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
	)	Monday, February 8, 2021
	)	9:00 a.m. Docket
Debtor.	)	
	)	BENCH RULING ON CONFIRMATION
	)	HEARING [1808] AND AGREED
	)	MOTION TO ASSUME [1624]
	)	

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

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

DALLAS, TEXAS - FEBRUARY 8, 2021 - 9:08 A.M.

THE COURT: Please be seated.

(Beeping.)

THE COURT: Someone needs to turn off their whatever. All right. Good morning. This is Judge Jernigan, and we have scheduled today a bench ruling regarding the Debtor's plan that we had a confirmation trial on last week. This is Highland Capital Management, LP, Case No. 19-34054.

Let me first make sure we've got Debtor's counsel on the line. Do we have --

MR. POMERANTZ: Yes.

THE COURT: -- Mr. Pomerantz?

MR. POMERANTZ: Yes, Your Honor. Good morning, Your Honor. Jeff Pomerantz; Pachulski Stang Ziehl & Jones; on behalf of the Debtor.

THE COURT: Okay. Good morning. Do we have the Creditors' Committee on the phone?

MR. CLEMENTE: Good morning, Your Honor. Matthew Clemente of Sidley Austin on behalf of the Creditors' Committee.

THE COURT: Good morning. All right. We had various Objectors. Do we have Mr. Dondero's counsel on the phone?

MR. LYNN: Yes, Your Honor. Michael Lynn, together with John Bonds and Bryan Assink, for Jim Dondero.

THE COURT: Good morning. For the Trusts, the

Dugaboy and Get Good Trusts, do we have Mr. Draper?

MR. DRAPER: Yes. Douglas Draper is on the line, Your Honor.

THE COURT: Good morning. Now, for what I'll call the Funds and Advisor Objectors, do we have Mr. Rukavina and your crew on the line?

MR. RUKAVINA: Davor Rukavina. And Lee Hogewood is also on the line.

THE COURT: All right. Good morning to you. All right. And we had objections pending from the U.S. Trustee as well. Do we have the U.S. Trustee on the line?

(No response.)

THE COURT: All right. If you're appearing, you're on mute. We're not hearing you.

All right. Well, we have lots of other folks. I don't mean to be neglectful of them, but we're going to get on with the ruling this morning. This is going to take a while. This is a complex matter, so it should take a while.

All right. Before the Court, of course, for consideration is the Debtor's Fifth Amended Plan, first filed on November 24, 2020, as later modified on or around January 22, 2021, with more amendments filed on or around February 1, 2021. The Court will hereinafter refer to this as the "Plan."

The parties refer to the Plan as a monetization plan because it involves the gradual wind-down of the Debtor's

assets and certain of its funds over time, with the Reorganized Debtor continuing to manage certain other funds for a while, under strict governance and monitoring, and a Claimants Trust will receive the proceeds of that process, with the creditors receiving an interest in that trust. There is also anticipated to be Litigation Sub-Trust established for the purpose of pursuing certain avoidance or other causes of action for the benefit of creditors.

The recovery for general unsecured creditors is estimated now at 71 percent.

The Plan was accepted by 99.8 percent of the dollar amount of voting creditors in Class 8, the general unsecured class, but as to numerosity, a majority of the class of general unsecured creditors did not vote in favor of the plan. Specifically, 27 claimants voted no and 17 claimants voted yes. All but one of the rejecting ballots were cast by employees who, according to the Debtor, are unlikely to have allowed claims because they are asserted for bonuses or other compensation that will not become due.

Meanwhile, in a convenience class, Class 7, of general unsecured claims under one million dollars, one hundred percent of the 16 claimants who chose to vote in that class chose to accept the Plan.

Because of the rejecting votes in Class 8, and because of certain objections to the Plan, the Court heard two full days

of evidence, considering testimony from five witnesses and thousands of pages of documentary evidence, in considering whether to confirm the Plan pursuant to Sections 1129(a) and (b) of the Bankruptcy Code.

The Court finds and concludes that the Plan meets all of the relevant requirements of Sections 1123, 1124, and 1129 of the Code, and other applicable provisions of the Bankruptcy Code, but is issuing this detailed ruling to address certain pending objections to the Plan, including but not limited to objections regarding certain Exculpations, Releases, Plan Injunctions, and Gatekeeping Provisions of the Plan.

The Court reserves the right to amend or supplement this oral ruling in more detailed findings of fact, conclusions of law, and an Order.

First, by way of introduction, this case is not your garden-variety Chapter 11 case. Highland Capital Management, LP is a multibillion dollar global investment advisor, registered with the SEC pursuant to the Investment Advisers Act of 1940. It was founded in 1993 by James Dondero and Mark Okada. Mr. Okada resigned from his role with Highland prior to the bankruptcy case being filed. Mr. Dondero was in control of the Debtor as of the day it filed bankruptcy, but agreed to relinquish control of it on or about January 9, 2020, pursuant to an agreement reached with the Official Unsecured Creditors' Committee, which will be described later.

Although Mr. Dondero remained on as an unpaid employee and portfolio manager with the Debtor after January 9, 2020, his employment with the Debtor terminated on October 9, 2020. Mr. Dondero continues to work for and essentially control numerous nondebtor companies in the Highland complex of companies.

The Debtor is headquartered in Dallas, Texas. As of the October 2019 petition date, the Debtor employed approximately 76 employees.

Pursuant to various contractual arrangements, the Debtor provides money management and advisory services for billions of dollars of assets, including CLOs and other investments. Some of these assets are managed pursuant to shared services agreements with a variety of affiliated entities, including other affiliated registered investment advisors. In fact, there are approximately 2,000 entities in the Byzantine complex of companies under the Highland umbrella.

None of these affiliates of Highland filed for Chapter 11 protection. Most, but not all, of these entities are not subsidiaries, direct or indirect, of Highland. And certain parties in the case preferred not to use the term "affiliates" when referring to them. Thus, the Court will frequently refer loosely to the so-called, in air quotes, "Highland complex of companies" when referring to the Highland enterprise. That's a term many of the lawyers in the case use.

Many of the companies are offshore entities, organized in

such faraway jurisdictions as the Cayman Islands and Guernsey.

The Debtor is privately owned 99.5 percent by an entity called Hunter Mountain Investment Trust; 0.1866 percent by the Dugaboy Investment Trust, a trust created to manage the assets of Mr. Dondero and his family; 0.0627 percent by Mark Okada, personally and through family trusts; and 0.25 percent by Strand Advisors, Inc., the general partner.

The Debtor's primary means of generating revenue has historically been from fees collected for the management and advisory services provided to funds that it manages, plus fees generated for services provided to its affiliates.

