Docket #1823 Date Filed: 01/22/2021

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

In re:	)	Chapter 11
	)	
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	)	Case No. 19-34054-sgj11
Debtor.	)	
	)	**Docket Ref. Nos. [1472, 1661, 1666, 1667, 1669-71, 1673-77, 1807]**

RESPONSE OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS IN SUPPORT OF CONFIRMATION TO DEBTOR'S FIFTH AMENDED PLAN OF REORGANIZATION AND JOINDER TO DEBTOR'S OMNIBUS REPLY TO OBJECTIONS TO CONFIRMATION OF THE FIFTH AMENDED CHAPTER 11 PLAN OF REORGANIZATION OF HIGHLAND CAPITAL MANAGEMENT, L.P.

The official committee of unsecured creditors (the "Committee")[2] of Highland Capital Management, L.P. (the "Debtor"), hereby submits this statement in support of an order confirming the *Debtor's Fifth Amended Plan of Reorganization* (the "Plan"). The Committee also joins in the *Debtor's Omnibus Reply to Objections to Confirmation of the Fifth Amended Chapter 11 Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1807] (the "Debtor's Reply") and adopts the legal argument and authority set forth therein.[3] In support of the Plan, the Committee respectfully states as follows:

[1] The Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

[2] The Committee consists of (i) Redeemer Committee of Highland Crusader Fund, (ii) Meta-e Discovery, (iii) UBS Securities LLC and UBS AG London Branch, and (iv) Acis Capital Management, L.P. and Acis Capital Management GP, LLP.

[3] All capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Plan or the Debtor's Reply.

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PRELIMINARY STATEMENT

1. The Committee fully supports confirmation of the Plan. Confirmation of the Debtor's Plan represents the next critical step in vindicating the rights of the Debtor's creditors, several of whom have been seeking payment of their claims for over a decade. Two key achievements during this case led to the formulation of the Plan currently before the Court: (1) the removal of Jim Dondero from control of the Debtor and installation of an independent board of directors and CEO and (2) the settlement and resolution of the largest unsecured claims against the Debtor. The Committee was the catalyst for the removal of Mr. Dondero and the creating and implementation of the bespoke governance protocol and has been actively involved in every critical aspect of this case, including designing and negotiating the terms of the Plan. As the Court is aware, plan negotiations between the Committee and the Debtor were hard fought (as demonstrated by the Committee's successful objection to the Disclosure Statement, for example) and ultimately resulted in the Plan. The Committee believes confirmation of the Plan is in the best interests of the Debtor's unsecured creditors and respectfully requests that the Court confirm the Plan.

2. The Plan has received overwhelming support from the Debtor's unsecured creditors. Every unsecured creditor in Class 7 (Convenience Claims) voted in favor of the Plan. *See* [Docket No. 1772], Ex. A. Unsecured creditors holding more than $300 million (or 93.4%) of Allowed General Unsecured Claims in Class 8 (in the aggregate) also voted in favor of the Plan. *See id*. All of the 31 Class 8 votes against the Plan were cast by either: (i) current or former employees or statutory insiders of the Debtor with close ties to Mr. Dondero or (ii) employees with contingent claims that either will be paid in full in the ordinary course or do not qualify for payment

under the terms of the Debtor's bonus plan. *See* [Docket No. 1772], Ex. A. Consequently, all of the Debtor's non-insider creditors voted in favor of the Plan.

3. The unresolved objections to confirmation should be overruled. Nearly all of the substantive objections to confirmation of the Plan were filed by Mr. Dondero, entities owned and/or controlled by Mr. Dondero, and certain current and former employees of the Debtor, who have a well-documented history of loyalty to Mr. Dondero. No plan will satisfy Mr. Dondero, however, unless such plan gives him control over the Debtor's assets and business. Yet Mr. Dondero has been unwilling to acquire such control legitimately, by proposing an alternative plan that would put creditors in a better position than under the current Plan. Nor is Mr. Dondero willing to pay for a release of valuable Estate Claims and causes of action against him, which claims the current Plan preserves for the benefit of creditors. As such, the Plan represents the best available alternative for the Debtor's creditors and should be confirmed.

