final Plan Injunction is the only basis to dismiss this case. As for why this Court should stay this proceeding and not dismiss outright based upon its Final Plan Injunction, that answer is predicated on judicial and party efficiency. Were this Court to dismiss this action based upon the Final Plan Injunction, Plaintiffs would be forced to appeal the dismissal predicated, at least in part, on the validity of the injunction. That would likely then dovetail with the pending appeal of the Final Plan, *writ large*. If the Fifth Circuit Appeal were to result in reversal of the Final Plan Injunction, then the case would be right back here and could at that time proceed to the merits. If the appeal were to ultimately result in an affirmance, then this Court could simply dismiss the case based upon the Final Plan Injunction. There is no reason for the additional cost of attorney time and paperwork of triggering an appeal, docketing the appeal, designating the appellate record, etc.

IV.

CONCLUSION

Plaintiffs are wholly prohibited from participating further in this action by the now-effective terms of the Plan that purport to enjoin Plaintiffs and exculpate Defendant Highland. In light of their inability to conduct the litigation and the pending Fifth Circuit Appeal, which that court has certified for direct appeal. Plaintiffs respectfully submit that the most appropriate course

for this Court is to stay all proceedings until the appeal is decided, or dismiss the action based upon the Final Plan Injunction. Plaintiffs therefore respectfully request a stay and all further relief to which they may be entitled.

Dated: November 10, 2021

Respectfully submitted,

SBAITI & COMPANY PLLC

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COUNSEL FOR PLAINTIFFS

CERTIFICATE OF CONFERENCE

I hereby certify that, in a series of communications between August 13 and 26, 2021, I conferred with Defendant's counsel regarding this Motion, and counsel indicated that they are opposed to the relief sought in this Motion.

/s/ Jonathan Bridges
Jonathan Bridges

EXHIBIT A

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	§	
Defendant.	§	
	§	

MOTION TO WITHDRAW REFERENCE AND BRIEF IN SUPPORT

The Charitable DAF Fund, L.P. and CLO Holdco, Ltd., Plaintiffs in the above-referenced adversary proceeding, file this Motion under 28 U.S.C. § 157(d), Rule 5011 of the Federal Rules of Bankruptcy Procedure, and Rule 5011-1 of the Local Bankruptcy Rules, and respectfully ask the Court to withdraw the reference pursuant to its standing order, Ord. of Reference of Bankr.

Cases & Proc. Nunc Pro Tunc, In re Misc. Ord. No. 3:04-MI-00033 (N.D. Tex. Oct. 4, 1982), as to the above-referenced adversary proceeding.

A. Withdrawal Of The Reference Is Mandatory

1. This adversary proceeding primarily involves fiduciary duties imposed upon Registered Investment Advisers by the Investment Advisers Act of 1940 ("Advisers Act") and corresponding state law claims for breach of those duties. It also involves causes of action under the civil RICO statute, for which breaches of Advisers Act fiduciary duties serve as the predicate act. As a result, presiding over this action will require extensive consideration of federal laws regulating interstate commerce, which renders withdrawal of the reference to bankruptcy court mandatory under 28 U.S.C. § 157(d).

2. Under § 157(d), withdrawal of the reference is mandatory when a proceeding "requires consideration" of non-bankruptcy federal laws regulating interstate commerce:

> The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

28 U.S.C. § 157(d); *cf. TMT Procurement Corp. v. Vantage Drilling Co. (In re TMT Procurement Corp.)*, 764 F.3d 512, 523 & n.40 (5th Cir. 2014) (noting bankruptcy court's "more limited jurisdiction" as a result of its "limited power" under 28 U.S.C. § 157); *LightSquared Inc. v. Deere & Co.*, 2014 U.S. Dist. LEXIS 14752 (S.D.N.Y. 2014) (quoting *Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 454 B.R. 307, 312 (S.D.N.Y. 2011), for the proposition that, "[i]n determining whether withdrawal is mandatory, the Court 'need not evaluate the merits of the parties' claims; rather, it is sufficient for the Court to determine that the proceeding will involve

consideration of federal non-bankruptcy law'"); *In re Cont'l Airlines Corp.*, 50 B.R. 342, 360 (S.D. Tex. 1985), *aff'd*, 790 F.2d 35 (5th Cir. 1986) ("While that second clause [of § 157(d)] might not apply when some 'other law' only tangentially affects the proceeding, it surely does apply when federal labor legislation will likely be material to the proceeding's resolution.") (emphasis added).