For additional liquidity, the Debtor, prior to the petition date, would sell liquid securities in the ordinary course, primarily through a brokerage account at Jefferies, LLC. The Debtor would also, from time to time, sell assets at nondebtor subsidiaries and distribute those proceeds to the Debtor in the ordinary course of business.

The Debtor's current CEO, James Seery, credibly testified that the Debtor was "run at a deficient for a long time and then would sell assets or defer employee compensation to cover its deficits." This Court cannot help but wonder if that was necessitated because of enormous litigation fees and expenses that Highland was constantly incurring due to its culture of litigation, as further addressed hereafter.

Highland and this case are not garden-variety for so many

reasons. One is the creditor constituency. Highland did not file bankruptcy because of some of the typical reasons a large company files Chapter 11. For example, it did not have a large asset-based secured lender with whom it was in default. It only had relatively insignificant secured indebtedness owing to Jefferies, with whom it had a brokerage account, and one other entity called Frontier State Bank.

Highland did not have problems with trade vendors or landlords. It did not suffer any type of catastrophic business calamity. In fact, it filed Chapter 11 six months before the COVID-19 pandemic was declared. The Debtor filed Chapter 11 due to a myriad of massive unrelated business litigation claims that it was facing, many of which had finally become liquidated or were about to become liquidated after a decade or more of contentious litigation in multiple fora all over the world.

The Unsecured Creditors' Committee in this case has referred to the Debtor under its former chief executive, Mr. Dondero, as a serial litigator. This Court agrees with that description. By way of example, the members of the Creditors' Committee and their history of litigation with the Debtor and others in the Highland complex are as follows:

First, the Redeemer Committee of the Highland Crusader Fund, which I'll call the Redeemer Committee. This Creditors' Committee member obtained an arbitration award against the

Debtor of more than $190 million, inclusive of interest, approximately five months before the petition date from a panel of the American Arbitration Association. It was on the verge of having that award confirmed by the Delaware Chancery Court immediately prior to the petition date, after years of disputes that started in late 2008 and included legal proceedings in Bermuda. This creditor's claim was settled during the bankruptcy case in the amount of approximately $137.7 million. The Court is omitting various details and aspects of that settlement.

The second Creditors' Committee member, Acis Capital Management, LP, which was formerly in the Highland complex of companies but was not affiliated with Highland as of the petition date. This UCC member and its now-owner, Josh Terry, were involved in litigation with Highland dating back to 2016. Acis was forced into an involuntary bankruptcy in the Bankruptcy Court for the Northern District of Texas, Dallas Division, by Josh Terry, who was a former Highland portfolio manager, in 2018 after Josh Terry obtained an approximately $8 million arbitration award and judgment against Acis that was issued by a state court in Dallas County, Texas. Josh Terry was ultimately awarded the equity ownership of Acis by the Dallas Bankruptcy Court in the Acis bankruptcy case.

Acis subsequently asserted a multimillion dollar claim against Highland in the Dallas Bankruptcy Court for Highland's

alleged denuding of Acis in fraud of its creditors, primarily Josh Terry.

The litigation involving Acis and Mr. Terry dates back to mid-2016, and has continued on, with numerous appeals of bankruptcy court orders, including one appeal still pending at the United States Court of Appeals for the Fifth Circuit.

There was also litigation involving Josh Terry and Acis in the Royal Court of the Island of Guernsey and in a court in New York.

The Acis claim was settled during this bankruptcy case in court-ordered mediation for approximately $23 million. Other aspects and details of this settlement are being omitted.

Now, the third Creditors' Committee member, UBS Securities. It's a creditor who filed a proof of claim in the amount of $1,039,000,000 in the Highland case. Yes, over one billion dollars. The UBS claim was based on the amount of a judgment that UBS received from a New York state court in 2020 after a multi-week bench trial which had occurred many months earlier on a breach of contract claim against other entities in the Highland complex. UBS alleged that the Debtor should be liable for the judgment. The UBS litigation related to activities that occurred in 2008. The litigation involving UBS and Highland and its affiliates was pending for more than a decade, there having been numerous interlocutory appeals during its history.

The Debtor and UBS recently announced a settlement of the UBS claim, which came a few months after court-ordered mediation. The settlement is in the amount of $50 million as a general unsecured claim, $25 million as a subordinated claim, and $18 million of cash coming from a nondebtor entity in the Highland complex known as Multistrat. Other aspects of this settlement are being omitted.

The fourth and last Creditors' Committee member is Meta-e Discovery. It is a vendor who happened to supply litigation and discovery-related services to the Debtor over the years. It had unpaid invoices on the petition date of more than $779,000.

It is fair to say that the members of the Creditors' Committee in this case all have wills of steel. They fought hard before and during the bankruptcy case. The members of the Creditors' Committee are highly sophisticated and have had highly sophisticated professionals representing them. They have represented their constituency in this case as fiduciaries extremely well.

In addition to these Creditors Committee members, who were all embroiled in years of litigation with Highland and its affiliates in various ways, the Debtor has been in litigation with Patrick Daugherty, a former limited partner and employee of Highland, for many years in both Delaware and Texas state courts. Patrick Daugherty filed a proof of claim for "at

least $37.4 million" relating to alleged breached employment-related agreements and for the tort of defamation arising from a 2017 press release posted by the Debtor.

The Debtor and Patrick Daugherty recently announced a settlement of the Patrick Daugherty claim in the amount of $750,000 cash on the effective date, an $8.25 million general unsecured claim, and a $2.75 million subordinated claim. Other aspects and details of this settlement are being omitted.

Additionally, an entity known as HarbourVest, who invested more than $70 million with an entity in the Highland complex, asserted a $300 million proof of claim against Highland, alleging, among other things, fraud and RICO violations. The HarbourVest claim was settled during the bankruptcy case for a $45 million general unsecured claim and a $35 million junior claim.

Other than these claims just described, most of the other claims in this case are claims asserted against the Debtor by other entities in the Highland complex, most of which entities the Court finds to be controlled by Mr. Dondero; claims of employees who believe that they are entitled to large bonuses or other types of deferred compensation; and claims of numerous law firms that did work for Highland and were unpaid for amounts due to them on the petition date.

Yet another reason this is not your garden-variety Chapter

11 case is its postpetition corporate governance structure. Highland filed bankruptcy October 16, 2019. Contentiousness with the Creditors' Committee began immediately, with first the Committee's request for a change of venue from Delaware to Dallas, and then a desire by the Committee and the U.S. Trustee for a Chapter 11 or 7 trustee to be appointed due to concerns over and distrust of Mr. Dondero and his numerous conflicts of interest and alleged mismanagement or worse.

After many weeks of the threat of a trustee lingering, the Debtor and the Creditors' Committee negotiated and the Court approved a corporate governance settlement on January 9, 2020 that resulted in Mr. Dondero no longer being an officer or director of the Debtor or of its general partner, Strand.