4. The Plan's structure is straightforward: it provides for the orderly monetization of all of the Debtor's assets, including claims and causes of action, and distribution of the proceeds to stakeholders in accordance with applicable legal priorities. For the reasons set forth below and in the Debtor's Reply, in which the Committee joins, the Plan satisfies all requirements for confirmation under the Bankruptcy Code.

I. The Debtor Release, Exculpation, and Injunction Provisions are Appropriate and Warranted under Fifth Circuit Law.

5. Nearly all objections filed directly or indirectly by Mr. Dondero raise objections to the Debtor Release, Exculpation, and/or Injunction provisions under the Plan. Each of the Debtor Release, Exculpation, and Injunction, however, are entirely appropriate and warranted under the circumstances of this case. Mr. Dondero (personally and through his affiliates) continue to pursue

reckless litigation tactics in an effort to inflict additional costs on the Estate (and deplete value available for creditors) and bully the Debtor's CEO (and possibly other employees) into doing what he wants. Indeed, as the Court is aware, Mr. Dondero made explicit threats to the Debtor's CEO in recent weeks and remains unapologetic about doing so.[4] Allowing Mr. Dondero and his affiliates to continue these tactics will cause significant additional harm to the Estate and creditors. Accordingly, the Debtor Release, Exculpation, Injunction and similar provisions are vital to the ultimate success of the Plan.

A. The Debtor Release is Not a Non-Consensual Third Party Release.

6. The Dugaboy Investment Trust and Get Good Trust [Docket No. 1667], the Funds and Advisors [Docket No. 1670], United States Trustee [Docket No. 1671], NexPoint Real Estate Partners, LLC [Docket No. 1673], CLO Holdco, Ltd. [Docket No. 1675], and NexPoint RE Entities [Docket No. 1677] (collectively, the "Release Objectors") each raised an objection or joined in an objection to the Debtor Release. In objecting to the Debtor Release, however, each of the Release Objectors appear to either misunderstand or willingly ignore the reality that it is only *the Debtor* releasing the Released Parties under the Plan. Each Release Objector relies on *Pacific Lumber Company*, in which case the release at issue was a release of claims held by an *objecting creditor* against a *nondebtor—i.e.*, a third-party release. *See In re Pacific Lumber Co.*, 584 F.3d 229, 253 (5th Cir. 2009) (striking the non-consensual non-debtor releases except with respect to the creditors' committee and its members); Appellants' Brief at 55, *Bank of New York Mellon Trust Co., N.A. v. Official Unsecured Creditors' Committee*, Case No. 08-40746, 2008 WL 7404489

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[4] *See, e.g.* Hr'g Tr. 22:9-13 (Dec. 10, 2020) ("While [the Court] appreciate[s] Mr. Bonds doing what was an honorable thing apologizing on behalf of his client for the written communications that were worded in such a way where someone might think they were threatening or a violation of the stay, it wasn't an apology from Mr. Dondero directly.").

(5th Cir. Aug. 25, 2008) (describing non-debtor release at issue). Here, however, the Debtor Release provides that "[o]n and after the Effective Date, each Released Party is deemed to be, hereby conclusively, absolutely, unconditionally, irrevocably, and forever released and discharged *by the Debtor and the Estate* . . ." *See* Plan, Art. IX.D (emphasis added). No non-Debtor party is being forced to release any claims against another non-Debtor party. As such, the reliance of each Release Objector on *Pacific Lumber Company* is misguided and irrelevant.

7. On the contrary, section 1123(b)(3)(A) of the Bankruptcy Code explicitly permits that a plan provide for the settlement of any claim or interest held by the debtor or the estate. *See* 11 U.S.C. § 1123(b)(3)(A). In other words, the Debtor Release constitutes an acceptable settlement of claims against a limited scope of parties (*i.e.*, the estate fiduciaries and their principals and professionals) without which the Debtor could not achieve confirmation. *See, e.g.*, *In re Bigler LP*, 442 B.R. 537, 547 (Bankr. S.D. Tex. 2010) (finding that a debtor release was an acceptable settlement of claims under section 1123(b)(3)(A) in exchange for consideration provided by the released parties). Accordingly, the Committee respectfully submits that the objections raised by each of the Release Objectors should be overruled.