3. Plainly here, the claims in the Complaint at least involve federal laws "regulating organizations or activities affecting interstate commerce." The Advisers Act and the RICO statute are such laws, and at least the first and fourth counts of the Complaint sound under them. *See, e.g.*, Complaint ¶¶ 57 & n.5, 66, 69, 74 & n.6, 89 (explicitly invoking various provisions of the Advisers Act and accompanying regulations), 114, 117, 131, 132 (invoking the RICO statute). Defendant's entire argument against withdrawal of the reference thus turns on whether these laws "must be considered."

4. It is readily apparent that these statutes must be considered in this adversary proceeding. The briefing already puts at issue significant, hotly contested issues regarding the interplay of bankruptcy law and the Advisers Act, including

- Whether Defendant owed fiduciary duties under the Advisers Act that are unwaivable;
- To whom such duties are owed and whether they were violated;
- Whether such Advisers Act fiduciary duties can be terminated by a blanket release in a bankruptcy settlement;
- Whether res judicata applies to bar claims for breach of Advisers Act duties that had not yet accrued at the time of the action alleged to have barred them;
- Whether a contractual jury waiver is enforceable as to claims for breach of unwaivable Advisers Act fiduciary duties;
- Whether such waivers can be enforced as to non-parties to the waiver;
- Whether breach of Advisers Act fiduciary duties can serve as a predicate for civil RICO liability under the RICO statute, among other significant legal issues.

Presiding over this action most certainly will require consideration of all these issues.

5. Before joining the Fifth Circuit, Judge Clement addressed a similar matter during her time in the Eastern District of Louisiana. There, in *In re Harrah's Entm't*, 1996 U.S. Dist. LEXIS 18097, at *7-8 (E.D. La. 1996), she denied a motion to refer a federal securities action to bankruptcy court, despite finding that the bankruptcy court had related-to jurisdiction. Judge Clement wrote,

> Although "related to" bankruptcy jurisdiction exists over the non-debtor plaintiffs' non-bankruptcy federal securities claims against non-debtor defendants, placing that bankruptcy jurisdiction in the bankruptcy court is inappropriate because plaintiffs would be entitled to a mandatory withdrawal of the reference. Rather than waste judicial resources on a meaningless referral to bankruptcy court, the Court will retain jurisdiction over this suit.

Id. at *11.

6. Judge Clement rejected the argument that the case would "only involve the simple application of established federal securities laws." *Id*. at *7. Instead, she relied on alleged "violations of several federal securities laws" and the plaintiff's attempt "to hold defendants directly liable and secondarily liable based on a 'controlling person' theory for certain acts and omissions." *Id*.

7. Without any need to analyze how "established" the applicable law might be, Judge Clement concluded, "This federal securities litigation involves more than simple application of federal securities laws and will be complicated enough to warrant mandatory withdrawal under § 157(d)." *Id*. (citing *Rannd Res. v. Von Harten (In re Rannd Res.)*, 175 B.R. 393, 396 (D. Nev. 1994), for the proposition that withdrawal of the reference is mandatory where resolution requires more than simple application of federal securities laws, even though that court's determination

was based solely on a review of the complaint's alleged violations of § 12(2) of the Securities Act of 1933, § 10 of the Securities Exchange Act of 1934, and Rule 10b-5).

8. This authority is on all fours here. In the Complaint, Plaintiffs allege violations of federal securities law (the Advisers Act), as well as the RICO statute. Deciding even the pending motion to dismiss will require far more than simple application of these laws. Nothing more is necessary to satisfy § 157(d). *Cf. In re IQ Telecomms., Inc.*, 70 B.R. 742, 745 (N.D. Ill. 1987) ("Nevertheless, Central's second amended complaint easily meets [the § 157(d)] standard. Count 2 of the complaint consists of 76 pages and alleges that 29 individuals and entities violated RICO by engaging in a pattern of mail fraud, 18 U.S.C. § 1341, wire fraud, 18 U.S.C. § 1343, and 139 specific instances of bankruptcy fraud, 18 U.S.C. § 152."); *S. Pac. Transp. Co. v. Voluntary Purchasing Gps.*, 252 B.R. 373, 382-84 (E.D. Tex. 2000) (holding that even the court's "limited" role in approving a CERCLA settlement "necessarily involves the substantial and material consideration of CERCLA" and "will require the court to examine the unique facts of the case in light of those CERCLA provisions which create the causes of action at issue"). *Compare id.* at 382 ("It is well settled that CERCLA is a statute "'rooted in the commerce clause' and is precisely 'the type of law . . . Congress had in mind when it enacted the statutory withdrawal provision [in § 157(d)].'" *with* the Advisers Act, 15 U.S.C. § 80b-1 ("Upon the basis of facts disclosed by the record and report of the Securities and Exchange Commission made pursuant to section 30 of the Public Utility Holding Company Act of 1935, and facts otherwise disclosed and ascertained, it is hereby found that investment advisers are of national concern, in that, among other things—(1) their advice, counsel, publications, writings, analyses, and reports are furnished and distributed, and their contracts, subscription agreements, and other arrangements with clients are negotiated and performed, by the use of the mails and means and instrumentalities of interstate commerce;