As part of the court-approved settlement, three eminently-qualified Independent Directors were chosen by the Creditors' Committee and engaged to lead Highland through its Chapter 11 case. They were James Seery, John Dubel, and Retired Bankruptcy Judge Russell Nelms. They were technically the Independent Directors of Strand, the general partner of the Debtor. Mr. Dondero had previously been the sole director of Strand, and thus the sole person in ultimate control of the Debtor.

The three independent board members' resumes are in evidence. James Seery eventually was named CEO of the Debtor. Suffice it to say that this changed the entire trajectory of

the case. This saved the Debtor from a trustee. The Court trusted the new directors. The Creditors' Committee trusted them. They were the right solution at the right time.

Because of the unique character of the Debtor's business, the Court believed this solution was far better than a conventional Chapter 7 or 11 trustee. Mr. Seery, in particular, knew and had vast experience at prominent firms with high-yield and distressed investing similar to the Debtor's business. Mr. Dubel had 40 years of experience restructuring large, complex businesses and serving on their boards of directors in this context. And Retired Judge Nelms had not only vast bankruptcy experience but seemed particularly well-suited to help the Debtor maneuver through conflicts and ethical quandaries.

By way of comparison, in the Chapter 11 case of Acis, the former affiliate of Highland that this Court presided over two or three years ago, which company was much smaller in size and scope than Highland, managing only five or six CLOs, a Chapter 11 trustee was elected by the creditors that was not on the normal rotation panel for trustees in this district, but rather was a nationally-known bankruptcy attorney with more than 45 years of large Chapter 11 case experience. This Chapter 11 trustee performed valiantly, but was sued by entities in the Highland complex shortly after he was appointed, which this Court had to address. The Acis trustee

could not get Highland and its affiliates to agree to any actions taken in the case, and he finally obtained confirmation of a plan over Highland and its affiliates' objections in his fourth attempted plan, which confirmation then was promptly appealed by Highland and its affiliates.

Suffice it to say it was not easy to get such highly-qualified persons to serve as independent board members and CEO of this Debtor. They were stepping into a morass of problems. Naturally, they were worried about getting sued, no matter how defensible their efforts might be, given the litigation culture that enveloped Highland historically. It seemed as though everything always ended in litigation at Highland.

The Court heard credible testimony that none of them would have taken on the role of Independent Director without a good D&O insurance policy protecting them, without indemnification from Strand, guaranteed by the Debtor; without exculpation for mere negligence claims; and without a gatekeeper provision, such that the Independent Directors could not be sued without the bankruptcy court, as a gatekeeper, giving a potential plaintiff permission to sue.

With regard to the gatekeeper provision, this was precisely analogous to what bankruptcy trustees have pursuant to the so-called "Barton Doctrine," which was first articulated in an old U.S. Supreme Court case.

The Bankruptcy Court approved all of these protections in a January 9, 2020 order. No one appealed that order. And Mr. Dondero signed the settlement agreement that was approved by that order.

An interesting fact about the D&O policy came out in credible testimony at the confirmation hearing. Mr. Dubel and an insurance broker from Aon, named Marc Tauber, both credibly testified that the gatekeeper provision was needed because of the so-called, and I quote, "Dondero Exclusion" in the insurance marketplace.

Specifically, the D&O insurers in the marketplace did not want to cover litigation claims that might be brought against the Independent Directors by Mr. Dondero because the marketplace of D&O insurers are aware of Mr. Dondero's litigiousness. The insurers would not have issued a D&O policy to the Independent Directors without either the gatekeeping provision or a "Dondero Exclusion" being in the policy.

Thus, the gatekeeper provision was part of the January 9, 2020 settlement. There was a sound business justification for it. It was reasonable and necessary. It was consistent with the Barton Doctrine in an extremely analogous situation -- *i.e.*, the independent board members were analogous to a three-headed trustee in this case, if you will. Mr. Dondero signed off on it. And, again, no one ever appealed the order

approving it.

The Court finds that, like the Creditors' Committee, the independent board members here have been resilient and unwavering in their efforts to get the enormous problems in this case solved. They seem to have at all times negotiated hard and with good faith. As noted previously, they changed the entire trajectory of this case.

Still another reason why this was not your garden-variety case was the mediation effort. In summer of 2020, roughly nine months into the Chapter 11 case, this Court ordered mediation among the Debtor, Acis, UBS, the Redeemer Committee, and Mr. Dondero. The Court selected co-mediators, since this seemed like such a Herculean task, especially during COVID-19, where people could not all be in the same room. Those co-mediators were Retired Bankruptcy Judge Allan Gropper from the Southern District of New York, who had a distinguished career presiding over complex Chapter 11 cases, and Ms. Sylvia Mayer, who likewise has had a distinguished career, first as a partner in a preeminent law firm working on complex Chapter 11 cases, and subsequently as a mediator and arbitrator in Houston, Texas.

As noted earlier, the Acis claim was settled during the mediation, which seemed nothing short of a miracle to this Court, and the UBS claim was settled many months later, and this Court believes the groundwork for that ultimate

settlement was laid, or at least helped, through the mediation. And as earlier noted, other enormous claims have been settled during this case, including that of the Redeemer Committee, who, again, had asserted approximately or close to a $200 million claim; HarbourVest, who asserted a $300 million claim; and Patrick Daugherty, who asserted close to a $40 million claim.

This Court cannot stress strongly enough that the resolution of these enormous claims and the acceptance of all of these creditors of the Plan that is now before the Court seems nothing short of a miracle. It was more than a year in the making.

Finally, a word about the current remaining Objectors to the Plan before the Court. Once again, the Court will use the phrase "not garden-variety." Originally, there were over one dozen objections filed to this Plan. The Debtor has made various amendments or modifications to the Plan to address some of these objections. The Court finds that none of these modifications require further solicitation, pursuant to Sections 1125, 1126, 1127 of the Code, or Bankruptcy Rule 3019, because, among other things, they do not materially adversely change the treatment of the claims of any creditor or interest holder who has not accepted in writing the modifications.

Among other things, there were changes to the projections

that the Debtor filed shortly before the confirmation hearing that, among other things, show the estimated distribution to creditors and compare plan treatment to a likely disbursement in a Chapter 7.

These do not constitute a materially adverse change to the treatment of any creditors or interest holders. They merely update likely distributions based on claims that have now been settled, and they've otherwise incorporated more recent financial data. This happens often before confirmation hearings. The Court finds that it did not mislead or prejudice any creditors or interest holders, and certainly there was no need to resolicit the Plan.