B. The Exculpation Provision is Sufficiently Tailored to Comply with Fifth Circuit Law.

8. The Release Objectors and Mr. Dondero [Docket No. 1661](collectively, the "Exculpation Objectors") rely again on *Pacific Lumber Company* in objecting to the Plan's Exculpation provision. Again, this reliance is misplaced. The holding in *Pacific Lumber Company* is limited to striking an exculpation and release clause that was tantamount to a non-consensual non-debtor release. *See Pacific Lumber Co.*, 584 F.3d at 253. The Exculpation Objectors also cite *Thru, Inc.*, where the District Court for the Northern District of Texas held that an exculpation

clause was too broad when the exculpated parties included the debtor, its officers, directors, employees, agents, advisors, and affiliates. *See In re Thru, Inc.*, 2018 WL 5113124, *22 (N.D. Tex. Oct. 19, 2018).

9. Initially, the Committee too was concerned with the breadth of the proposed Exculpation provision and asserted that it was in contravention of applicable law because, at the time, the "Exculpated Parties" included, among others, Strand and "Related Persons" of the Debtor and Strand (which definition at the time was likely to sweep in the majority of the Highland enterprise). *See* [Docket No. 1239] at ¶ 15. In response to the Committee's objection, the Debtor further restricted the scope of the Exculpation provision to protect only the fiduciaries in this case (*i.e.*, the Debtor and the Committee), directors and officers specifically appointed post-petition by order of the Bankruptcy Court [Docket Nos. 339, 776], and each of their professionals, no longer including the "Related Persons" of the Debtor, Strand or the Employees. *See* [Docket No. 1455]; Plan, Art. IX.C. This is simply not a sweeping and overbroad provision like those objected to in *Pacific Lumber Co.* (which included non-debtor plan sponsors) and *Thru, Inc.* (which included prepetition directors and officers and the debtor's affiliates). Moreover, the Exculpation provision contains the customary carve-outs for bad faith, fraud, gross negligence, criminal misconduct, and willful misconduct. Accordingly, the Committee respectfully submits that the Exculpation provision is appropriate and should be approved.

C. The Injunction Provision Complies with Fifth Circuit Law.

10. The Exculpation Objectors, other than the US Trustee (collectively, the "Injunction Objectors") further object to the Plan's Injunction provision as being impermissible under Fifth Circuit law. In their objections, the Injunction Objectors primarily rely on *Matter of Zale Corp.*, in which case the Fifth Circuit took issue with injunctions that would effectively discharge non-

debtors from any liability to third parties. *See Matter of Zale Corp.*, 62 F.3d 746, 760 (5th Cir. 1995). Again, this case is distinguishable. This is not the case where there will be a non-debtor sponsor or affiliate against which parties can seek recourse, nor will there be a reorganized debtor with a purpose other than to facilitate the monetization process.

11. Rather, here, there is an identity of interest in each of the "Protected Parties" as they would all look to the Debtor's Estate to defend claims: (a) the Reorganized Debtor will have to use the Estate funds to defend any claim made against itself or any of its subsidiaries that do not hold capital of their own; (b) Strand, as structured by Mr. Dondero, is not independently funded and would have to look to the Debtor's Estate; (c) the Independent Directors and CEO are each indemnified by the Debtor either directly or under its directors and officers insurance policy (*see, e.g.*, [Docket No. 854] at ¶ 4); (d) the Committee is a statutory fiduciary whose professional fees and expenses are paid by the Debtor's Estate; (e) the Claimant Trust will be funded by cash of the Estate and will not be generating revenue for any purpose other than making distributions to beneficiaries in accordance with the Plan; (f) each of the Claimant Trustee, Litigation Trustee, Oversight Board, and members of the Oversight Board will be indemnified by the Claimant Trust (*see* Claimant Trust Agreement, Art. 8.2); (g) the Litigation Sub-Trust and Litigation Trustee will be funded exclusively by the Claimant Trust (*see* Litigation Sub-Trust Agreement, Art. 1.1(q)); and (h) retained Professionals are in the ordinary course indemnified by their clients. In other words, any attempt to litigate against a "Protected Person" would be an attempt to litigate against and recover from the Debtor's Estate. Those are the precise circumstances under which the Fifth Circuit noted it would be appropriate to issue an injunction akin to the Injunction set forth in the Plan. *See Zale Corp.*, 62 F.3d at 761 (finding that a permanent injunction may be proper under unusual circumstances, such as "when the nondebtor and the debtor enjoy such an identity of