(2) their advice, counsel, publications, writings, analyses, and reports customarily relate to the purchase and sale of securities traded on national securities exchanges and in interstate over-the-counter markets, securities issued by companies engaged in business in interstate commerce, and securities issued by national banks and member banks of the Federal Reserve System; and (3) the foregoing transactions occur in such volume as substantially to affect interstate commerce, national securities exchanges, and other securities markets, the national banking system and the national economy.").

9. Although it is unnecessary to demonstrate that Plaintiffs' Advisers Act allegations will require application of underdeveloped law, that is certainly the case. As the Third Circuit pointed out in 2013, there is considerable "confusion" in the case law stemming from the fact that federal law (the Advisers Act) provides "the duty and the standard to which investment advisers are to be held," but "the cause of action is presented as springing from state law." *Belmont v. MB Inv. Partners, Inc.*, 708 F.3d 470, 502 (3d Cir. 2013). The *Belmont* court further suggests the "confusion [that this situation] engenders may explain why there has been little development in either state or federal law on the applicable standards." *Id*. (emphasis added). "Half a century later," the *Belmont* court tells us, "courts still look primarily to *Capital Gains Research[, Inc.*, 375 U.S. 180, 192 (1963),] for a description of an investment adviser's fiduciary duties." *Id*. at 503; *see also* Plaintiffs' Response to Motion to Dismiss (addressing the Debtor's erroneous argument that the Advisers Act creates no private right of action). This observation is bolstered by the necessity of relying extensively on SEC regulations and rulings in the Complaint. *See* Complaint ¶ 57 & n.5 (invoking Investment Advisers Act Release Nos. 3060 (July 28, 2010), and 2106 (Jan. 31, 2003), 66 (17 C.F.R. 275.206(4)-7), 69 (27 C.F.R. part 275 and Rule 10b5-1), 74 & n.6 (Advisers Act Release No. 4197 (Sept. 17, 2015)).

B. This Adversary Proceeding Is Not A Core Proceeding

10. In previous briefing, the Debtor has suggested that this adversary proceeding should remain in bankruptcy court because it is a core proceeding under Title 11. Plaintiffs respectfully submit this is incorrect because the causes of action asserted in the Complaint do not "arise under," or "arise in" Title 11 and therefore cannot be "core" proceedings.

11. To be clear, Plaintiffs are not seeking and hereby disclaim any relief that would literally unwind or reverse any settlement approved by the bankruptcy court. Neither do they attempt an end run around the provisions of any approval. They merely seek vindication of their rights via damages, and they respectfully submit that a proper jurisdictional analysis demonstrates their causes of action are not core proceedings within the bankruptcy court's jurisdiction, for the reasons addressed below.

12. ***First***, "the 'core proceeding' analysis is properly applied not to the case as a whole, but as to each cause of action within a case." *Legal Xtranet, Inc. v. AT&T Mgmt. Servs., L.P. (In re Legal Xtranet, Inc.)*, 453 B.R. 699, 708–09 (Bankr. W.D. Tex. 2011); *Davis v. Life Inv'rs Ins. Co. of Am.*, 282 B.R. 186, 193 n. 4 (S.D. Miss.2002); *see also In re Exide Techs.*, 544 F.3d 196, 206 (3d Cir. 2008) ("A single cause of action may include both core and non-core claims. The mere fact that a non-core claim is filed with a core claim will not mean the second claim becomes 'core.'").

13. ***Second***, the Fifth Circuit has explained that "§ 157 equates core proceedings with the categories of 'arising under' and 'arising in' proceedings; therefore, a proceeding is core under section 157 if it invokes a substantive right provided by title 11[, it 'arises under' the Bankruptcy Code,] or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case[, it 'arises in' a bankruptcy case]." *United States. Brass Corp. v. Travelers Ins. Grp., Inc. (In*

re United States Brass Corp.), 301 F.3d 296, 304 (5th Cir. 2002); *TXMS Real Estate Invs., Inc. v. Senior Care Ctrs., LLC (In re Senior Care Centers, LLC)*, 622 B.R. 680, 692–93 (Bankr. N.D. Tex. 2020); Stern v. Marshall, 564 U.S. 462, 476 (2011).