The only Objectors to the Plan left at this time were Mr. Dondero and entities that the Court finds are controlled by him. The standing of these entities to object to the Plan exists, but the remoteness of their economic interest is noteworthy, and the Court questions the good faith of the Objectors. In fact, the Court has good reason to believe that these parties are not objecting to protect economic interests they have in the Debtor, but to be disruptors.

Mr. Dondero wants his company back. This is understandable. But it's not a good faith basis to lob objections to the Plan. The Court has slowed down confirmation multiple times on the current Plan and urged the parties to talk to Mr. Dondero. The parties represent that

they have, and the Court believes that they have.

Now, to be specific about the remoteness of the objectors' interests, the Court will address them each separately. First, Mr. Dondero has a pending objection. Mr. Dondero's only economic interest with regard to the Debtor at this point is an unliquidated indemnification claim. And based on everything this Court has heard, his indemnification claim will be highly questionable at this juncture.

Second, a joint objection has been filed by the Dugaboy Trust and the Get Good Trust. As for the Dugaboy Trust, it was created to manage the assets of Mr. Dondero and his family, and it owns a 0.1866 percent limited partnership interest in the Debtor. The Court is not clear what economic interest the Get Good Trust has, but it likewise seems to be related to Mr. Dondero, and it has been represented to the Court numerous times that the trustee is Mr. Dondero's college roommate.

Another group of Objectors that has joined together in one objection is what the Court will refer to as the Highland and NexPoint Advisors and Funds. The Court understands they assert disputed administrative expense claims against the estate. While the evidence presented was that they have independent board members that run these companies, the Court was not convinced of their independence from Mr. Dondero. None of the so-called independent board members of these

entities have ever testified before the Court. Moreover, they have all been engaged with the Highland complex for many years.

The witness who testified on these Objectors' behalves at confirmation, Mr. Jason Post, their chief compliance officer, resigned from Highland after more than twelve years in October 2020, at the same time that Mr. Dondero resigned or was terminated by Highland. And a prior witness recently for these entities whose testimony was made part of the record at the confirmation hearing essentially testified that Mr. Dondero controlled these entities.

Finally, various NexBank entities objected to the Plan. The Court does not believe they have liquidated claims. Mr. Dondero appears to be in control of these entities as well.

To be clear, the Court has allowed all of these objectors to fully present arguments and evidence in opposition to confirmation, even though their economic interests in the Debtor appear to be extremely remote and the Court questions their good faith. Specifically on that latter point, the Court considers them all to be marching pursuant to the orders of Mr. Dondero.

In the recent past, Mr. Dondero has been subject to a TRO and preliminary injunction by the Bankruptcy Court for interfering with the current CEO's management of the Debtor in specific ways that were supported by evidence. Around the

time that this all came to light and the Court began setting hearings on the alleged interference, Mr. Dondero's company phone supplied to him by Highland, which he had been asked to turn in, mysteriously went missing. The Court merely mentions this in this context as one of many reasons that the Court has to question the good faith of Mr. Dondero and his affiliated objectors.

The only other pending objection besides these objections of the Dondero and Dondero-controlled entities is an objection of the United States Trustee pertaining to the release, exculpation, and injunction provisions in the Plan.

In juxtaposition to these pending objections, the Court notes that the Debtor has resolved earlier-filed objections to the Plan filed by the IRS, Patrick Daugherty, CLO Holdco, Ltd., numerous local taxing authorities, and certain current and former senior-level employees of the Debtor.

With that rather detailed factual background addressed, because certainly context matters here, the Court now addresses what it considers the only serious objections raised in connection with confirmation. Specifically, the Plan contain certain releases, exculpation, plan injunctions, and a gatekeeper provision which are obviously not fully consensual, since there are objections. Certainly, these provisions are mostly consensual when you consider that parties with hundreds of millions of dollars' worth of legitimate claims have not

objected to them.

First, a word about plan releases generally, since the Objectors at times seem to gloss over, in this Court's view, relevant distinctions, and seem to refer to the plan releases in this Plan and the exculpations and the plan injunctions all as impermissible third-party releases, when, in fact, they are not, *per se*.

It has, without a doubt, become quite commonplace in complex Chapter 11 bankruptcy cases to have three categories of releases in plans. These three types are as follows.

First, Debtor Releases. A debtor release involves a release by the debtor and its bankruptcy estate of claims against nondebtor third-parties. For example, a release may be granted in favor of creditors, directors, officers, employees, professionals who participated in the bankruptcy process. This is the least-controversial type of release because the debtor is extinguishing its own claims, which are property of the estate, that a debtor has authority to utilize or not, pursuant to Sections 541 and 363 of the Bankruptcy Code.

Authority for a debtor release pursuant to a plan arises out of Section 1123(b)(3)(A), which indicates that a plan may provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate."

In this context, it would appear that the only analysis

required is to determine whether the release or settlement of the claim is an exercise of reasonable business judgment on that part of the debtor, is it fair and equitable, is it in the best interest of the estate, given all the relevant facts and circumstances? Also relevant is whether there's consideration given of some sort by the releasees.

Now, the second type of very commonplace Chapter 11 plan release is an exculpation. Chapter 11 plans also very often have these exculpation provisions, and they're something much narrower in scope and time than a full-fledged release. An exculpation provision is more like a shield for a certain subset of key actors in the case for their acts during and in connection with the case, which acts may have been merely negligent.

Specifically, a plan may absolve certain actors -- usually estate fiduciaries -- such as an Official Unsecured Creditors' Committee and its members, Committee professionals, sometimes Debtor professionals, senior management, officers and directors of the Debtor, from any liability for postpetition negligent conduct -- *i.e.*, conduct which occurred during the administration of the Chapter 11 case and in the negotiation, drafting, and implementation of a plan. An exculpation provision typically excludes gross negligence and willful misconduct. It is usually worded in a passive voice, so it may seem a little unclear as to whether it is actually a

release and by whom.

In any event, the rationale is that parties who actively participate in a court-approved process -- often, court-approved transactions by court order -- should receive protection for their work. Otherwise, who would want to work in such a messy, contentious situation, only to be sued for alleged negligence for less-than-perfect end results?

Chapter 11 end results are not always pretty. One could argue that these exculpation provisions, though, are much ado about nothing. Why? For one thing, again, the shield is only as to negligent conduct. There is no shield for other problematic conduct, such as gross negligence or willful misconduct.

Second, in many situations, any claims or causes of action that might arise will belong to the Debtor or its estate. Thus, they would already be released pursuant to a debtor release.

Additionally, there is case law stating that, where a claim is brought against an estate professional whose fees have already been approved in a final fee application, any claims are barred by *res judicata*. Thus, exculpated professionals would only have potential exposure for a very short window of time, until final fee applications.

Additionally, certain case law in Texas makes clear that an attorney generally does not owe any duties to persons other

than his own client.