interests that the suit against the nondebtor is essentially a suit against the debtor"). Accordingly, the Committee respectfully submits that the Injunction Objectors' objections should be overruled.

II. The Plan's Post-Confirmation Jurisdiction (or "Gatekeeper") Provision is Necessary and Appropriate.

12. The Dondero objectors (Mr. Dondero, and the Dugaboy Investment Trust and Get Good Trust (together, the "Dondero Trusts")), unsurprisingly, also take issue with the scope of this Court's jurisdiction post-confirmation. It is no secret that Mr. Dondero is litigious and left to his own devices would drain the Estate's resources by commencing lawsuits (either directly or indirectly through any entity he owns or controls) all over the world, including as far as Guernsey, regardless of whether any lawsuits have merit or are prohibited by the terms of the Plan. As such, the Plan's requirement that a plaintiff first obtain a determination by this Court that the claims and causes of action that he or she wants to bring are outside the scope of the Plan's protections before filing elsewhere (i.e., the Gatekeeper Provision) is absolutely essential in this case. And to be clear, the Gatekeeper Provision is not tantamount to a release or a deprivation of a party's right to a day in court—instead, it is a narrowly tailored procedure designed to address a very real issue in order to further the purpose of the bankruptcy case (and indeed the goal of the bankruptcy process—to maximize the value available to distribution to unsecured creditors. Courts in this district have found similar provisions to be appropriate. *See, e.g., In re Pilgrim's Pride Corp.*, 2010 Bankr. LEXIS 72 (Bankr. N.D. Tex. Jan. 14, 2010).

13. Contrary to the objections raised by Mr. Dondero and the Dondero Trusts, the Gatekeeper Provision would not impermissibly extend the Bankruptcy Court's jurisdiction. Section 1142(b) of the Code provides that post-confirmation, the bankruptcy court may direct any parties to "perform any act" necessary for the consummation of the plan. *See*

United States Brass Corp. v. Travelers Ins. Group, Inc. (In re United States Brass Corp.), 301 F.3d 296, 305 (5th Cir. 2002) (holding that bankruptcy court had jurisdiction over issue because while the plan had been substantially consummated, it had not been *fully* consummated, the dispute related directly to the plan, the outcome would affect the parties' post confirmation rights and responsibilities and the proceeding would impact compliance with, or completion of the plan, specifically referencing section 1142(b)). Furthermore, unlike a typical plan of reorganization that rehabilitates the debtor and sends it back into the marketplace (in which case a bankruptcy court's jurisdiction would be greatly diminished after confirmation), the Debtor's Plan is in substance a plan that monetizes the Debtor's assets and winds down operations in a controlled environment. Every action expected to be taken by the Protected Parties will, therefore, be in furtherance of the Plan. *See Boston Regional Med. Ctr., Inc. v. Reynolds (In re Boston Regional Med. Ctr., Inc.)*, 410 F.3d 100, 107 (1st Cir. 2005) (drawing a distinction between the diminished jurisdiction of a bankruptcy court over a truly reorganized debtor and reorganized debtor that "exists for the singular purpose of executing an order of the bankruptcy court"); *TXMS Real Estate Invs., Inc. v. Senior Care Ctrs., LLC (In re Senior Care Ctrs., LLC)*, 2020 Bankr. LEXIS 3205 (Bankr. N.D. Tex. Nov. 12, 2020) (holding that the Bankruptcy Court had jurisdiction over a dispute related to a liquidating trust).