14. ***Third***, none of the Plaintiffs' five causes of action—breach of fiduciary duty under the Advisers Act, breach of contract related to the HCLOF Company Agreement, negligence, RICO, and tortious interference—arise under title 11. That is, none of the substantive rights of recovery are created by federal bankruptcy law. And plainly so. Because "[a]rising under' jurisdiction [only] involve[s] cause[s] of action created or determined by a statutory provision of title 11," this is indisputably the case. *Wood v. Wood (In re Wood)*, 825 F.2d 90, 97 (5th Cir.1987) (noting that a proceeding does not "arise under" Title 11 if it does not invoke a substantive right, created by federal bankruptcy law, that could not exist outside of bankruptcy).

15. ***Fourth***, for similar reasons, none of Plaintiffs' causes of action "arise in" a bankruptcy case. "Claims that 'arise in' a bankruptcy case are claims that by their nature, not their particular factual circumstance, could only arise in the context of a bankruptcy case." *Legal Xtranet, Inc.*, 453 B.R. at 708–09 (emphasis added) (citing *Stoe v. Flaherty*, 436 F.3d 209, 216 (3d Cir. 2006). The Debtor has previously argued that, because the factual circumstances giving rise to the causes of action included the HarbourVest Settlement, which was approved by the bankruptcy court, this somehow transforms Plaintiffs' causes of action into core claims. But it is the nature of the causes of action that determines whether they are core, not their "particular factual circumstance." *Id*.

16. To illustrate the point, in *Gupta v. Quincy Med. Ctr.*, 858 F.3d 657, 660 (1st Cir. 2017), the bankruptcy court had issued a sale order which approved an asset purchase agreement whereby the purchaser became obligated to make certain payments to employees. The purchaser

failed to make these payments, so the employees sued the purchaser in bankruptcy court, and the bankruptcy judge rendered a judgment in favor of the employees. On appeal, the district court concluded that the bankruptcy court lacked subject matter jurisdiction over the claims—claims plainly related to and existing only because of the approved sale order that gave rise to them. The First Circuit affirmed, explaining as follows:

> [T]he fact that a matter would not have arisen had there not been a bankruptcy case does not ipso facto mean that the proceeding qualifies as an 'arising in' proceeding. Instead, the fundamental question is whether the proceeding by its nature, not its particular factual circumstance, could arise only in the context of a bankruptcy case. In other words, it is not enough that Appellants' claims arose in the context of a bankruptcy case or even that those claims exist only because Debtors (Appellants' former employer) declared bankruptcy; rather, "arising in" jurisdiction exists only if Appellants' claims are the type of claims that can only exist in a bankruptcy case.

Id. at 664–65 (emphasis added).

17. Like the claims in *Gupta*, the Plaintiffs' causes of action here arose in the context of a transaction approved in a bankruptcy case. But obviously, the causes of action are not "the type of claims that can only exist in a bankruptcy case." And that ends the analysis. Because Plaintiffs' causes of action do arise under the Bankruptcy Code, and because they are not claims that could only arise in the context of bankruptcy, this action is not a core proceeding.

C. The Bankruptcy Court Has Limited Post-Confirmation "Related-To" Jurisdiction

18. Plaintiffs do not contest that this action is related to the bankruptcy case in some fashion. But "related to" jurisdiction is a term of art with differing requirements depending on the status of the bankruptcy case. In its current, post-confirmation status, Plaintiffs respectfully submit that the bankruptcy court lacks even "related to" jurisdiction over this action.

19. "Related to" jurisdiction is meant to avoid piecemeal adjudication and promote judicial economy by aiding in the efficient and expeditious resolution of all matters connected to

the debtor's estate. *See Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 752 (5th Cir.1995). Importantly, proceedings merely "related to" a case under title 11 are considered "non-core" proceedings. *Stern*, 564 U.S. at 477; COLLIER ON BANKRUPTCY ¶ 3.02[2], p. 3–26, n.5 (16th ed. 2010) ("The terms 'non-core' and 'related' are synonymous.").

20. The jurisdictional standard for "related to" jurisdiction varies depending on whether the proceeding at issue was commenced pre- or post-confirmation. *See Beitel v. OCA, Inc. (In re OCA, Inc.)*, 551 F.3d 359, 367 at n.10 (5th Cir. 2008). And "after confirmation of a reorganization plan, a stricter post-confirmation standard applies." S*ee Bank of La. v. Craig's Stores of Tex., Inc. (In re Craig's Stores of Tex., Inc.)*, 266 F.3d 388, 390–91 (5th Cir.2001) (explaining this distinction).