All of this suggests that the shield of a typical exculpation provision may rarely become useful or needed.

Moving now to the third type of release, a true third-party release, Chapter 11 plans also sometimes contain third-party releases. A true third-party release involves the release of claims held by nondebtor third parties against other nondebtor third parties, and there is often no limitation on the scope and time of the claims released.

This is the most heavily scrutinized of the three types of plan releases. Much of the case authority focuses on whether a third-party release is consensual or not in analyzing their propriety and/or enforceability.

In Highland, there are no third-party releases. Rather, there are debtor releases and exculpations. There also happen to be plan injunctions and gatekeeper provisions that have been challenged. The Objectors argue that these provisions violate the Fifth Circuit's opinion in *Pacific Lumber* or are otherwise beyond the jurisdiction or authority of the bankruptcy court. These arguments are now addressed.

First, the debtor release is found at Article IX.D of the Plan. The language, in pertinent part, reads as follows. "On 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, in each case on behalf of themselves and their respective successors, assigns, and representatives, including but not limited to the Claimant Trust and the Litigation Sub-Trust, from any and all causes of action, including any derivative claims, asserted on behalf of the Debtor, whether known or unknown, foreseen or unforeseen, matured or unmatured, existing or hereafter arising, in law, equity, contract, tort, or otherwise, that the Debtor or the Estate would have been legally entitled to assert in their own right, whether individually or collectively, or on behalf of the holder of any claim against, or interest in, a debtor or other person."

There are certain exceptions discussed, and then Released Parties are defined at Definition 113 of the Plan collectively as: the Independent Directors; Strand, solely from the date of the appointment of the Independent Directors through the effective date; the CEO/CRO; the Committee, the members of the Committee, in their official capacities; the professionals retained by the Debtor and the Committee in the Chapter 11 case; and the employees. This is a defined term in the Plan Supplement and does not include certain employees.

To be clear, these are not third-party releases such as addressed in the *Pacific Lumber* case. These are the Debtor's and/or the bankruptcy estate's causes of action that are proposed to be released. Releases by a debtor are

discretionary and can be provided by a debtor to persons who have provided consideration to the debtor and the estate. Section 1123(b)(3)(A) of the Bankruptcy Code permits this.

The evidence here supported the notion that these releases are a *quid pro quo* for the Released Parties' significant contributions to a highly complex and contentious restructuring. The Debtor is releasing its own claims. Some of the Released Parties would have indemnification rights against the Debtor. And the Debtor's CEO, James Seery, credibly testified that he does not believe any claims exist as to the Released Parties. The Court approves the Debtor releases and overrules the objections to them.

Next, the exculpations appear at Article IX.C of the Plan and provide as follows: Subject in all respects to Article XII.D of the Plan, to the maximum extent permitted by applicable law, no Exculpated Party will have or incur, and each Exculpated Party is hereby exculpated from, any claim, obligation, suit, judgment, damage, demand, debt, right, cause of action, remedy, loss, and liability for conduct occurring on or after the petition date in connection with or arising out of the filing and administration of the Chapter 11 case, the negotiation and pursuit of a disclosure statement, the Plan, or the solicitation of votes for or confirmation of the Plan, the funding or consummation of the Plan, or any related agreements, instruments, et cetera, et cetera, whether or not

such Plan distributions occur following the effective date, the implementation of the Plan, and any negotiation, transactions, and documentation in connection with the foregoing clauses, provided, however, the foregoing will not apply to any acts or omissions of any Exculpated Party arising out of or related to acts or omissions that constitute bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct; or Strand or any employee other than with respect to actions taken by such entities from the date of appointment of the Independent Directors through the effective date.

Exculpated Parties are later defined at Section -- or, earlier defined at Section 62 of the Plan, Definition No. 62 of the Plan, as later limited by the Debtor, as announced in the confirmation hearing. And so these are the Exculpated Parties: the Debtor and its successors and assigns; the employees, certain employees, as defined; Strand; the Independent Directors; the Committee, the members of the Committee, in their official capacities; the professionals retained by the Debtor and the Committee in the Chapter 11 case; the CEO and CRO; and the related persons as to each of these parties listed in Part (iv) through (viii) above; provided, for the avoidance of doubt, and it goes on to say Dondero, Mark Okada, and various others aren't Exculpated Parties.

Now, as earlier mentioned, the Objectors argue that *Pacific Lumber*, 584 F.3d 229, a Fifth Circuit case from 2009, categorically rejects the permissibility of nonconsensual exculpations as well as third-party releases in a Chapter 11 plan. So the Court is going to take a deep dive into that assertion.

In *Pacific Lumber*, the Fifth Circuit reviewed on appeal numerous challenges to a confirmed plan of affiliated debtors known as Palco and Scopac and four subsidiaries. The debtor Palco owned and operated the sawmill, a power plant, and even a town called Scotia, California. The debtor Scopac owned timberlands. A creditor, a secured creditor called Marathon had a claim against Palco's assets. Marathon estimated Palco's assets were worth $110 million. Its claim was $160 million. Meanwhile, other parties had large secured claims against the other debtor, Scopac.

The plan that the bankruptcy court confirmed, which was on appeal to the Fifth Circuit, was filed by both the secured creditor Marathon and a joint plan proponent called MRC. MRC was a competitor of the debtor Palco. The Marathon/MRC plan proposed to dissolve all the debtors, cancel intercompany debts, and create two new entities, Townco and Newco. Almost all of the debtor Palco's assets, including the town of Scotia, California, would be transferred to Townco. The timberlands and other assets, including the sawmill, would be

placed in Newco.

Marathon and MRC proposed to contribute $580 million to Newco to pay claims against Scopac. And Marathon would convert its secured claim against Palco's assets into equity, giving it full ownership of Townco, a 15 percent stake in Newco, and a new note for the sawmill's working capital. MRC would own the other 80 percent of Newco and would manage and run the company.

An indenture trustee for the secured indebtedness against Scopac -- which, by the way, had also been a plan proponent of a competing plan -- appealed the confirmation order, raising eight distinct issues on appeal. One of the eight issues pertained to what the Fifth Circuit referred to as a "nondebtor exculpation and release clause." This issue is discussed on the last two pages of a very lengthy opinion.

While the complained-of provision is not quoted verbatim in the *Pacific Lumber* opinion, it appears to have been a typical exculpation clause. Not a third-party release; a typical exculpation clause. The Fifth Circuit stated, "The plan releases MRC, Marathon, Newco, Townco, and the Unsecured Creditors' Committee, and their personnel, from liability, other than for willful and gross negligence related to proposing, implementing, and administering the plan" at Page 251.

The Fifth Circuit held that "the nondebtor releases must

be struck except with respect to the Creditors' Committee and its members."