14. Moreover, requirements to seek permission to file lawsuits are not novel, and have been properly used and upheld in appropriate circumstances. *Baum v. Blue Moon Ventures, LLC,* 513 F.3d at 189 (after the bankruptcy court and district court determined that the Baums interjected themselves in various bankruptcy proceedings by filing vexatious, abusive and harassing litigation, an injunction was entered preventing the Baums from filing litigation without the consent of the district court judge); *Safir v. United States Lines, Inc.*, 792 F.2d 19, 25 (2d Cir. 1986) (agreeing

litigant's conduct warranted a pre-filing injunction, but narrowed the scope such that the litigant had to seek permission from the district court before filing certain types of additional actions). The Gatekeeper Provision is entirely consistent with such precedent, and it is truly critical under the circumstances of this case. As such, the Committee respectfully submits that the Court should overrule Mr. Dondero and the Dondero Trusts' objections to the Gatekeeper Provision and confirm the Plan as-is.

III. The Plan Satisfies the Best Interests of Creditors Test under Section 1129(a)(7) of the Bankruptcy Code.

15. Mr. Dondero, through the Dondero Trusts, also argues that the Plan fails the "best interests of creditors" test under section 1129(a)(7) of the Bankruptcy Code. Specifically, Mr. Dondero attempts to convert his grievances over not being able to participate in or interfere with the post-Effective Date operations into a "best interests test" objection by asserting without substantiation that the projected value of creditors' recovery under the Plan should be discounted.

16. As an initial matter, the Debtor objectively satisfies section 1129(a)(7) as the Liquidation Analysis [Docket No. 1473, Ex. C] shows that the Plan provides over 20% more value to creditors than a hypothetical liquidation under chapter 7. The Dondero Trusts fail to present any evidence to support their statement that the projected recoveries for creditors under the Plan should be discounted at all, let alone in excess of 20%.

17. The Committee further notes that a number of the Dondero Trusts' grievances in this objection are factually inaccurate. The Dondero Trusts first assert that the Reorganized Debtor has no affirmative obligation to report activity to holders of beneficial interests in the Claimant Trust. The Plan, in fact, does require the provision of quarterly reports. Under the Plan, creditors are beneficiaries of the Claimant Trust, which will indirectly own the Reorganized Debtor, and the

Claimant Trustee will be required to provide quarterly reports to the Oversight Board and Claimant Trust Beneficiaries, including reporting as to the Reorganized Debtor's activity. *See* Claimant Trust Agreement, Sec. 3.12(b). The holders of the Contingent Trust Interests, however, have no rights to receive any reports until such time as their interests vest and they become Claimant Trust Beneficiaries pursuant to the terms of the Claimant Trust Agreement. Indeed, providing confidential reports to the current equityholders while they only hold Contingent Trust Interests could actually be prejudicial—they could use such disclosures to their advantage to interfere with monetization efforts or litigation strategy.

18. Second, the Dondero Trusts suggest that the Claimant Trust Agreement absolves the Claimant Trustee of any fiduciary duties. Again, this is false. The Claimant Trust Agreement makes clear that any actions taken by the Claimant Trustee as officer of the Reorganized Debtor will be consistent with the Reorganized Debtor's fiduciary duties. *See id.* at Sec. 2.3(b)(viii). The Claimant Trust Agreement, and any duties owed by the Claimant Trustee to beneficiaries, is otherwise governed by and consistent with the Delaware Statutory Trust Act.

19. Third, the Dondero Trusts assert that the Plan does not satisfy section 1129(a)(7) because a Chapter 7 trustee would have to obtain Court authority to sell assets. This argument ignores several realities including that the Plan provides notice to all interested parties that the Debtor will be winding down and its assets will be monetized. Any party who is interested in purchasing any of the Debtor's assets, including Mr. Dondero, is welcome to make an offer on any such assets, which would be considered by the Claimant Trustee. This option is not precluded after the Effective Date. Additionally, the Dondero Trusts' argument ignores the reality that a Chapter 7 trustee would not be familiar with the Debtor's assets and that the carefully crafted Claimant Trust Agreement and the processes and oversight embedded therein, including the

continuing jurisdiction of the Court, are designed to maximize the recovery on the assets. In light of these facts, a Chapter 7 trustee in all likelihood would result in *lower* recoveries for creditors.