21. Essentially, "after a debtor's reorganization plan has been confirmed, the debtor's estate, and thus bankruptcy jurisdiction, ceases to exist, other than for matters pertaining to the implementation or execution of the plan." *Id*. 266 F.3d at 390; *Faulkner v. Eagle View Capital Mmgt. (In re The Heritage Org., L.L.C.)*, 454 B.R. 353, 358 (Bankr. N.D. Tex. 2011).

22. Here, on February 22, 2021, the Bankruptcy Court entered the Order (I) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (II) Granting Related Relief [Bankruptcy Court Dkt. No. 1943]. The Complaint was filed on April 12, 2021. Thus, the proceeding was commenced post-confirmation.

23. There is no contending here that this action involves "matters pertaining to the implementation or execution of the plan," as required under *Craig's Stores*. Certainly Plaintiffs can think of no way that their action affects plan "implementation or execution." Thus, it follows that the bankruptcy court's related-to jurisdiction over this matter, if ever there were any, has now ended.

24. While the Debtor may argue that the bankruptcy court has "related to" jurisdiction as a result of a judgment potentially reducing available cash to pay creditors under the confirmed plan, this is precisely the argument that the Fifth Circuit rejected in *Craig's Stores*. *See Coho Oil & Gas, Inc. v. Finley Res., Inc. (In re Coho Energy, Inc.)*, 309 B.R. 217, 220 (Bankr. N.D. Tex. 2004) (recognizing the rejection of this argument). As the Fifth Circuit explained: "while Craig's insists that the status of its contract with the Bank will affect its distribution to creditors under the plan, the same could be said of any other post-confirmation contractual relations in which Craig's is engaged." 266 F.3d at 391. And that type of effect does not meet the threshold for post-confirmation related-to jurisdiction.

25. The Debtor may also contend that there is post-confirmation "related to" jurisdiction because the lawsuit will delay payments to creditors under the confirmed plan. But this is just a repackaged reduction-in-assets argument. The same would be true of any post-confirmation lawsuit against the Debtor and does not meet the "more exacting theory of post-confirmation bankruptcy jurisdiction" required by *Craig's Stores*. *See Montana v. Goldin (In re Pegasus Gold Corp.)*, 394 F.3d 1189, 1194 (9th Cir. 2005) (stating "post-confirmation bankruptcy court jurisdiction is necessarily more limited than pre-confirmation jurisdiction, and … the *Pacor* formulation [used to analyze related-to jurisdiction] may be somewhat overbroad in the post-confirmation context"); *Faulkner v. Kornman*, No. 10-301, 2015 Bankr. LEXIS 700 (Bankr. S.D. Tex. 2015) (stating "[t]he general rule is that post-confirmation subject matter jurisdiction is limited"); *Triad Guar. Ins. v. Am. Home Mortg. Inv. Corp (In re Am. Home Mortg. Holding)*, 477 B.R. 517, 529-30 (Bankr. D. Del. 2012) (stating "[a]fter confirmation… the test for ' related to ' jurisdiction becomes more stringent if the plaintiff files its action after the confirmation date")

(emphasis in original); *cf. Price v. Rochford*, 947 F.2d 829, 832 n.1 (7th Cir. 1991) (noting that "after a bankruptcy is over, it may well be more appropriate to bring suit in district court").

26. Finally, the retention of jurisdiction in the confirmed plan does nothing to alter the forgoing analysis. *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 151 (2009). A bankruptcy court may not "retain" jurisdiction it does not have. *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 (1995). "[N]either the parties nor the bankruptcy court can create § 1334 jurisdiction by simply inserting a retention of jurisdiction provision in a plan of reorganization if jurisdiction otherwise is lacking." *Valley Historic Ltd. P'ship. v. Bank of N.Y.*, 486 F.3d 831, 837 (4th Cir. 2007); *see also Zerand–Bernal Group, Inc. v. Cox*, 23 F.3d 159, 164 (7th Cir. 1994) ("[O]rders approving [a] bankruptcy sale [or] . . . plan of reorganization . . . [cannot] confer jurisdiction. A court cannot write its own jurisdictional ticket.").

27. In sum, because 28 U.S.C. § 157(d) mandates withdrawal of the reference here, because this is not a "core" proceeding, and because the bankruptcy court lacks even "related to" jurisdiction at this stage, the Court should withdraw the reference as to this adversary proceeding and grant Plaintiffs all additional relief to which they may be entitled.

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Respectfully submitted,

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