Footnote 26 of the opinion also states that the appellants had "not briefed why Newco and Townco or their officers and directors should not be released," and so "we do not analyze their position." Rather, the Fifth Circuit merely analyzed why the exculpation provision was not permissible as to the two plan proponents, MRC and Marathon.

Thus, the Court views *Pacific Lumber* as being a holding that squarely addressed the propriety of two plan proponents, a secured lender and a third-party competitor purchaser of the Debtors, obtaining nonconsensual exculpation in the plan. However, its reasoning certainly cannot be ignored, strongly suggesting it would not be inclined to approve an exculpation for any party other than a Creditors' Committee or its members.

As far as the Fifth Circuit's reasoning, it relied on Bankruptcy Code Section 524(e) for striking down the exculpations, stating, "The law states, however, that discharge of a debt of the debtor does not affect the liability of any other entity on such debt." Page 251. The opinion suggests that MRC and Marathon may have tried to argue that 524(e) did not apply to their exculpations because MRC and Marathon were not liable as co-obligors in any way on any of the debtor's debt.

The Fifth Circuit seemed dismissive of this argument, stating as follows, "MRC/Marathon insist the release clause is part of their bargain because, without the clause, neither company would have been willing to provide the plan's financing. Nothing in the records suggests that MRC/Marathon, the Committee, or the Debtor's officers and directors were co-liable for the Debtor's prepetition debts. Instead, the bargain the proponents claim to have purchased is exculpation from any negligence that occurred during the course of the case. Any costs the released parties might incur defending against suits alleging such negligence are unlikely to swamp either of these parties or the consummated reorganization. We see little equitable about protecting the released nondebtors from negligence suits arising out of the reorganization."

The Court goes on to note that, in a variety of cases, that releases have been approved, but these cases "seem broadly to foreclose nonconsensual nondebtor releases and permanent injunctions."

The Court then adds at Footnote 27 that the Fifth Circuit in the past did not set aside challenged plan releases that were in final nonappealable orders and were the subject of collateral attack much later, citing its famous *Republic Supply v. Shoaf* case, where the Fifth Circuit ruled that *res judicata* barred a debtor from bringing a claim that was specifically and expressly released by a confirmed

reorganization plan because the debtor -- the objector failed to object to the release at confirmation.

The Fifth Circuit in *Pacific Lumber* also noted that the Bankruptcy Code permits bankruptcy courts to enjoin third-party asbestos claims under certain circumstances, 524(g), which the Court said suggests nondebtor releases are most appropriate as a method to channel mass tort claims towards a specific pool of assets, citing numerous cases, including *Johns-Manville*.

In reach its holding, the Fifth Circuit saw no reason to uphold exculpation to the plan proponents MRC and Marathon, seeming to find it inconsistent with 524(e) under the facts at bar, but the Court did uphold exculpation for the Creditors' Committee and its members, stating, "We agree, however, with courts that have held that 1103(c) under the Code, which lists the Creditors' Committee's powers, implies Committee members have qualified immunity for actions within the scope of their duties." Numerous cites. "The Creditors' Committee and its members are the only disinterested volunteers among the parties sought to be released here. The scope of protection, which does not insulate them from willful and gross negligence, is adequate."

Thus, the Court held that the exculpation provisions in *Pacific Lumber* must be struck except with regard to the Creditors' Committee and its members.

Now, after all of that, this Court believes the following can be gleaned from *Pacific Lumber*. First, the Fifth Circuit hinted that consensual exculpations and/or consensual nondebtor third-party releases are permissible. The Court was, of course, dealing with nonconsensual exculpations in *Pacific Lumber*. In this regard, I note Page 252, where the Court cited various prior Fifth Circuit authority and then stated, "These cases seem broadly to foreclose nonconsensual nondebtor releases and permanent injunctions."

The second thing that can be gleaned from *Pacific Lumber*: The Fifth Circuit hinted that nondebtor releases may be permissible in cases involving global settlements of mass claims against the debtors and co-liable parties. The Court, of course, referred to 524(g), but various other cases which approved nondebtor releases where mass claims were channeled to a specific pool of assets.

Third, the Fifth Circuit outright held that exculpations from negligence for a Creditors' Committee and its members are permissible because the concept is both consistent with 1103(c), "which implies Committee members have qualified immunity for actions within the scope of their duties," and a good policy result, since "if members of the Committee can be sued by persons unhappy with the outcome of the case, it will be extremely difficult to find members to serve on an official committee."

Fourth, the Fifth Circuit recognized in *Pacific Lumber* that *res judicata* may bar complaints regarding an impermissible plan release, citing to its earlier *Republic Supply v. Shoaf* opinion.

Now, being ever-mindful of the Fifth Circuit's words in *Pacific Lumber*, this Court cannot help but wonder about at least three things.

First, did the Fifth Circuit leave open the door that facts/equities might sometimes justify approval of an exculpation for a person other than a Creditors' Committee and its members? For example, the Fifth Circuit stated, in referring to the plan proponents Marathon and MRC, that "Any costs the released parties might incur defending against suits alleging such negligence are unlikely to swamp either of these parties or the consummated reorganization." Here, this Court can easily expect the proposed exculpated parties to incur costs that could swamp them and the reorganization based on the past litigious conduct of Mr. Dondero and his controlled entities. Do these words of the Fifth Circuit hint that equities/economics might sometimes justify an exculpation?

Second, did the Fifth Circuit's rationale for permitted exculpations to Creditors' Committee and their members, which was clearly policy-based, based on their implied qualified immunity flowing from their duties in Section 1103 and their disinterestedness, and the importance of their role in a

Chapter 11 case, did this rationale leave open the door to sometimes permitting exculpations to other parties in a particular Chapter 11 case besides Creditors' Committees and their members? For example, in a situation such as the Highland case, in which Independent Directors, brought in to avoid a trustee, are more like a Creditors' Committee than an incumbent board of directors.

Third, the Fifth Circuit's sole statutory basis was Section 524(e). This Court would humbly submit that this is a statute dealing with prepetition liability in which some nondebtor is liable with the Debtor. Exculpation is a concept dealing with postpetition liability.

The Ninth Circuit recently, in a case called *Blixseth v. Credit Suisse*, 961 F.3d 1074 (9th Cir. 2020), approved the validity of an exculpation clause incorporated into a confirmed Chapter 11 plan that purported to absolve certain nondebtor parties that were "closely involved" in drafting the plan. They were the largest secured creditor, a purchaser, and an individual who was an indirect owner of certain of the debtor companies. The exculpation was from any negligence, liability, for "any act or omission in connection with, related to, or arising out of the Chapter 11 cases."

By the time the appeal was before the Ninth Circuit, the only issue was the propriety of the exculpation clause as to the large secured creditor, which was also a plan proponent,

since all the other exculpated parties had settled with the appellant.

The Court, in determining that the exculpation clause was permissible as to the secured lender, concluded that Section 524(e) "does not bar a narrow exculpation clause of the kind here at issue -- that is, one focused on actions of various participants in the plan approval process and relating only to that process," Page 1082. Why? Because "Section 524(e) establishes that discharge of a debt of the debtor does not affect the liability of any other entity on such debt." In other words, the discharge in no way affects the liability of any other entity for the discharged debt. By its terms, 524(e) prevents a bankruptcy court from extinguishing claims of creditors against nondebtors over the very discharged debt through the bankruptcy proceedings.

The Court went on to explicitly disagree with *Pacific Lumber* in its analysis of 524(e), reiterating that an exculpation clause covers only liabilities arising from the bankruptcy proceedings and not of any of the debtor's discharged debt. Footnote 7, Page 1085.

Ultimately, the Court held that under Section 105(a), which empowers a bankruptcy court to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of Chapter 11 and Section 1123, which establishes the appropriate content of the bankruptcy plan, under these

sections, the bankruptcy court had authority to approve an exculpation clause intended to trim subsequent litigation over acts taken during the bankruptcy proceedings and so render the plan viable.

This Court concludes that, just as the Fifth Circuit left open the door for consensual exculpations and releases in *Pacific Lumber*, just as it left open the door for consensual exculpations and releases in *Pacific Lumber*, its dicta suggests that an exculpation might be permissible if there is a showing that "costs that the released parties might incur defending against suits alleging such negligence are likely to swamp either the Exculpated Parties or the reorganization." Again, that was a quote from the Fifth Circuit.

If ever there were a risk of that happening in a Chapter 11 reorganization, it is this one. The Debtor's current CEO credibly testified that Mr. Dondero has said outside the courtroom that if Mr. Dondero's own pot plan does not get approved, that he will "burn the place down." Here, this Court can easily expect the proposed exculpated parties might expect to incur costs that could swamp them and the reorganization process based on the past litigious conduct of Mr. Dondero and his controlled entities.

Additionally, this Court concludes that the Fifth Circuit's rationale in *Pacific Lumber* for permitted exculpations to Creditors' Committees and their members, which

was clearly policy-based based on their implied qualified immunity flowing from Section 1103 and their importance in a Chapter 11 case, leaves the door open to sometimes permitting exculpations to other parties in a particular Chapter 11 case besides a UCC and its members.

Again, if there was ever such a case, the Court believes it is this one, in which Independent Directors were brought in to avoid a trustee and are much more like a Creditors' Committee than an incumbent board of directors. While, admittedly, there are a few exculpated parties here proposed beyond the independent board, such as certain employees, it would appear that no one is invulnerable to a lawsuit here if past is prologue in this Highland saga.

The Creditors' Committee was initially not keen on exculpations for certain employees. However, Mr. Seery credibly testified that there was a contentious arm's-length negotiation over this and that he needs these employees to preserve value implementing the Plan. Mr. Dondero has shown no hesitancy to litigate with former employees in the past, to the *nth* degree, and there is every reason to believe he would again in the future, if able.

Finally, in this situation, in the case at bar, we would appear to have a *Shoaf* reason to approve the exculpations. The January 9, 2020 order of this Court, Docket Entry 339, which approved the independent board and an ongoing corporate

governance structure for this case, and which is incorporated into the Plan at Article IX.H, provided as follows: "No entity may commence or pursue a claim or cause of action of any kind against any Independent Director, any Independent Director's agents, or any Independent Director's advisors relating in any way to the Independent Director's role as an Independent Director of Strand without the Court (1) first determining, after notice, that such claim or cause of action represents a colorable claim of willful misconduct or gross negligence against Independent Director, any Independent Director's agents, or any Independent Director's advisors; and (2) specifically authorizing such entity to bring such a claim. The Court will have sole jurisdiction to adjudicate any claim for which approval of the Court to commence or pursue has been granted."

This was both an exculpation from negligence as to the Independent Directors and their agents and advisors, as well as a gatekeeping provision. This Court believes that this provision basically approved an exculpation for the Independent Directors way back on January 9, 2020 for their postpetition conduct that might be negligent. And this is the law of the case and has *res judicata* preclusive effect now.

Thus, as to the three Independent Directors, as well as the other named parties in the January 9, 2020 order, their agents, their advisors, we have a situation that fits within

Republic Supply v. Shoaf, and we fit within the exception articulated in *Pacific Lumber*.

The Court reserves the right to supplement these findings and conclusions as to the exculpations, but based on the foregoing, they are approved and the objections are overruled.

Now, turning to the Plan objection, it appears at Article IX.F of the Plan and provides, in pertinent part, as follows: Upon entry of the confirmation order, all enjoined parties are and shall be permanently enjoined on and after the effective date from taking any action to interfere with the implementation or consummation of the Plan. 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 interests, from directly or indirectly -- and then commencing, conducting, continuing any suit, action, proceeding of any kind, and numerous other acts of that vein.

The injunction set forth herein shall extend to and apply to any act of the type set forth in any of the causes above against any successors to the Debtor, including but not limited to the Reorganized Debtor, the Litigation Sub-Trust, and the Claimant Trust, and their respective property and interests in property.

Plan injunctions like this are commonplace and

appropriate. They are entirely consistent with and permissible under Bankruptcy Code Sections 1123(a)(5), 1123(a)(6), 1141(a) and (c), and 1142, as well as Bankruptcy Rule 3016(c), which articulates the form that a plan injunction must be set forth in a plan.

The Court finds the objections to the Plan Injunctions to be unfounded, and they are thus overruled without much discussion here.

Now, lastly, the Gatekeeper Provision. It appears at Paragraph 4 of Article IX.F of the Plan and provides, in pertinent part, "Subject in all respects to Article XII.D, no Enjoined Party may commence or pursue a claim or cause of action of any kind against any Protected Party that arose or arises from or is related to the Chapter 11 case, the negotiation of the Plan, the administration of the Plan, or property to be distributed under the Plan, the wind-down of the business of the Debtor or Reorganized Debtor, the administration of the Claimant Trust or the Litigation Sub-Trust, or the transactions in furtherance of the foregoing, without the Bankruptcy Court (1) first determining, after notice and a hearing, that such claim or cause of action represents a colorable claim of any kind, including but not limited to negligence, bad faith, criminal misconduct and willful misconduct, fraud, or gross negligence against a Protected Party; and (2) specifically authorizing such

Enjoined Party to bring such claim or cause of action against such Protected Party, provided, however, that the foregoing will not apply to a claim or cause of action against Strand or against any employee other than with respect to actions taken, respectively, by Strand or any such employee from the date of appointment of the Independent Directors through the effective date. The Bankruptcy Court will have sole and exclusive jurisdiction to determine whether a claim or cause of action is colorable and, only to the extent legally permissible and as provided for in Article XI, shall have jurisdiction to adjudicate the underlying colorable claim or cause of action."

This gatekeeper provision appears necessary and reasonable in light of the litigiousness of Mr. Dondero and his controlled entities that has been described at length herein. Provisions similar to this have been approved in this district in the *Pilgrim's Pride* case and the *CHC Helicopter* case. The provision is within the spirit of the Supreme Court's Barton Doctrine. And it appears consistent with the notion of a pre-filing injunction to deter vexatious litigants that has been approved by the Fifth Circuit in such cases as *Baum v. Blue Moon Ventures*, 513 F.3d 181, and in the *In re Carroll* case, 850 F.3d 811, which arose out of a bankruptcy pre-filing injunction.

The Fifth Circuit, in fact, noted in the *Carroll* case that federal courts have authority to enjoin vexatious litigants

under the All Writs Act, 28 U.S.C. § 1651. And additionally, under the Bankruptcy Code, a bankruptcy court can issue any order, including a civil contempt order, necessary or appropriate to carry out the provisions of the Code, citing, of course, 105 of the Bankruptcy Code.

The Fifth Circuit stated that, when considering whether to enjoin future filings against a vexatious litigant, a bankruptcy court must consider the circumstances of the case, including four factors: (1) the party's history of litigation; in particular, whether he has filed vexatious, harassing, or duplicative lawsuits; (2) whether the party had a good faith basis for pursuing the litigation, or perhaps intended to harass; (3) the extent of the burden on the courts and other parties resulting from the party's filings; and (4) the adequacy of alternatives.

In the *Baum* case, the Fifth Circuit stated that the traditional standards for injunctive relief -- *i.e.*, irreparable harm and inadequate remedy at law -- do not apply to the issuance of an injunction against a vexatious litigant.

Here, although I have not been asked to declare Mr. Dondero and his affiliated entities as vexatious litigants *per se*, it is certainly not beyond the pale to find that his long history with regard to the major creditors in this case has strayed into that possible realm, and thus this Court is justified in approving this provision.

One of the Objectors' lawyers stated very eloquently in closing argument, in opposing the plan injunction and gatekeeping provisions, that "Even a serial killer has constitutional rights," suggesting that these provisions would deprive Mr. Dondero and his controlled entities of fundamental rights or due process somehow. But to paraphrase the district court in the *Carroll* case, no one, rich or poor, is entitled to abuse the judicial process. There exists no constitutional right of access to the courts to prosecute actions that are frivolous or malicious. The Plan injunction and gatekeeper provisions in Highland's plan simply set forth a way for this Court to use its tools, its inherent powers, to avoid abuse of the court system, protect the implementation of the Plan, and preempt the use of judicial time that properly could be used to consider the meritorious claims of other litigants.

Accordingly, the Objectors' objections to this provision are overruled.

As earlier stated, this Court reserves the right to alter or supplement this ruling in a written order. In this regard, the Court directs Debtor's counsel -- I hope you are still awake; it's been a long time -- the Court directs Debtor's counsel to submit a form of order. And specifically, I assume that you've already prepared or have been in the process of preparing a set of findings of fact, conclusions of law, and confirmation order that tracks the confirmation evidence and

recites conclusions of law that the Plan complies with all the various provisions of Section 1123, 1129, and other applicable Code provisions.

What I want you to do is take this bench ruling and add it to what you've prepared. And what I mean is, as you can tell, I've been reading: I will have my courtroom deputy email to you all a copy of what I just read. I'll have her obviously copy the Debtor's counsel, Creditors' Committee, Dondero and the other Objectors, copy them on this written document she's going to send out. And, again, I want you to kind of meld it into what you've already been preparing.

Obviously, I did not address in this oral ruling every provision of 1129(a) and (b). I did not address every 1123 objection. I did not even address every single objection of the Objectors. But, again, any objection I've not specifically addressed today is overruled.

The briefing, I should say, that the Debtor submitted, there was a Memorandum of Law in Support of Confirmation filed on January 22nd. There was also a reply brief, a hundred pages or so, separately filed, replying to all the objections. I don't disagree with anything that was in that. So, again, to the extent you want to send me conclusions of law that are along the lines of that briefing, I would consider that.

And so what I thought is you'll send me the melded document and I will edit it if I see fit. I recognize this

may take a few days, so I don't give you a strict timetable, just hopefully it won't take too many days.

All right. Is there anyone out there -- Mr. Pomerantz, you had to go to jury duty, except I can't believe --

MR. POMERANTZ: No, I --

THE COURT: I can't believe you were called, but are you there?

MR. POMERANTZ: Your Honor, I am here. I was luckily excused, because I probably wouldn't have made it.

Your Honor, one just comment I'd make. You referred to the January 9th order. You didn't refer to the CEO order, which is your order July 16th, which had the same gatekeeper provision. I assume that was the same analysis?

THE COURT: That was an oversight. Same analysis. And that's exactly why I said I reserve the right to supplement or amend, because I know there had to be places like that where I omitted to mention something important.

MR. POMERANTZ: But thank you, Your Honor, for your thoughtful ruling, and we will certainly incorporate your materials into the order that we're working on and get it to you when we can. But we appreciate it on behalf of the Debtor. We know this took a lot of time and a lot of effort. Hopefully, you got a chance to still watch the Super Bowl yesterday.

THE COURT: Well, when I saw that Tom Brady was going

to win, I turned it off.

I'm sorry. That's terrible. You know, my law clerk, my law clerk that you can't see, Nate, he is from Ann Arbor, Michigan, University of Michigan, and he almost cried when I said I didn't like Tom Brady the other day. So, I apologize.

MR. POMERANTZ: Your Honor, one other comment. We had our motion to assume our nonresidential real property lease that was also on. It got missed in all the fanfare, but it was -- it has been unopposed and essentially done pursuant to stipulation. So we'd like to submit an order on that as well.

THE COURT: Okay. I have seen that, and I approve it under 365. You may submit the order. Okay. Thank you.

MR. POMERANTZ: Thank you, Your Honor.

THE CLERK: All rise.

(Proceedings concluded at 10:35 a.m.)

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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 **02/09/2021**

_____ _____

Kathy Rehling, CETD-444 Date

Certified Electronic Court Transcriber

INDEX

PROCEEDINGS 3

WITNESSES

-none-

EXHIBITS

-none-

RULINGS

Confirmation Hearing [1808] 3

Agreed Motion to (1) Assume Non-Residential Real Property Lease with Crescent TC Investors, LP upon Confirmation of Plan and (II) Extend Assumption Deadline [1624] 50

END OF PROCEEDINGS 50

INDEX 51