20. The Plan clearly satisfies the "best interests of creditors" test under section 1129(a)(7) of the Bankruptcy Code, and the Dondero Trusts' objection should be overruled.

IV. The Plan Does Not Unfairly Discriminate Against Dondero Employees and the Dondero Employees' Other Objections Should be Overruled.

21. Unsurprisingly, Mr. Dondero's long-term and loyal colleagues Scott Ellington and Isaac Leventon (together, the "Dondero Employees"),[5] who have also been terminated by the Debtor recently for aiding Mr. Dondero, have also objected to the Plan. Their objection, however, is filled with factual and legal misunderstandings and should be overruled for the reasons set forth below.

A. The Plan Does Not Unfairly Discriminate Against the Dondero Employees.

22. To start, in asserting that the Plan unfairly discriminates against the Dondero Employees, the Dondero Employees appear to conflate the treatment of their Claims with the Debtor Release, which is a discretionary provision wholly unrelated to the treatment of Claims. Specifically, section 1123(a)(4) of the Bankruptcy Code requires that a plan "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest." 11 U.S.C. § 1123(a)(4). Courts draw a distinction between treatment under a plan on account of a claim or interest, and treatment for some other reason. *See In re CHC Grp. Ltd.*, No. 16-31854, 2017 Bankr.

[5] Frank Waterhouse and Thomas Surgent originally were party to this objection as well but have since signed stipulations with the Debtor, pursuant to which they are required to withdraw their objection to confirmation of the Plan.

LEXIS 1016, at *53 (Bankr. N.D. Tex. Mar. 3, 2017) (holding that a distribution made on account of a commitment to backstop a rights offering was not in violation of 1123(a)(4), because it was on account of the commitment, and not the claims in the class.); *see also Acequia, Inc. v. Clinton (In re Acequia, Inc.)*, 787 F.2d 1352 (9th Cir. 1986) (plan that permits one shareholder to serve as an officer or director, but does not extend that right to another shareholder, does not violate section 1123(a)(4) because a position as an officer and director is separate from that of a shareholder); *In re Heron, Burchette, Ruckert, & Rothwell*, 148 B.R. 660, 672 (Bankr. D.D.C. 1992) ("The objectors fail to distinguish between a [claimant's] treatment under the plan on account of a claim or interest and treatment for other reasons. Only the former is governed by § 1123(a)(4).").

23. Here, the Plan provides that the Dondero Employees' Claims in Class 8 will, if Allowed, receive the same treatment as all other General Unsecured Claims. This is wholly unaffected by whether or not the Dondero Employees are released by the Debtor under the Plan. As such, this objection should be overruled.

B. A Release of Claims Against the Dondero Employees as the Default Rule is not Supported under Applicable Law.

24. The Dondero Employees also raise an objection to a proposed stipulation settling their bonus claims in exchange for being included in the Debtor Release, despite the fact that the stipulation is not part of the Plan nor binding absent agreement. In asserting such objection, the Dondero Employees seem to be working off the flawed presumption that a release by the Debtor should simply be the default treatment. *See* Senior Employee Obj. [Docket No. 1669], at 3. As the Committee detailed in its successful objection to the Disclosure Statement, the Debtor must demonstrate that a release included in a chapter 11 plan under section 1123(b)(3)(A) of the Bankruptcy Code (evaluated under the same standards as a motion for settlement brought under

Rule 9019) must be "fair and equitable" and in the best interests of the estate. *See Cadle Co. v. Mims (In re Moore)*, 608 F.3d 253, 263 (5th Cir. 2010) (citing *Am. Can Co. v. Herpel (In re Jackson Brewing Co.)*, 624 F.2d 605, 608 (5th Cir. 1980); *see also In re Bigler LP*, 442 B.R. 537, 543 n.6 (Bankr. S.D. Tex. 2010) ("[S]ettlement provisions in a Chapter 11 plan must satisfy the standards used to evaluate compromises under Rule 9019).

25. Throughout this case the Committee has made clear that it believes the Estate likely has claims against the Dondero Employees, each of whom are the subject of troubling findings by various courts and tribunals (with testimony and developments in the various recent court proceedings serving to reinforce this conclusion). As such, for a release of the Dondero Employees by the Debtor to satisfy the applicable legal standards, it would, at a minimum, have to be in exchange for value provided by each Dondero Employee to the Estate. In resolving the Committee's objection to the Disclosure Statement, the Committee agreed to the Debtor's proposal that the Dondero Employees be offered a stipulation pursuant to which they would agree to reduce the amounts of their bonus claims and sign an agreement to cooperate with the Claimant Trustee (*i.e.*, provide value to the Estate) in exchange for receiving a release under the Plan.[6] If the Dondero Employees do not want to execute a stipulation and provide value to the Estate, then the Debtor will not release any Estate Claims against the Dondero Employees under the Plan. Whether they choose to do so or not is entirely up to them.[7] Providing them with this choice, however, to

[6] The Dondero Employees take issue with no other employee being required to sign a stipulation to obtain a release under the Plan. This ignores the reality that the rank-and-file Employees are not subject to Court findings similar to those of the Dondero Employees or otherwise suspected of having assisted Mr. Dondero in any of his many schemes to defraud creditors. As such, the value they would need to provide to retain a release is significantly less than the value the Dondero Employees would need to provide for the release to be "fair and equitable."

[7] Notably, Mr. Waterhouse and Mr. Surgent ultimately decided to execute their stipulations and have since been deemed to have Allowed claims in Class 7 on account of their bonuses.

obtain what they otherwise are not entitled to (a very valuable release), does not somehow discriminate unfairly against the Dondero Employees. As such, these objections should be overruled as irrelevant to confirmation of the Plan.

C. The Dondero Employees Cannot Split Their Claims for Voting Purposes.

26. The Dondero Employees also assert that the Plan unfairly discriminates against them because, without signing the stipulation, they do not have a separate claim for which they can opt into Class 7 Convenience Claim treatment. Absent signing the stipulation with the Debtor, each Senior Employee filed and is voting on account of *one* claim. The Court's order approving the Disclosure Statement, the solicitation procedures, and the ballots mailed to voting creditors all made clear that creditors will only be permitted to vote once on account of their claim, and even if a creditor had filed multiple claims (which the Dondero Employees did not), their claims would be aggregated and treated as a single vote to accept or reject the plan. *See* [Docket No. 1476] at ¶¶ 23(f), 23(h), 25, and Ex. A. It was only pursuant to the stipulation that, if executed, the Senior Employee would be allowed a *separate* claim for their bonus, which claim would be treated as a Class 7 Convenience Claim. Because no Senior Employee signed the stipulation, however, they only had one claim each for voting purposes (a portion of which is unliquidated) and could not split their claim to make a partial Convenience Class Election. As such, this objection should also be overruled.

D. The Dondero Employees' Conduct During this Case Gives Rise to Additional Equitable Considerations.

27. The Committee also notes for the Court that the Dondero Employees' conduct during this case may also give rise to equitable remedies and that cannot be discounted when considering the merits of their objections.

28. First, the Committee believes there would be a strong case for designating the Dondero Employees' votes as not being cast in good faith. Specifically, section 1126(e) of the Bankruptcy Court permits the court, on request of a party in interest and after notice of a hearing, to designate any acceptance or rejection that was not made in good faith. 11 U.S.C. § 1126(e). While "good faith" is not defined in the Bankruptcy Code, the inquiry usually turns on whether a creditor's vote was cast for the ulterior purpose of securing some advantage to which the creditor was not otherwise entitled. *See, e.g.*, *In re Applegate Prop., Ltd.*, 25 C.B.C.2d 1672, 1682–84, 133 B.R. 827, 834–35 (Bankr. W.D. Tex. 1991). For example, courts in this jurisdiction and others have designated votes as not being cast in good faith when (a) a party voted to block a reorganization plan in order to acquire the debtor company for one's self or put the debtor out of business to realize competitive gain) (*In re* Applegate Prop., Ltd., 25 C.B.C.2d 1672, 1682–84, 133 B.R. 827, 834–35 (Bankr. W.D. Tex. 1991)); (b) an affiliate or insider purchased claims to block confirmation of a competing plan (*see id.*); (c) a vote to accept a plan was motivated by financial incentives provided under a separate settlement agreement (*see In re* Quigley, 437 B.R. 102, 131 (Bankr. S.D.N.Y. 2010)); and (d) a vote motivated by considerations not consistent with protecting the creditor's self-interest (*see In re Adelphia Communs. Corp.*, 359 B.R. 54, 60–61 (Bankr. S.D.N.Y. 2006)). Here, a number of facts have come to light in recent months which only serve to reinforce the unavoidable conclusion that the Dondero Employees carry out Mr. Dondero's bidding. Given Mr. Dondero's opposition to the Plan orchestrated by a phalanx of his controlled entities, it is certainly highly plausible that the Dondero Employees voted to reject the Plan in furtherance of Mr. Dondero's efforts and not out of their interest as a creditor of the Debtor's Estate, and therefore in bad faith. Given the other strong, and legally dispositive

arguments that address the Dondero Employees' objections, additional fact intensive litigation regarding these issues is not necessary at this juncture.

29. In addition, the Committee believes there is also a strong possibility that the Dondero Employees' claims could be equitably subordinated under section 510(c) of the Bankruptcy Code. In the Fifth Circuit, three conditions that must be satisfied for application of equitable subordination: (1) the claimant must have engaged in some type of inequitable conduct; (2) the misconduct must have resulted in injury to the creditors of the bankrupt party or conferred an unfair advantage on the claimant; and (3) equitable subordination must not be inconsistent with any provisions of the Bankruptcy Act. *See Benjamin v. Diamond* (*In re Mobile Steel Corp.*), 563 F.2d 692 (5th Cir. 1977). Typically, these conditions are usually confined to three scenarios: (a) when a fiduciary of the debtor misuses its position to the disadvantage of other creditors; (b) when a third party controls the debtor to the disadvantage of other creditors; and (c) when a third party actually defrauds other creditors. *In re U.S. Abatement Corp.*, 39 F.3d 556, 561(5th Cir. 1994). Notably, courts in the Fifth Circuit generally do not require that the misconduct be directly related to the creation of the claim. *See Machinery Rental Inc. v. Herpel (In re Multiponics, Inc.*), 622 F.2d 709 (5th Cir. 1980). Again, based merely on the facts that have come to light in recent months in discovery and through depositions, it is highly likely that the standard for equitable subordination can be met with respect to both of the Dondero Employees.

V. The Committee Joins in the Debtor's Reply to Remaining Objections.

30. The Committee also joins in the Debtor's Reply to all objections, including those not specifically discussed herein, and respectfully submits that the Plan satisfies all requirements under section 1129 of the Plan, is in the best interests of creditors, and should be confirmed.

WHEREFORE, the Committee respectfully requests that the Court overrule all objections to the Plan and confirm the Plan.

Dated: January 22, 2020
Dallas, Texas

SIDLEY AUSTIN LLP
/s/ *Juliana L. Hoffman*

Penny P. Reid
Paige Holden Montgomery
Juliana L. Hoffman
2021 McKinney Avenue
Suite 2000
Dallas, Texas 74201
Telephone: (214) 981-3300
Facsimile: (214) 981-3400

-and-

Matthew A. Clemente (admitted *pro hac vice*)
Dennis M. Twomey (admitted *pro hac vice*)
Alyssa Russell (admitted *pro hac vice*)
One South Dearborn Street
Chicago, Illinois 60603
Telephone: (312) 853-7000
Facsimile: (312) 853-7036

COUNSEL FOR THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS