

Case No. 3:21-cv-01895-D

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In the Matter of: Highland Capital Management, L.P.,
Debtor.

NexPoint Advisors, L.P., Highland Capital Management Fund Advisors, L.P., and
The Dugaboy Investment Trust,

Appellants,

v.

Highland Capital Management, L.P.,

Appellee.

APPELLANTS' APPENDIX

On Appeal from the United States Bankruptcy Court for
the Northern District of Texas, the Honorable Stacey G.C. Jernigan

<p>Davor Rukavina, Esq. Julian P. Vasek, Esq. MUNSCH HARDT KOPF & HARR, P.C. 500 North Akard St., Ste. 3800 Dallas, Texas 75201-6659 Telephone: (214) 855-7500 Facsimile: (214) 855-7584</p> <p>ATTORNEYS FOR APPELLANT NEXPOINT ADVISORS, L.P. AND HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.</p>	<p>Douglas Scott Draper, Esq. HELLER, DRAPER & HORN, L.L.C. 650 Poydras Street, Suite 2500 New Orleans, LA 70130-0000</p> <p>ATTORNEYS FOR THE DUGABOY INVESTMENT TRUST</p>
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NexPoint Advisors, L.P., Highland Capital Management Fund Advisors, L.P., and The Dugaboy Investment Trust, the appellants in this bankruptcy appeal, hereby file their *Appendix* pursuant to Fed. R. Bankr. P. 8018(b).

<u>Tab</u>	<u>Description</u>	<u>Record Number</u>
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RESPECTFULLY SUBMITTED this 18th day of October, 2021.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Davor Rukavina

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**ATTORNEYS FOR APPELLANTS
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-- and --

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**ATTORNEYS FOR THE DUGABOY
INVESTMENT TRUST**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 18th day of October, 2021, he caused a true and a correct copy of the foregoing document with exhibits to be served on counsel for the Appellee, Highland Capital Management, L.P., including through Jeff Pomerantz , Esq., one of its counsel of record.

By: /s/ Davor Rukavina
Davor Rukavina, Esq.



CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed July 21, 2021

Henry G. C. George
United States Bankruptcy Judge

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

In re:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Case No. 19-34054
	§	Chapter 11
	§	
Debtor.	§	Re: Docket No. 2491
	§	

**ORDER APPROVING DEBTOR'S MOTION FOR ENTRY OF AN ORDER (I)
AUTHORIZING THE (A) CREATION OF AN INDEMNITY SUBTRUST AND (B)
ENTRY INTO AN INDEMNITY TRUST AGREEMENT AND (II) GRANTING
RELATED RELIEF**

Upon the *Debtor's Motion for Entry of an Order (i) Authorizing the (A) Creation of an Indemnity Subtrust and (b) Entry into an Indemnity Trust Agreement and (ii) Granting Related Relief* (the "Motion"),¹ and the Court finding that: (i) this Court has jurisdiction over this matter

¹ All terms not otherwise defined herein shall be given the meanings ascribed to them in the Motion.

Exhibit A



pursuant to 28 U.S.C. §§ 157 and 1334; (ii) venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409; (iii) this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); (iv) due and sufficient notice of the Motion has been given; (v) entry into the Trust Agreement and the consummation of the transactions contemplated thereby is an exercise of the Debtor's sound business judgment; and (vi) it appearing that the relief requested in the Motion is necessary and in the best interests of the Debtor's estate and creditors; and good and sufficient cause appearing therefor, it is hereby

ORDERED, ADJUDGED, AND DECREED that:

1. The Motion is **GRANTED** as set forth herein and as modified on the record to provide that the Indemnification Note will be unsecured.

2. Pursuant to 11 U.S.C. §§ 363(b) and 105(a), the Debtor is authorized (i) to enter into and perform under the Trust Agreement and consummate the transactions contemplated thereby, including the creation of the Indemnity Subtrust., and (ii) to negotiate, prepare, execute, and deliver all documents and take such other action as may be necessary or appropriate to implement, effectuate, and fully perform its obligations as and when they are incurred and come due under the Trust Agreement.

3. The terms and provisions of this Order shall be binding in all respects upon all parties in this chapter 11 case, the Debtor, its estate, and all successors and assigns thereof.

4. Notwithstanding the possible applicability of Bankruptcy Rule 6004(h) or otherwise, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

5. The Debtor is authorized to take all actions necessary to effectuate the relief granted in this Order in accordance with the Motion.

6. This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

END OF ORDER

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

In re:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT,	§	Case No. 19-34054
L.P., ¹	§	Chapter 11
	§	
Debtor.	§	
	§	

**DEBTOR’S MOTION FOR ENTRY OF AN ORDER (I) AUTHORIZING THE (A)
CREATION OF AN INDEMNITY SUBTRUST AND (B) ENTRY INTO AN INDEMNITY
TRUST AGREEMENT AND (II) GRANTING RELATED RELIEF**

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.

The above-captioned debtor and debtor-in-possession (the “Debtor”) hereby moves (the “Motion”), pursuant to sections 105(a) and 363(b) of title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the “Bankruptcy Code”), for the entry of an order, substantially in the form attached hereto as **Exhibit A** (the “Proposed Order”), (i) authorizing the (a) creation of an indemnity subtrust (the “Indemnity Subtrust”), and (b) entry into an indemnity trust agreement (the “Trust Agreement”), and (ii) granting related relief.

INTRODUCTION²

1. Pursuant to this Motion, the Debtor requests authority to create the Indemnity Subtrust and enter into a Trust Agreement that is substantially consistent with terms set forth in the Term Sheet attached to this Motion as **Exhibit B** (collectively the “Indemnity Trust Documents”). As discussed below, the Indemnity Trust Documents will secure the indemnity obligations of the Claimant Trust, Litigation Trust and the Reorganized Debtor pursuant to the terms of the Claimant Trust Agreement, the Litigation Trust Agreement, the Reorganized Limited Partnership Agreement and the Plan (collectively the “Indemnity Obligations”).

2. The Debtor intends for the Indemnity Subtrust to be in lieu of directors’ and officers’ insurance (“D&O Insurance”), which the Debtor contemplated obtaining as a condition to the Effective Date for the benefit of the beneficiaries of the Indemnity Obligations. The Debtor and the Committee thoroughly explored the market for obtaining D&O Insurance. Based on such due diligence, the Debtor, in consultation with the Committee, determined that based upon the prohibitive cost of D&O Insurance, securing the Indemnity Obligations through an Indemnity Subtrust is preferable and in the best interests of the Debtor’s estate and its creditors. Moreover, as discussed below, establishing the Indemnity Subtrust will facilitate the Effective

² Capitalized terms used but not defined in this introduction have the meanings given to them below.

Date of the Plan which the Debtor anticipates will occur on or about August 1, 2021, if the Court approves the Motion.

JURISDICTION

3. The United States Bankruptcy Court for the Northern District of Texas (the “Court”) has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

4. The bases for the relief requested herein are sections 105 and 363 of the Bankruptcy Code.

STATEMENT OF FACTS

A. The Debtor’s Bankruptcy Case

5. On October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Bankruptcy Court”).

6. On October 29, 2019, the Official Committee of Unsecured Creditors (the “Committee”) was appointed by the U.S. Trustee in the Delaware Bankruptcy Court. On December 4, 2019, the Delaware Bankruptcy Court entered an order transferring venue of the Debtor’s chapter 11 case to this Court [Docket No. 186].³

7. The Debtor has continued in the possession of its property and has continued to operate and manage its business as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this chapter 11 case.

³ All docket numbers refer to the docket maintained by this Court.

B. **The Court's Confirmation of the Plan and Denial of Motions for a Stay Pending Appeal.**

8. On February 22, 2021, after a two-day hearing, the Bankruptcy Court entered the *Order (i) Confirming the Fifth Amended Plan of Reorganization (as Modified) and (ii) Granting Related Relief* [Docket No. 1943] (the "Confirmation Order") with respect to the Debtor's *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.*, as modified (the "Plan").⁴

9. James Dondero and certain of his related entities (collectively, the "Dondero Entities") appealed the Confirmation Order [Docket Nos. 1957, 1966, 1970, 1972] and filed motions in this Court seeking a stay of the Confirmation Order pending appeal [Docket Nos. 1955, 1967, 1971, 1973] (the "Stay Motions"). This Court denied the Stay Motions [Docket Nos. 2084, 2095].

10. Certain of the Dondero Entities subsequently filed motions for stay pending appeal in the District Court for the Northern District of Texas, Dallas Division (the "District Court"), in April 2021 (the "District Court Stay Motions").

11. In May 2021, following the grant of an expedited appeal by the Fifth Circuit Court of Appeals, certain of the Dondero Entities filed motions for stay pending appeal in the Fifth Circuit in May 2021 (the "Appellate Stay Briefs") despite not having a ruling on the District Court Stay Motions. On June 21, 2021, the Fifth Circuit denied the Appellate Stay Briefs.

12. On June 23, 2021, the District Court denied the District Court Stay Motions.

⁴ Unless otherwise noted, capitalized terms used herein have the meanings given to them in the Plan. The confirmed Plan included certain amendments filed on February 1, 2021. See *Debtor's Notice of Filing of Plan Supplement to the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)*, Ex. B [Docket No. 1875].

C. **Conditions to the Effective Date of the Plan.**

13. Article VIII of the Plan contains the conditions to the Effective Date of the Plan. The two conditions that have delayed the occurrence of the Effective Date are (i) the Confirmation Order becoming a Final Order and (ii) the Debtor obtaining D&O Insurance acceptable to the Debtor, the Committee, the Claimant Trust Oversight Committee, and the Litigation Trustee.

14. In addition, the Debtor determined, in the weeks following confirmation, that it would require exit financing in order to maintain sufficient liquidity for post-Effective Date operations and to comply with its obligations under the Plan. The facts and circumstances leading to the Debtor's decision to obtain exit financing are set forth in the *Motion for Entry of an Order (i) Authorizing the Debtor to (a) Enter into Exit Financing Agreement in Aid of Confirmed Chapter 11 Plan and (b) Incur and Pay Related Fees and Expenses, and (ii) Granting Related Relief* [Docket No. 2229] (the "Exit Financing Motion"). The Court approved the Exit Financing at a hearing on June 25, 2021.

15. As discussed at the confirmation hearing, the Debtor encountered difficulty in obtaining D&O Insurance because of the litigiousness of the case and the threat that litigation would continue well beyond confirmation of the Plan. Nevertheless, after confirmation, the Debtor, working closely with the Committee, continued to pursue D&O Insurance. Ultimately, however, the Debtor, the Committee, and the Independent Board, including Mr. Seery, who will be the Claimant Trustee and manage the Reorganized Debtor, determined that the insurance that was available was both insufficient and too costly in light of the coverage being provided.

16. The Debtor, working closely with the Committee, subsequently investigated alternatives to traditional D&O Insurance that could provide the beneficiaries of the Indemnity

Obligations protection after the Effective Date. The most attractive alternative was to create the Indemnity Subtrust, the approval of which is being sought through this Motion. If the Court approves this Motion, the Debtor will waive the condition to the Effective Date requiring the Confirmation Order to become a Final Order and thereby paving the way for the Plan to become effective.

D. Post-Effective Date Governance and Management

17. The Plan provides for the creation of the Claimant Trust, the Litigation Trust, and the Reorganized Debtor on the Effective Date to facilitate the monetization of the Debtor’s assets and the pursuit of Estate Claims for the benefit of the Debtor’s creditors and stakeholders. As currently contemplated, the Claimant Trust will be overseen by James P. Seery, Jr., as the Claimant Trustee, and an Oversight Board, made up of the Debtor’s largest creditors. The Claimant Trust is governed by the terms of the Claimant Trust Agreement.⁵ The Litigation Sub-Trust is governed by the terms of the Litigation Trust Agreement.⁶ And the Reorganized Debtor will be governed by the Reorganized Limited Partnership Agreement.⁷ It is anticipated that Mr. Seery will be the Claimant Trustee and the chief executive officer of the Reorganized Debtor.

E. Post-Effective Date Indemnification

18. The terms of the Claimant Trust Agreement, the Litigation Trust Agreement, and the Reorganized Limited Partnership Agreement each provide for a broad indemnification of the parties tasked with managing the implementation of the Plan (collectively, the “Indemnified

⁵ The final Claimant Trust Agreement was filed as Exhibit R to *Debtor’s Notice of Filing of Plan Supplement to the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (with Technical Modifications)* [Docket No. 1811] on January 22, 2021 (the “January Supplement”).

⁶ The final Litigation Trust Agreement was filed as Exhibit T to the January Supplement.

⁷ The final Reorganized Limited Partnership Agreement was filed as Exhibit Z to the January Supplement.

Parties”).⁸ The costs of indemnifying the Indemnified Parties (the “Indemnification Costs”) were provided for in the Plan and the Plan Documents. The Indemnification Costs would be treated as expenses and be paid before, and be senior to, distributions to the Debtor’s pre-petition creditors, *i.e.*, the Claimant Trust Beneficiaries. The relevant documents also authorized the reservation of assets sufficient to fund the Indemnification Costs.

A. The Indemnity Subtrust and Trust Agreement

19. As discussed above, the Debtor has determined that it is in the best interests of the Debtor’s estate and its stakeholders to create the Indemnity Subtrust pursuant to the terms of the Trust Agreement. The Indemnity Subtrust will be administered by a third-party corporate trustee. The Indemnity Trust will, as discussed below, be funded on the Effective Date with \$2.5 million in cash and a note (the “Indemnification Note”) in the principal amount of \$22.5 million with such amounts to be held in reserve and used solely to pay Indemnification Costs that are not otherwise paid or payable by the Claimant Trust, Litigation Trust, or Reorganized Debtor, as applicable.

20. As contemplated by the Plan and consistent with the Claimant Trust Agreement, the Litigation Trust Agreement, and the Reorganized Limited Partnership Agreement, the Indemnification Costs have priority to other claims. The Indemnity Subtrust is the vehicle which ensures that adequate provision for such Indemnification Costs is made, notwithstanding the

⁸ The Indemnified Parties of (a) the Claimant Trust are (i) the Claimant Trustee (including each former Claimant Trustee), (ii) Delaware Trustee, (iii) the Oversight Board, and (iv) all past and present Members of the Oversight Board, and the employees, agents, and professionals of each of the foregoing; (b) the Litigation Trust are (i) the Litigation Trustee (including each former Litigation Trustee), (ii) the Oversight Board, and (iii) all past and present Members of the Oversight Board, and the employees, agents, and professionals of each of the foregoing; and (c) the Reorganized Debtor are (i) New GP LLC (as the Reorganized Debtor’s general partner) and each member, partner, director, officer, and agent thereof, (ii) each person who is or becomes an officer of the Reorganized Debtor, and (iii) each person who is or becomes an employee or agent of the Reorganized Debtor if New GP LLC determines in its sole discretion that such employee or agent should be indemnified. *See* Claimant Trust Agreement, § 8.2; Litigation Trust Agreement, § 8.2.; Reorganized Limited Partnership Agreement, §§ 10(b)-(c).

timing pursuant to which assets are monetized and distributions would otherwise be made to such beneficiaries of the Claimant Trust.

21. Certain material terms of the Trust Agreement and the Indemnity Subtrust are as follows:⁹

Beneficiaries:	The Indemnified Parties
Indemnity Trustee	A corporate trustee with appropriate trust powers under applicable state and/or federal law.
Indemnity Trust Administrator	Mr. Seery, initially in his capacity as the Claimant Trustee or in his individual capacity if no longer serving as the Claimant Trustee.
Indemnity Trust Corpus	At the inception of the Indemnity Trust, the trust corpus shall consist of the following, to be irrevocably contributed by the Grantor: <ol style="list-style-type: none">1. Cash of \$2.5 million; and2. the Indemnification Funding Note, in the principal amount of \$22.5 million. The foregoing contributions are intended to create and maintain a balance of liquid assets in the Indemnity Trust Account of not less than \$25 million (the “Indemnity Trust Account Minimum Balance”).
Indemnification Funding Note	The Indemnification Funding Note will represent and document the Claimant Trustee’s obligation to make additional cash deposits into the Indemnity Trust Account to satisfy the obligations of the Claimant Trust, the Litigation Sub-Trust, and the Reorganized Debtor, each of which will be jointly and severally liable under the Indemnification Funding Note. After the initial funding of principal under the Indemnification Funding Note, the principal balance thereof will at all times equal the amount representing the difference between (i) the Indemnity Trust Account Minimum Balance and (ii) the balance of liquid assets held in the Indemnity Trust Account, as reported on the most recent quarterly statement issued by the Indemnity Trustee.
Withdrawal of Trust Assets	Consistent with the Indemnity Trust’s purpose as a collateral mechanism, withdrawals from the Indemnity Trust Account are contemplated only following a tender of for indemnity pursuant to Section 8.2 of the Claimant Trust Agreement and the failure of such Beneficiary to receive payment in full of such indemnity claim from the Claimant Trust within [30] days.
Duration of the Indemnity Trust	The Indemnity Trust will exist and remain in full force and effect until the <i>earlier of</i> (i) the expiry of all indemnification rights under Section 8.2 of the Claimant Trust Agreement, due to expiration of all applicable statutes of limitations (as determined by the Indemnity Trust Administrator, in his sole and absolute discretion), and (ii) the mutual agreement to terminate the Indemnity Trust by the Grantor and the Indemnity Trust Administrator.
Liquidation and Final Distribution of Trust Assets	Upon dissolution and liquidation of the Indemnity Trust, any assets remaining in the Indemnity Trust Account will be transferred to the Claimant Trust; provided, however, if the Claimant Trust is no longer in existence, then such distribution of the Indemnity Trust assets will be made according to the same distribution methodology contemplated in Section 9.2 of the Claimant Trust

⁹ The following is by way of summary only. Parties are encouraged to read the entirety of the Term Sheet. In the event that the description set forth herein is in conflict with the Term Sheet, the Term Sheet will control. All terms are subject to change.

Governance of the Indemnity Trust

Agreement (or the successor to such numbered section) on the effective date of the termination of the Claimant Trust.

Consistent with the Indemnity Trust’s purpose as a collateral mechanism, it is not contemplated that the Indemnity Trust will need any comprehensive governance system. For any action contemplated or required in connection with the operation of the Indemnity Trust, and for any guidance or instruction to be provided to the Indemnity Trustee, such function, rights and responsibility shall be vested in the Indemnity Trust Administrator, and the Indemnity Trustee will take written directions from the Indemnity Trust Administrator, in such form specified in the Indemnity Trust Agreement and otherwise satisfactory to the Indemnity Trustee.

Beneficiaries will not be involved in or have any rights with respect to the administration of the Indemnity Trust or have any right to direct the actions of the Indemnity Trustee with respect to the Indemnity Trust or the assets held in the Indemnity Trust Account, other than the Indemnity Trust Administrator in such capacity.”

22. The Debtor believes that it has the support of the Committee with respect to the implementation of the Indemnity Subtrust. However, the Debtor and the Committee are still discussing the terms of the Trust Agreement and the foregoing terms may change. If the terms change, the Debtor will file an updated Term Sheet as necessary.

B. Entry into the Trust Agreement Is an Exercise of the Debtor’s Sound Business Judgment and Should Be Approved

23. The Bankruptcy Code authorizes a debtor, after notice and a hearing, to “use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1). It is well established in this jurisdiction that a debtor may use property of the estate outside the ordinary course of business if there is a good business reason for doing so. *See, e.g., Black v. Shor (In re BNP Petroleum Corp.)*, 642 F. App’x 429, 435 (5th Cir. 2016) (sale of debtors’ assets under section 363(b) of the Bankruptcy Code must “be supported by an articulated business justification, good business judgment, or sound business reasons.”) (quoting *Cadle Co. v. Mims (In re Moore)*, 608 F.3d 253, 263 (5th Cir. 2010)); *Petfinders LLC v. Sherman (In re Ondova Ltd)*, 620 F. App’x 290, 291 (5th Cir. 2015) (sale of debtors’ assets under section 363(b) of the Bankruptcy Code is exercise of the trustee’s sound business judgment”); *In re ASARCO, LLC*, 441 B.R. 813, 830 (Bankr. S.D. Tex. 2010) (outside of the ordinary course of

business, “for the debtor-in-possession or trustee to satisfy its fiduciary duty to the debtor, creditors, and equity holders, there must be some articulated business justification for using, selling, or leasing the property”) (quoting *In re Continental Air Lines*, 780 F.2d 1223, 1226 (5th Cir. 1986)), *aff’d*, 650 F.3d 593 (5th Cir. 2011).

24. To determine whether the business-judgment test is satisfied, courts require “a showing that the proposed course of action will be advantageous to the estate.” *In re Pisces Energy, LLC*, 2009 Bankr. LEXIS 4709, at *18 (Bankr. S.D. Tex. Dec. 21, 2009). In the absence of a showing of bad faith or an abuse of business discretion, a debtor’s business judgment will not be altered. *See, e.g., NLRB v. Bildisco & Bildisco (In re Bildisco)*, 682 F.2d 72, 79 (3d Cir. 1982), *aff’d*, 465 U.S. 513 (1984); *Lubrizol Enter. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1047 (4th Cir. 1985). “Great judicial deference is given” to the “exercise of business judgment.” *GBL Holding Co. v. Blackburn/Travis/Cole, Ltd. (In re State Park Bldg. Grp.)*, 331 B.R. 251, 254 (Bankr. N.D. Tex. 2005).

25. Entry into and performance under the Trust Agreement and the creation of the Indemnity Subtrust is in the best interests of the Debtor’s estate and represents a sound exercise of the Debtor’s business judgment. The Effective Date of the Plan cannot occur unless it is certain that there will be sufficient resources to pay the Indemnification Costs. As the Court is unfortunately aware, the Dondero Entities’ strategy is to sue the Debtor’s current management and post-Effective Date management whenever possible. Mr. Dondero admitted as much during the hearing held on June 8, 2021. The Debtor is therefore under no illusions. There will be Indemnification Costs and, unfortunately, they probably will be significant.

26. For that reason, among others, without the ability to guarantee payment of the Indemnification Costs, the Debtor would not be able to engage competent management to

oversee the implementation of the Plan, including the monetization of the Debtor's assets, prosecution of Estate Claims, and, ultimately, distributions to the Claimant Trust Beneficiaries. As discussed above, execution of the Trust Agreement is in lieu of obtaining D&O Insurance which, because of Mr. Dondero's history of litigiousness and his notoriety in the insurance industry could not be obtained in a cost-effective manner.

27. The Indemnity Subtrust (when coupled with the Exit Facility) will allow the Plan to become effective and permit the Reorganized Debtor to monetize its assets and pay allowed claims, as contemplated under the Plan, while the Reorganized Debtor or Litigation Trustee, as applicable, simultaneously pursues Estate Claims and otherwise attempts to recover value for creditors.

28. For these reasons, the Debtor submits that entering into the Trust Agreement and the creation of the Indemnity Subtrust will be an exercise of its sound business judgment, in the best interests of the Debtor's estate, and should be approved.

C. Waiver of the Stay Period Pursuant to Bankruptcy Rule 6004(h) Is Proper

29. The Indemnity Subtrust is required to promptly implement the Effective Date. Consequently, the Debtor requests that the Court enter an order providing that the Debtor has established cause to exclude the relief requested herein from the fourteen-day stay period provided under Bankruptcy Rule 6004(h). Accordingly, the Debtor requests that the Order authorizing the Debtor to enter into the Trust Agreement be effective immediately upon entry such that the Debtor may proceed to complete the necessary related work to enable the prompt occurrence of the Effective Date.

Notice

30. Notice of this Motion shall be given to the following parties or, in lieu thereof, to their counsel, if known: (a) the Office of the United States Trustee; (b) the Office of the United

States Attorney for the Northern District of Texas; (c) the Debtor's principal secured parties; (d) counsel to the Committee; and (e) parties requesting notice pursuant to Bankruptcy Rule 2002. The Debtor submits that, in light of the nature of the relief requested, no other or further notice need be given.

[Remainder of Page Intentionally Blank]

WHEREFORE, the Debtor respectfully requests that the Court enter an order, substantially in the form annexed hereto as **Exhibit A**, granting the relief requested in the Motion and such other and further relief as may be just and proper.

Dated: June 25, 2021

PACHULSKI STANG ZIEHL & JONES LLP

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EXHIBIT A

Proposed Order

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

In re:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT,	§	Case No. 19-34054
L.P.,	§	Chapter 11
	§	
Debtor.	§	Re: Docket No. _____
	§	

**ORDER APPROVING DEBTOR’S MOTION FOR ENTRY OF AN ORDER (I)
AUTHORIZING THE (A) CREATION OF AN INDEMNITY SUBTRUST AND (B)
ENTRY INTO AN INDEMNITY TRUST AGREEMENT AND (II) GRANTING
RELATED RELIEF**

Upon the *Debtor’s Motion for Entry of an Order (i) Authorizing the (A) Creation of an Indemnity Subtrust and (b) Entry into an Indemnity Trust Agreement and (ii) Granting Related Relief* (the “Motion”),¹ and the Court finding that: (i) this Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; (ii) venue is proper pursuant to 28 U.S.C. §§ 1408 and

¹ All terms not otherwise defined herein shall be given the meanings ascribed to them in the Motion.

1409; (iii) this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); (iv) due and sufficient notice of the Motion has been given; (v) entry into the Agreement was an exercise of the Debtor's sound business judgment; and (vi) it appearing that the relief requested in the Motion is necessary and in the best interests of the Debtor's estate and creditors; and good and sufficient cause appearing therefor, it is hereby

ORDERED, ADJUDGED, AND DECREED that:

1. The Motion is granted as set forth herein.
2. The Debtor is authorized to enter into and perform under the Trust Agreement and consummate the transactions contemplated thereby, including the creation of the Indemnity Subtrust.
3. The Debtor is authorized to negotiate, prepare, execute, and deliver all documents and take such other action as may be necessary or appropriate to implement, effectuate, and fully perform its obligations as and when they are incurred and come due under the Trust Agreement.
4. The terms and provisions of this Order shall be binding in all respects upon all parties in this chapter 11 case, the Debtor, its estate, and all successors and assigns thereof.
5. Notwithstanding the possible applicability of Bankruptcy Rules 6004(h) or otherwise, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.
6. The Debtor is authorized to take all actions necessary to effectuate the relief granted in this Order in accordance with the Motion.

7. This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

END OF ORDER

EXHIBIT B

TERM SHEET FOR INDEMNITY TRUST AGREEMENT

This Term Sheet sets forth the basic terms of a proposed trust (the “Indemnity Trust”) to provide collateral security supporting the indemnification obligations specified in (i) Section 8.2 of that certain Claimant Trust Agreement, effective as of [●], 2021 (the “Claimant Trust Agreement”), establishing that certain claimant trust (the “Claimant Trust”) pursuant to the *Fifth Amended Plan of Reorganization of Highland Capital Management L.P (as Modified)* (the “Plan”), (ii) Section 8.2 of the Litigation Sub-Trust Agreement, establishing the Litigation Sub-Trust pursuant to the Plan, and (iii) Section 10 of the Reorganized Limited Partnership Agreement (as defined in the Plan), establishing the Reorganized Debtor (as defined in the Plan) pursuant to the Plan. The Indemnity Trust is based on the fundamental premise, as set forth under the Plan and consistent with the Claimant Trust Agreement and related documents, that the indemnification rights under the Claimant Trust are senior priority obligations of the Claimant Trust, relative to the classes of beneficiaries thereunder, and that adequate provision for such indemnification needs to be funded, notwithstanding the timing pursuant to which assets are realized by the Claimant Trust and distributions would otherwise be made to such beneficiaries of the Claimant Trust. The Indemnity Trust is not intended to address any qualifications, requirements or standards for indemnification; such matters are to be addressed solely under and pursuant to the standards set forth in Section 8.2 of the Claimant Trust Agreement, Section 8.2 of the Litigation Sub-Trust Agreement, and Section 10 of the Reorganized Limited Partnership Agreement. This Term Sheet assumes that the Indemnity Trust is intended solely as a collateral mechanism, to fund indemnification claims that were tendered to but not paid by the Claimant Trust, Litigation Sub-Trust or the Reorganized Debtor within a reasonable period of time (thirty (30) days) following such claim being made. Capitalized terms used but not otherwise defined herein shall have the meanings set forth in the Claimant Trust Agreement.

Grantor	Claimant Trust, pursuant to the authority granted under Section 6.1(a) of the Claimant Trust Agreement.
Beneficiaries	<p>The Beneficiaries of the Indemnity Trust shall be the following:</p> <ol style="list-style-type: none"> 1. Indemnified Parties under Section 8.2 of the Claimant Trust Agreement and their respective employees, agents and professionals, which are also indemnitees under the same provision; 2. “Indemnified Parties” under Section 8.2 of the Litigation Sub-Trust Agreement and their respective employees, agents and professionals, which are also indemnitees under the same provision; and 3. “Covered Persons” under Section 10 of the Reorganized Limited Partnership Agreement.
Indemnity Trustee	A corporate trustee with appropriate trust powers under applicable state and/or federal law.
Indemnity Trust Administrator	James P. Seery, Jr., initially in his capacity as the Claimant Trustee or in his individual capacity if no longer serving as

	<p>the Claimant Trustee. If James P. Seery, Jr. voluntarily resigns or is unable to serve as Indemnity Trust Administrator, his legal successors or assigns.</p> <p>If Cause (as defined in the Claimant Trust Agreement) to remove James P. Seery Jr. or the then current Indemnity Trust Administrator is shown by final order of a court of competent jurisdiction, a successor chosen by the Claimant Trustee.</p> <p>Governance of the Indemnity Trust shall be effected by and through the Indemnity Trust Administrator (see “Governance”).</p>
<p>Indemnity Trust Corpus</p>	<p>At the inception of the Indemnity Trust, the trust corpus shall consist of the following, to be irrevocably contributed by the Grantor:</p> <ol style="list-style-type: none"> 1. Cash of \$2.5 million; and 2. the Indemnification Funding Note, in the principal amount of \$22.5 million. <p>The foregoing contributions are intended to create and maintain a balance of liquid assets in the Indemnity Trust Account of not less than \$25 million (the “Indemnity Trust Account Minimum Balance”).</p>
<p>Indemnification Funding Note</p>	<p>The Indemnification Funding Note will represent and document the Claimant Trustee’s obligation to make additional cash deposits into the Indemnity Trust Account to satisfy the obligations of the Claimant Trust, the Litigation Sub-Trust, and the Reorganized Debtor, each of which will be jointly and severally liable under the Indemnification Funding Note; such deposits are intended to ensure proper allocation of the respective assets of the Claimant Trust, the Litigation Sub-Trust and the Reorganized Debtor to the Indemnity Trust upon material monetizations by the Claimant Trust, reflective of the Claimant Trustee’s power to reserve for senior indemnity claims under Section 6.1(a) of the Claimant Trust Agreement. Payments under the Indemnification Funding Note will be senior in priority to any distributions to the Claimant Trust beneficiaries.</p> <p>The initial principal amount of the Indemnification Funding Note will be \$22.5 million, representing the extent of the additional collateral to be allocated to the Indemnity Trust, such that the Indemnity Trust Account</p>

	<p>will maintain the Indemnity Trust Account Minimum Balance.</p> <p>The initial principal amount of the Indemnification Funding Note will be paid in full or in part on the earlier of (a) demand for payment from the Indemnity Trust Administrator or (b) the date at which the net asset value (asset value net of liabilities and expense reserves) is less than 200% of the principal amount of the Indemnification Funding Note. Subject to the foregoing, the Claimant Trustee will have sole and absolute discretion to determine the timing and amount of the payments of the initial principal amount of the Indemnification Funding Note consistent with his view of liquidity needs of the Claimant Trust and related entities and the requirements of any financing agreement binding on the Claimant Trust. Upon the Claimant Trustee's determination that such a payment should be made, the amount of the payment shall be due within five (5) days of such a determination.</p> <p>After the initial funding of principal under the Indemnification Funding Note, the principal balance thereof will at all times equal the amount representing the difference between (i) the Indemnity Trust Account Minimum Balance and (ii) the balance of liquid assets held in the Indemnity Trust Account, as reported on the most recent quarterly statement issued by the Indemnity Trustee. Such principal balance of the Indemnification Funding Note will be documented by the Indemnity Trust Administrator and will be paid in full, in a manner determined by the Claimant Trustee consistent with the procedures set forth in the immediately preceding paragraph hereof.</p> <p>For the avoidance of doubt, the foregoing payments under the Indemnification Funding Note will be senior to any distribution to beneficiaries under the Claimant Trust. In the event that the liquid assets of the Claimant Trust are insufficient to satisfy the foregoing payments, the Claimant Trustee must take all reasonable action to satisfy such obligations under the Indemnification Funding Note, including accessing any available credit lines or third-party leverage, and no current payments to Claimant Trust beneficiaries will be made until all current amounts due under the Indemnification Funding Note have been made. Consistent with the foregoing, upon written request of the Indemnity Trust Administrator, the Claimant Trustee shall provide collateral to secure any amounts due or which may become due under the Indemnification Funding Note, including the posting of a bank letter of</p>
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	<p>credit, under terms acceptable to the Indemnity Trust Administrator.</p> <p>The Indemnification Funding Note will not bear interest, other than that which must be imputed under applicable law. All amounts due under the Indemnification Funding Note shall be absolute, regardless of their characterization.</p>
Indemnity Trust Account	<p>A custodial account to be maintained/held by the Indemnity Trustee. The trust corpus and other assets of the Indemnity Trust shall be held in such Indemnity Trust Account maintained by the Indemnity Trustee, for the benefit of the Beneficiaries. Any investment income (see “Investment of Trust Assets”) shall be retained in the Indemnity Trust Account and will be included in the balance of Indemnity Trust Corpus. Any investment income, investment loss and Withdrawals of Trust Assets will be included in the determination of whether the Indemnity Trust Account Minimum Balance has been achieved (see “Indemnification Funding Note”).</p>
Reports and Account Statements	<p>The Indemnity Trustee will provide comprehensive Indemnity Trust Account statements to the Beneficiaries and the Indemnity Trust Administrator on a quarterly basis, beginning at inception. Such statements will include the balance of the assets held in the Indemnity Trust Account as of the subject reporting date, plus a full accounting of all deposits (including amounts collected under the Indemnification Funding Note and any investment income) and any withdrawals/distributions made during the subject period and the effect of any investment losses. Such statements may be redacted for any sensitive information, as determined by the Indemnity Trust Administrator, in his sole and absolute discretion.</p>
Withdrawal of Trust Assets	<p>Consistent with the Indemnity Trust’s purpose as a collateral mechanism, withdrawals from the Indemnity Trust Account are contemplated only following a tender of for indemnity pursuant to Section 8.2 of the Claimant Trust Agreement, Section 8.2 of the Litigation Sub Trust Agreement, or the Reorganized Limited Partnership Agreement and the failure of such Beneficiary to receive payment in full of such indemnity claim from the Claimant Trust within 30 days. It is expressly contemplated that in the ordinary course of their respective businesses, the Claimant Trust, the Litigation Sub-Trust, and the Reorganized Debtor will pay the costs and expenses of</p>

	<p>defending indemnified claims as well as the amount of any such claims if successful. The Indemnity Trust will serve as a source of indemnification for such claims as provided herein in the event that any of the Claimant Trust, the Litigation Sub-Trust, or the Reorganized Debtor, as the case may be, does not pay such claims.</p> <p>A request for withdrawal of assets from the Indemnity Trust Account must be presented to the Indemnity Trustee, with a copy to the Indemnity Trust Administrator, and must be accompanied by an written certification of the following:</p> <ol style="list-style-type: none"> 1. A claim for indemnification was made under Section 8.2 of the Claimant Trust Agreement, Section 8.2 of the Litigation Sub Trust Agreement, or the Reorganized Limited Partnership Agreement, accompanied by a copy of such claim and all underlying documentation. 2. The Beneficiary did not receive full payment with respect to such indemnification claim with 30 days. <p>Following the receipt of the above information, the Indemnity Trust Administrator will issue a withdrawal/distribution order to the Indemnity Trustee, with a copy to the claiming Beneficiary. Upon receipt of such order, the Indemnity Trustee will pay the full amount of the requested distribution to the subject Beneficiary; such payment will be made within 3 business days of receipt.</p> <p>In the event that a claiming Beneficiary receives payment with respect to the subject indemnity claim from the Claimant Trust or any other source, such Beneficiary must promptly notify the Indemnity Trustee and the Indemnity Trust Administrator, and the subject request for payment from the Indemnity Trust will be revised accordingly; to the extent that any such amounts were already received from the Indemnity Trust, such amounts must be repaid to the Indemnity Trust Account, without interest.</p>
<p>Duration of the Indemnity Trust</p>	<p>The Indemnity Trust will exist and remain in full force and effect until the <i>earlier of</i> (i) the expiry of all indemnification rights under Section 8.2 of the Claimant Trust Agreement, Section 8.2 of the Litigation Sub Trust Agreement, and the Reorganized Limited Partnership Agreement due to expiration of all applicable statutes of limitations (as determined by the Indemnity Trust Administrator, in his sole and absolute discretion), and (ii)</p>

	<p>the mutual agreement to terminate the Indemnity Trust by the Grantor and the Indemnity Trust Administrator.</p> <p>For the avoidance of doubt, neither the liquidation or termination of the Claimant Trust nor the legal existence of the Grantor or any other party thereto will have any effect on the legal existence of the Indemnity Trust.</p>
Wind-down	<p>Upon the determination of the Indemnity Trust Administrator that the Claimant Trust has substantially completed its efforts to monetize and distribute its assets or such earlier date that the Indemnity Trust Administrator shall determine, the Indemnity Trust Administrator and the Claimant Trust Oversight Committee shall work in good faith to replace the Indemnity Funding Note with a suitable third-party insurance policy.</p>
Liquidation and Final Distribution of Trust Assets	<p>Upon dissolution and liquidation of the Indemnity Trust, any assets remaining in the Indemnity Trust Account will be transferred to the Claimant Trust; provided, however, if the Claimant Trust is no longer in existence, then such distribution of the Indemnity Trust assets will be made according to the same distribution methodology contemplated in Section 9.2 of the Claimant Trust Agreement (or the successor to such numbered section) on the effective date of the termination of the Claimant Trust.</p>
Limitations on Transferability	<p>A beneficial interest in the Indemnity Trust may not be transferred, assigned or hypothecated without the consent of the Indemnity Trust Administrator in his sole and absolute discretion, provided that such transfer, assignment or hypothecation does not confer upon such assignee status as a Beneficiary under the Indemnity Trust. The Indemnity Trust Administrator may impose such conditions and other terms upon any transfer, assignment or hypothecation as he considers appropriate, in his sole and absolute discretion.</p> <p>In the event of an assignment, the foregoing limitations on transferability will continue to apply in all respects to such beneficial interest and will be binding on the assignee of such beneficial interest.</p>
Governance of the Indemnity Trust	<p>Consistent with the Indemnity Trust's purpose as a collateral mechanism, it is not contemplated that the Indemnity Trust will need any comprehensive governance system. For any action contemplated or required in connection with the operation of the Indemnity Trust, and for any guidance or instruction to be provided to the Indemnity Trustee, such function, rights and responsibility shall be vested in the Indemnity Trust Administrator, and the Indemnity Trustee will take written directions from the</p>

	<p>Indemnity Trust Administrator, in such form specified in the Indemnity Trust Agreement and otherwise satisfactory to the Indemnity Trustee.</p> <p>Consistent with the foregoing, the Indemnity Trust Administrator shall have the power to take any actions the Indemnity Trust Administrator, in his sole and absolute discretion, deems desirable or necessary in connection with the operation of the Indemnity Trust.</p> <p>The Indemnity Trust Administrator will have the power and authority to retain such experts and other advisors, including financial consultants and legal counsel, as he considers appropriate to address any matter relating to the Indemnity Trust. Without limiting the generality of the foregoing, to the extent the Indemnity Trust Administrator identifies any conflict of interest in his roles as the Claimant Trustee, on the one hand, and the Indemnity Trust Administrator, on the other, or otherwise relating to the Indemnity Trust, the Indemnity Trust Administrator may retain such experts, including legal counsel, as he, in his sole and absolute discretion, considers appropriate to evaluate and resolve any such conflict of interest. The cost of any such advisors/experts/counsel will be paid by the Claimant Trust, and if not paid in a timely fashion, can represent a claim for indemnity under the Indemnity Trust Agreement (see “Withdrawal of Trust Assets”). Beneficiaries will not be involved in or have any rights with respect to the administration of the Indemnity Trust or have any right to direct the actions of the Indemnity Trustee with respect to the Indemnity Trust or the assets held in the Indemnity Trust Account, other than the Indemnity Trust Administrator in such capacity.”</p>
<p>Indemnification of Indemnity Trustee</p>	<p>The Indemnity Trustee and the Indemnity Trust Administrator will be provided customary indemnification rights typical for a collateral trust of this type.</p>
<p>Nature and Evidence of Beneficial Interest</p>	<p>A beneficial interest in the Indemnity Trust will not entitle a Beneficiary to any direct right, title or interest in or to the specific assets held in the Indemnity Trust Account, and no Beneficiary will have any right to call for a partition or division of such assets.</p> <p>A beneficial interest in the Indemnity Trust will not be evidenced by any certificate, security, receipt or any other instrument. The Indemnity Trust Administrator will maintain a record of the Beneficiaries and their respective beneficial interests in the Indemnity Trust.</p>

	Notwithstanding the foregoing, the Indemnity Trustee or the Indemnity Trust Administrator will be authorized to provide evidence of beneficiary status upon request by a Beneficiary.
Investment of Trust Assets	The cash or other liquid assets in the Indemnity Trust Account will be invested in a manner consistent with that set forth in Section 3.4 of the Claimant Trust Agreement; provided, however, the approval of the Oversight Board will not be needed. Such investment function will be overseen by the Indemnity Trust Administrator and effected by the Indemnity Trustee.
Governing Law	The Indemnity Trust Agreement shall be governed by and construed in accordance with the laws of the State of Delaware.
Venue	Each of the parties consents and submits to the exclusive jurisdiction of the Bankruptcy Court of the Northern District of Texas for any action or proceeding instituted for the enforcement and construction of any right, remedy, obligation, or liability arising under or by reason of this Indemnity Trust Agreement or any act or omission of the Indemnity Trustee (acting in his capacity as the Indemnity Trustee or in any other capacity contemplated by this Indemnity Trust Agreement); provided, however, that if the Bankruptcy Court either declines to exercise jurisdiction over such action or cannot exercise jurisdiction over such action, such action may be brought in the state or federal courts located in the Northern District of Texas

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

In re: §
§ Chapter 11
HIGHLAND CAPITAL MANAGEMENT, §
L.P., § Case No. 19-34054-sgj11
§
Debtor. §

**OBJECTION TO DEBTOR’S MOTION FOR ENTRY OF AN ORDER
(I) AUTHORIZING THE (A) CREATION OF AN INDEMNITY SUBTRUST
AND (B) ENTRY INTO AN INDEMNITY TRUST AGREEMENT
AND (II) GRANTING RELATED RELIEF**

The Dugaboy Investment Trust, James Dondero, NexPoint Advisors, L.P. and Highland Capital Management Fund Advisors, L.P. (collectively, the “Objectors”) file this objection to the *Debtor’s Motion for Entry of an Order (I) Authorizing the (A) Creation of an Indemnity Subtrust and (B) Entry into an Indemnity Trust Agreement and (II) Granting Related Relief* (the “Motion”) [Dkt. # 2491] filed by Highland Capital Management, L.P. (“Debtor”) and would show the Court as follows:

Summary of Argument

The Motion is in fact a plan modification and, as such, the granting of the Motion should be denied unless the Court determines either the relief requested is not a plan modification or that it is a plan modification and the requirements contained in §§ 1122, 1123, 1125 and 1127 have been satisfied. The Motion as filed, when read in conjunction with other requirements under the Plan, other obligations the Debtor has taken on, and the procedural posture of the Motion and this case before the Court, cannot meet those standards and as such should be denied.

Factual Background

1. On February 22, 2021, this Court entered an *Order (I) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (II) Granting Related Relief* [Dkt. # 1943].

2. The *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* (the “Plan”) [Dkt. # 1808] as confirmed by the Court contained the following two provisions that are at issue in the Court’s review of the Motion. The first is that the Plan created

three (3) entities: a) the Reorganized Debtor; b) the Claimant Trust; and c) the Litigation Trust.¹ Pursuant to the Plan, all estate property was to be transferred into one of these three (3) entities, and then monetized prior to distribution to creditors. Of important note, no provision was made in the Plan for an Indemnity Trust or providing any such entity estate assets.

3. The Plan did require that the Debtor obtain D&O Insurance for the beneficiaries of the Indemnity Obligations under the Plan. In fact, as the Motion acknowledges, Article VIII of the Plan conditioned the effectiveness of the Plan on the Debtor's obtaining D&O Insurance acceptable to the Debtor, the Committee, the Claimant Trust Oversight Committee and the Litigation Trustee. (Motion ¶ 13.)

4. The Motion discloses the Debtor's inability to obtain economical D&O Insurance and, instead, requests approval to establish a new Indemnity Subtrust that will be administered by a third-party corporate trustee. The identification and compensation to be paid to this new trustee is not provided for in the Motion.

5. According to the Motion, the Indemnity Trust Administrator will be James Seery, in his capacity as Claimant Trustee. The Indemnity Trust, funded with \$2,500,000 of cash and an Indemnification Funding Note of \$22,500,000, will exist and remain in full force and effect until the earlier of a) the expiration rights under Section 8.2 of the Claimant Trust Agreement; or b) the mutual agreement to terminate the Indemnity Trust by the Grantor and the Indemnity Trust Administrator.²

6. Pursuant to the Term Sheet filed in support of the Motion (Motion, Ex. B "Term Sheet"), payments under the Indemnification Funding Note will be "senior to any distribution to

¹ Capitalized terms used and not otherwise defined herein shall have the same meaning ascribed to such terms in the Plan and Motion, as applicable.

² i.e., a forgivable note.

beneficiaries of the Claimant Trust.” The Term Sheet also provides that no “current payments to the Claimant Trust beneficiaries will be made until all current amounts due under the Indemnification Funding Note have been made.” The Claimant Trustee is also required to provide collateral for the Indemnification Funding Note upon written request of the Indemnity Trust Administrator.

7. However, the Debtor filed *Debtor's Motion for Entry of an Order (I) Authorizing the Debtor to (A) Enter into Exit Financing Agreement in Aid of Confirmed Chapter 11 Plan and (B) Incur and Pay Related Fees and Expenses, and (II) Granting Related Relief (“Exit Loan Motion”)* [Dkt. #2229] seeking Court approval for an Exit Loan that would provide \$20,000,000 or more of liquidity for the Claimant Trust. The Exit Loan Motion was premised on the fact that the Debtor needed additional liquidity to go effective and meet its cash obligations under the Plan. The Exit Loan Motion was approved by the Court on June 25, 2021.

Questions Raised by the Debtor’s Motion

8. The Motion fails to disclose the impact that the Indemnification Funding Note and the limitations on payments to Claimant Trust Beneficiaries have on the amount and timing of payment to Claimant Trust Beneficiaries.

9. The Motion does not address how the Debtor intends to reconcile the requirements to its Exit Loan Lender and the Indemnity Trust Advisor under the Indemnification Funding Note. The Debtor at the Exit Loan hearing testified that all or substantially all of its assets would serve as security for the Exit Loan and that the Exit Lender would be required to pursue the Claimant Trust prior to seeking collection from the Trussway Entities.

The Relief Requested in the Motion is an Improper Plan Modification Request

10. Pursuant to sections 1127(b) and (c) of the Bankruptcy Code, a confirmed plan which has not been substantially consummated cannot be modified unless (i) the plan, as modified, meets “the requirements of sections 1122 and 1123” of the Bankruptcy Code, (ii) the proponent of the modification complies section 1125 of the Bankruptcy Code with respect to the plan as modified, and (iii) the court, after notice and a hearing, confirms the plan as modified under section 1129 of the Bankruptcy Code. 11 U.S.C.A. § 1127(b) and (c).

11. Given these stringent requirements applicable to postconfirmation plan modification requests, “[w]hether or not a request of the bankruptcy court for postconfirmation relief is construed as a request to ‘modify’ the confirmed plan has significant ramifications.” 6 Norton Bankr. L. & Prac. 3d § 111:2. Indeed, the equity power afforded to courts under section 105(a) of the Bankruptcy Code “cannot be used to produce a result contrary to the specific provisions of section 1127(b).” 7 Collier on Bankruptcy ¶ 1127.03[2][a] (2021).

12. The term “modification” and what constitutes a “modification” are not defined in the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure.

13. In *In Re Ionosphere Clubs Inc.*, 208 BR 812, 815 (S.D.N.Y. 1997), the Court found that a modification occurs “when there is an alteration of the ‘legal relationships among the debtor and its creditors and other parties in interest’” or when the change to the plan affected the legal relationship among them.

14. In *In re Joint Eastern & Southern District Asbestos Litig.*, 982 F.2d 721,747-749 (2d Cir. 1992), the Court found a modification occurred when the change to the Plan “effectively altered” a creditor’s right to payment.

15. Within the Fifth Circuit, even slight postconfirmation changes to plans have been deemed modifications that must comply with section 1127 of the Bankruptcy Code. For example, *In re United States Brass Corp.*, 255 B.R. 189, 192-94 (Bankr. E.D. Tex. 2000), *subsequently aff'd sub nom. In re U.S. Brass Corp.*, 301 F.3d 296 (5th Cir. 2002), the court found that a post confirmation settlement agreement “in aid of and implementation of the Plan” – which sought to change the plan’s selected forum for postconfirmation litigation from a court to binding arbitration – constituted a modification that had to comply with section 1127 of the Bankruptcy Code.

16. The Bankruptcy Court for the Eastern District of Texas noted as follows:

The proposed “settlement” agreement alters by extension the provisions of the Plan respecting time limitations with respect to bringing actions if the arbitration results in giving the carriers a defense to coverage. Plan at 8.21. Moreover, arbitration (as to the claims which are the subject matter of the proposed “settlement”) was not an option specifically contemplated and negotiated by the parties at confirmation.

Id.

17. Similarly, in *Enter. Fin. Grp., Inc. v. Curtis Mathes Corp.*, 197 B.R. 40, 40-47 (E.D. Tex. 1996), the court found that a requested postconfirmation change to a plan described by the proponent as a “mere clarification” of a confirmed plan’s terms constituted a modification which had to comply with section 1127 of the Bankruptcy Code.

18. As set forth above, the Motion alters the rights of Creditor Trust Beneficiaries. The Motion introduces a senior creditor of the Claimant Trust who must be paid prior to payments to Creditor Trust Beneficiaries and who has a right to demand collateral for the Indemnification Funding Note

19. The Motion is an impermissible *de facto* modification of the Plan, both in terms of the creation of the Indemnity Trust and the limitations contained in the Term Sheet, with respect to limitations on payment to Claimant Trust Beneficiaries and the senior status of Indemnification

Funding Loan. In addition, the Term Sheet contains a bar on payment and the ability of the Indemnity Trust Advisor to demand collateral for the Indemnity Funding Note.

20. As such the question before this Court should not be one of business judgement but, rather, whether the relief sought is properly sought and warranted under section 1127 of the Bankruptcy Code.

CONCLUSION

Based upon the foregoing, the Objectors request that this Court deny the Motion.

Dated: July 14, 2021

Respectfully submitted,

/s/Douglas S. Draper.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on July 14, 2021, a true and correct copy of the foregoing document was served by the Court's CM/ECF system on counsel for the Debtor and on all other parties requesting such service in this case.

/s/ Bryan C. Assink
Bryan C. Assink

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Counsel for the Debtor and Debtor-in-Possession

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

In re:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,¹	§	Case No. 19-34054
	§	Chapter 11
	§	
Debtor.	§	Ref. Docket No. 2491, 2563
	§	

**DEBTOR’S REPLY IN SUPPORT OF MOTION FOR ENTRY OF AN ORDER (I)
AUTHORIZING THE (A) CREATION OF AN INDEMNITY SUBTRUST AND (B)
ENTRY INTO AN INDEMNITY TRUST AGREEMENT AND (II) GRANTING
RELATED RELIEF**

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.

The above-captioned debtor and debtor-in-possession (the “Debtor”) hereby submits this reply (the “Reply”) in response to the *Objection to Debtor’s Motion* (the “Motion”)² for Entry of an Order (i) Authorizing the (a) Creation of an Indemnity Subtrust and (b) Entry into an Indemnity Trust Agreement and (ii) Granting Related Relief [Docket No. 2563] (the “Objection”) filed by The Dugaboy Investment Trust (“Dugaboy”), James Dondero, NexPoint Advisors, L.P. (“NPA”), and Highland Capital Management Fund Advisors, L.P. (“HCMFA” and together with Dugaboy, Mr. Dondero, and NPA, “Objectors”). In further support of the Motion, the Debtor respectfully states as follows:

PRELIMINARY STATEMENT

1. Objectors once again attempt to put road blocks in the way of the implementation of the Plan. Objectors do this despite their standing being tenuous at best.³ None of them is ever likely to be a beneficiary of the Claimant Trust (a “Claimant Trust Beneficiary”) created by the Plan. Accordingly, the premise of the Objection – that the Indemnity Subtrust alters the rights of Claimant Trust Beneficiaries – is especially disingenuous. It is also ironic that Objectors – who are the reason why the Debtor replaced traditional directors’ and officers’ insurance (“D&O”

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

³ A chart showing each Objectors lack of standing is attached hereto as Exhibit A. As that chart shows, Mr. Dondero has asserted three unliquidated, contingent claims and an indirect equity interest, each of which is unlikely to be allowed by this Court or receive distributions under the Plan. Similarly, Dugaboy filed three proofs of claim, each of which the Debtor believes is frivolous and/or which arise from equity and is deeply subordinated. HCMFA filed two proofs of claim. These claims were expunged with HCMFA’s consent, and HCMFA has no prepetition claims. NPA filed two proofs of claim. These claims were expunged with the NPA’s consent. Although NPA’s claims were expunged, NPA asserts prepetition (and potentially postpetition) claims because it acquired the claims of five former Debtor employees solely to manufacture standing to object to the Plan. NPA and HCMFA also assert an “administrative claim,” which the Debtor believes is frivolous and has objected to. Regardless, under the Plan, administrative claims are unimpaired and will be paid in full. As such, even if allowed, the “administrative claim” will not receive an interest in the Claimant Trust. Consequently, Objectors’ standing is extremely attenuated and their chances of recovery in this case are, at best, theoretical and speculative thereby calling into question Objectors’ motivation. See *In re Kutner*, 3 B.R. 422, 425 (Bankr. N.D. Tex. 1980) (finding that a party had standing only when it had a “pecuniary interest . . . directly affected by the bankruptcy proceeding”); see also *In re Flintkote Co.*, 486 B.R. 99, 114-15 (Bankr. D. Del. 2012), *aff’d*, 526 B.R. 515 (D. Del. 2014) (a claim that is speculative cannot confer party in interest standing). “[A] bankruptcy judge must not blindly follow the hue and cry of the most vocal special interest groups; rather, [the judge] should consider all salient factors . . . and . . . act to further the diverse interests of the debtor, creditors and equity holders, alike.” *In re Lionel*, 722 F.2d 1063, 1071 (2d Cir. 1983).

Insurance”) with the Indemnity Subtrust – are the parties challenging the Motion as not being in the best interests of creditors and as an impermissible modification to the Plan.⁴

2. As discussed below, the Indemnity Subtrust the Debtor proposes to create is not a modification to the Plan. The Indemnity Subtrust replaces traditional D&O Insurance and does not alter the relationship between the Debtor and its creditors. Rather, the Indemnity Subtrust is a mechanism pursuant to which a reserve will be created for the payment of indemnification claims and is entirely consistent with the Plan and the expectations of the parties. Objectors also incorrectly argue that the Plan required the Debtor to obtain D&O Insurance. Obtaining D&O Insurance was a condition to the Effective Date of the Plan, which was subject to waiver by the Debtor and the Committee. Lastly, the proposed funding of the Indemnity Subtrust is consistent with the proposed use of the exit financing the Court authorized the Debtor to obtain.

3. The Debtor requests that the Court overrule the Objection, grant the Motion, and pave the way for the Plan to become effective.

REPLY

A. The Indemnity Subtrust is Consistent with the Plan and Not a Plan Modification

4. The Indemnity Subtrust does not constitute a plan modification. A determination whether requested relief constitutes a plan modification, which must meet the substantive and procedural requirement set out in section 1127 of the Bankruptcy Code, is determined on a on a case-by-case basis after a review of the express terms of the plan. *In re Johns-Manville Corp.*, 920 F.2d 121, 128 (2d Cir. 1990). A plan modification is something that alters the legal relationships between the debtor and its creditors and parties-in-interests or otherwise affects the legal relationship among them or the right to payment. *See Doral Ctr. v. Ionosphere Clubs (In re*

⁴ The Debtor is pleased to report that the Committee now fully supports the Motion and the creation of the Indemnity Subtrust consistent with the Term Sheet attached to the Motion.

Ionosphere Clubs), 208 B.R. 812, 816 (S.D.N.Y. 1997); *U.S. Brass Corp. v. Travelers Ins. Group, Inc. (In re U.S. Brass Corp.)*, 301 F.3d 296, 308 (5th Cir. 2002); *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 747-48 (2d Cir. 1992). The Indemnity Subtrust does none of these things, is entirely consistent with the Plan, and does not affect creditor rights. Therefore, the Indemnity Subtrust is not a modification of the Plan.

5. **First**, the creation of the Indemnity Subtrust does not alter the priority of the Claimant Trust Beneficiaries' claims. As disclosed in the Motion, and, as discussed below, the Claimant Trust Agreement, the Litigation Trust Agreement, and the Reorganized Limited Partnership Agreement (collectively the "Plan Implementation Documents") all provide for the indemnification of the various parties tasked with implementing the Plan after the Effective Date (collectively, the "Indemnified Parties"). See Claimant Trust Agmt., § 8.2; Litigation Trust Agmt., § 8.2; Reorganized Limited Partnership Agmt., §§ 10(b), (c); see also Motion, n. 8.

6. The cost of indemnifying the Indemnified Parties (the "Indemnification Costs") was also explicitly accounted for in the Plan and the Plan Implementation Documents. The Indemnification Costs are expenses that will be paid before, and be senior to, distributions to the Claimant Trust Beneficiaries. Further, each of the Plan Implementation Documents authorizes the creation of any reserves that may be necessary or advisable to ensure the Indemnification Costs of the Claimant Trust, the Litigation Trust, and the Reorganized Debtor (collectively, the "Post-Effective Date Entities") are satisfied. See Claimant Trust Agmt., § 6.1(d); Litigation Trust Agmt., § 5(b).⁵

7. The Plan Implementation Documents also authorize the relevant Post-Effective Date Entity to retain whatever professionals or third-party servicers it believes necessary to

⁵ Section 5(b) of the Reorganized Limited Partnership Agreement provides that the Claimant Trust, as limited partner, may make additional capital contributions to the Reorganized Debtor at the request of its general partner. This additional capital can be used to pay the Indemnification Costs.

implement the Plan. The fees and expenses of such entities would be considered expenses of the Post-Effective Date Entities and paid prior to distributions being made to the Claimant Trust Beneficiaries.⁶ See Claimant Trust Agmt., § 3.2(c)(x); Litigation Trust Agmt., § 3.2(c)(xii); Reorganized Limited Partnership Agmt., § 4(a), (b).

8. As such, there is no modification of the Plan. The Plan Implementation Documents expressly authorize the Post-Effective Date Entities (i) to pay the Indemnification Costs, (ii) to set whatever reserves necessary or advisable to ensure payment of the Indemnification Costs, (iii) to maintain those reserves for whatever duration of time necessary or advisable, and (iv) to retain third-parties to assist in the implementation of the Plan. The Indemnity Subtrust is a structure which implements what is already authorized under the Plan. There is no difference between setting, for example, a \$25 million indemnification reserve and establishing the Indemnity Subtrust (which accomplishes the same thing).⁷ Objectors can point to no provision of the Plan or the Plan Implementation Documents which would have led Claimant Trust Beneficiaries to believe that they would receive payment on account of their claims prior to the payment of the foregoing expenses, among others, or that reserves could not be established to satisfy the costs, including the Indemnification Costs, of the Post-Effective Date Entities.

⁶ As set forth in the Motion, the Indemnity Subtrust will be administered by a third-party corporate trustee (the “Indemnity Trustee”). The Debtor is still soliciting proposals from potential candidates for this role and the identity of the Indemnity Trustee is not yet known. Any Indemnity Trustee will be a regulated depository institution or an affiliate thereof. Based on the proposals received to date, the Debtor anticipates that the fees associated with retaining an Indemnity Trustee for the Indemnity Subtrust will not exceed \$150,000 per year.

⁷ Objectors’ argue that the creation of a separate trust – the Indemnity Subtrust – must be a plan modification because the Plan only contemplated the creation of the Claimant Trust and the Litigation Trust. There is nothing in the Plan that prohibits the creation of a separate trust; the important issue is whether the creation of the trust alters the rights of creditors under the Plan. For the reasons stated herein, it does not, and the Claimant Trust Beneficiaries have the same rights under the Plan whether reserves are created for potential indemnification claims under the Plan Implementation Documents or an Indemnity Subtrust is created. Accordingly, the funding of the Indemnification Note does not have any impact on the amount and timing of payments to Claimant Trust Beneficiaries as the timing and amount of any distributions were subject to appropriate funding of reserves under the Plan Implementation Documents. For the avoidance of doubt, the Claimant Trust Agreement also allows for the incurrence of debt “to fund activities of the Claimant Trust.” Claimant Trust Agmt., § 3.3(b)(vii).

9. **Second**, Objectors argue incorrectly that the Plan *required* the Debtor to obtain D&O Insurance. Objection ¶ 3. Obtaining D&O Insurance acceptable to the Debtor, the Committee, the Oversight Committee, and the Litigation Trustee was a *condition* to the Plan becoming effective. However, Objectors conveniently ignore the provision in the Plan that permits such condition to be *waived* by the Debtor with the Committee’s consent *without leave or order of the Bankruptcy Court or any formal action other than proceeding to confirm or effectuate the Plan*. See Plan, Art. VIII.B.⁸ Accordingly, the Debtor and Committee’s determination to waive the condition that provided for obtaining D&O Insurance cannot possibly be considered a modification of the Plan.⁹

10. **Third**, Objectors argue that there are inconsistencies between the exit financing (the “Exit Facility”) the Court authorized pursuant to the *Order Approving Debtor’s Motion for Entry of an Order (i) Authorizing the Debtor to (a) Enter into Exit Financing Agreement in Aid of Confirmed Chapter 11 Plan and (b) Incur and Pay Related Fees and Expenses, and (ii) Granting Related Relief* [Docket No. 2503] and the relief requested in the Motion. However, no such inconsistencies exist. The Exit Facility authorizes the Debtor to borrow \$20 million to fund its obligations under the Plan and allow the Plan to become effective. Part of the costs the Debtor anticipated when it determined its liquidity needs and what would be necessary for the Plan to become effective was the initial funding of the Indemnity Subtrust, and the Debtor’s

⁸ “The conditions to effectiveness of this Plan set forth in this ARTICLE VIII (other than that the Confirmation Order shall have been entered) may be waived in whole or in part by the Debtor (and, to the extent such condition requires the consent of the Committee, the consent of the Committee), without notice, leave or order of the Bankruptcy Court or any formal action other than proceeding to confirm or effectuate this Plan.” Plan, Art. VIII.B.

⁹ After confirmation of the Plan, the Debtor and the Committee continued to explore obtaining D&O Insurance. At the Committee’s suggestion, the Debtor retained an additional broker to pursue insurance markets that the Debtor’s insurance broker had not pursued pre-confirmation. While the new broker did identify insurance carriers that would provide D&O Insurance, the Debtor and the Committee determined that the coverage was extremely costly. As a result, the Debtor and the Committee began exploring alternatives that led to the Indemnity Subtrust contemplated by the Motion. If the Court approves the Motion, the Debtor and the Committee will waive the condition requiring the Debtor to obtain D&O Insurance.

projections, which supported the Exit Facility, contemplated the Debtor using \$2.5 million on the Effective Date to provide such initial funding. Accordingly, the initial funding requirements of the Indemnity Subtrust Account, which requires a \$2.5 million initial payment, are entirely consistent with the Debtor's funding requirements that supported the Exit Facility. Any further funding of the Indemnity Subtrust will be from future asset sales and not from the proceeds of the Exit Financing.¹⁰

B. Objectors Cite No Case Law Requiring Compliance with 11 U.S.C. § 1127(b)

11. As set forth above, the Indemnity Subtrust does not modify the Plan. The cases cited by Objectors do not alter this conclusion. Objectors' cases are factually inapposite for a number of reasons as they all discuss requested relief that fundamentally altered creditors' rights and obligations in a specific manner which clearly implicated section 1127. *See U.S. Brass Corp. v. Travelers Ins. Group, Inc. (In re U.S. Brass Corp.)*, 301 F.3d 296 (5th Cir. 2002) (finding it was an impermissible plan modification for the debtor to enter into a settlement that permitted the resolution of certain creditors' claims through binding arbitration, where other creditors who would be impacted by this had expressly bargained for the plan to provide that such claims would be resolved by litigation in a court of competent jurisdiction or settlement as a condition to withdrawing their plan objections); *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721 (2d Cir. 1992) (holding that modification of asbestos creditors' trust created by a confirmed plan was an impermissible plan modification when it changed the criteria for determining creditor recoveries and limited creditors' right to jury trial effectively altering substantial rights of creditors); *Doral Ctr. v. Ionosphere Clubs (In re Ionosphere Clubs)*, 208

¹⁰ The Debtor is working with Blue Torch Capital, its exit financier ("BTC"), to document the Exit Facility. BTC has consented to the creation of the Indemnity Subtrust, and, in connection therewith, the Debtor agreed that the Indemnification Note contemplated by the Indemnity Subtrust Term Sheet will be unsecured rather than secured as originally contemplated. In addition, the Claimant Trust will be permitted to fund the Indemnity Subtrust after the Effective Date provided that it meets certain asset ratio and liquidity covenant contained in the Exit Facility.

B.R. 812 (S.D.N.Y. 1997) (finding the modification of a confirmed plan to amend an assumed lease to add a right of first refusal that had been released by the plan was an impermissible plan modification); *Enterprise Fin. Group v. Curtis Mathes Corp.*, 197 B.R. 40 (E.D. Tex. 1996) (holding that allowing a reorganized debtor to pursue and share in the recovery of litigation claims that were transferred to a litigation trust pursuant to a substantially consummated plan was an impermissible plan modification). Unlike in Objectors' cases where each of the modifications was found to have modified a fundamental right granted parties under the plan or impacted the actual recovery of creditors, the Indemnity Subtrust does not change the treatment that any creditor will receive under the Plan, does not alter any rights granted creditors under the Plan and is not a plan modification.¹¹ The Indemnity Subtrust is nothing more than a procedural mechanism for establishing the Indemnification Costs reserve expressly contemplated by the Plan.

[Remainder of Page Intentionally Blank]

¹¹ To the extent there is a variation of the Plan terms (and there is not), it would be non-substantive and necessitated by Objectors' conduct. The Debtor could not secure acceptable D&O Insurance because of Mr. Dondero's notoriety in the industry. *See Beal Bank, S.S.B. v. Jack's Marine*, 201 B.R. 376, 380 (E.D. Pa. 1996) (finding that a slight variance in the timing of payment did not constitute a plan modification, especially when a "significant reason for this delay" was the objecting party's conduct).

WHEREFORE, for the reasons set forth herein and in the Motion, the Debtor respectfully requests that the Court grant the Motion.

Dated: July 16, 2021.

PACHULSKI STANG ZIEHL & JONES LLP

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Counsel for the Debtor and Debtor-in-Possession

EXHIBIT A

Basis for Standing*

<u>Objector</u>	<u>Basis for Standing¹</u>	<u>Status</u>
Dondero	Claim No. 138	Withdrawn with prejudice [D.I. 1510]
	Claim No. 141	Arises from equity; subject to subordination
	Claim No. 142	Arises from equity; subject to subordination
	Claim No. 145	Arises from equity; subject to subordination
	Claim No. 188	Withdrawn with prejudice [D.I. 1510]
	Indirect Equity Interest	Represents an indirect interest in Class A interests. Subordinated to Class B/C. Structurally subordinate. Represents 0.25% of total equity.
HCMFA	Claim No. 95	Expunged [D.I. 1233]
	Claim No. 119	Expunged [D.I. 1233]
NPA	D.I. 1826	HCMFA (along with NPA) has asserted a \$14 million administrative claim for alleged overpayments to the Debtor under the shared services agreements. The Debtor has objected [D.I. 2274] and believes the claim is frivolous.
	Advisor Response	HCMFA alleges standing as an “enjoined” party under the Plan. The Debtor has objected to its characterization of the Plan.
	Claim No. 104	Expunged [D.I. 1233]
	Claim No. 108	Expunged [D.I. 1233]
	D.I. 2044	After the Debtor challenged NPA’s standing to object to the Plan, NPA purchased the claim of a former employee to manufacture standing. Employee had not objected to or voted against the Plan. The Debtor has objected to this claim [D.I. 2059].
	D.I. 2045	After the Debtor challenged NPA’s standing to object to the Plan, NPA purchased the claim of a former employee to manufacture standing. Employee had not objected to or voted against the Plan.
	D.I. 2046	After the Debtor challenged NPA’s standing to object to the Plan, NPA purchased the claim of a former employee to manufacture standing. Employee had not objected to or voted against the Plan. The Debtor has objected to this claim [D.I. 2059].
	D.I. 2047	After the Debtor challenged NPA’s standing to object to the Plan, NPA purchased the claim of a former employee to manufacture standing. Employee had not objected to or voted against the Plan. The Debtor has objected to this claim [D.I. 2059].
	D.I. 2266	After the Debtor challenged NPA’s standing to object to the Plan, NPA purchased the claim of a former employee to manufacture standing. Employee had not objected to or voted against the Plan. The Debtor has objected to this claim [D.I. 2059].
	D.I. 1826	NPA (along with HCMFA) has asserted a \$14 million administrative claim for alleged overpayments to the Debtor under the shared services agreements. The Debtor has objected [D.I. 2274] and believes the claim is frivolous.
Dugaboy	Advisor Response	NPA alleges standing as an “enjoined” party under the Plan. The Debtor has objected to its characterization of the Plan.
	Claim No. 113	Arises from equity; subject to subordination
	Claim No. 131	Objection filed and in litigation. Seeks to pierce the veil and hold the Debtor liable for subsidiary debts. Debtor believes claim is frivolous.
	Claim No. 177	Objection filed and in litigation. Seeks damages for postpetition management of estate. Debtor believes the claim is frivolous.
	Class A Interests	Subordinated to Class B/C. Represents 0.1866% of total equity.
	Dugaboy Response	Dugaboy alleges standing as an “enjoined” party under the Plan. The Debtor has objected to its characterization of the Plan.

¹ The information herein with respect to HCMFA and NPA comes from that certain *Response of the Advisors to Order Requiring Disclosures* [D.I. 2543] (the “Advisors Response”) and with respect to Dugaboy the *Second Amended Response of Dugaboy Investment Trust to Order Requiring Disclosures* [D.I. 2549] (the “Dugaboy Response”). Mr. Dondero did not file a disclosure statement with this Court. Information about Mr. Dondero’s claims comes from the docket.

* All capitalized terms used but not defined herein have the meaning given to them in Debtors’ *Reply in Support of Motion for Entry of an Order (i) Authorizing the (a) Creation of an Indemnity Subtrust and (b) Entry into an Indemnity Trust Agreement and (ii) Granting Related Relief.*

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

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In Re:) **Case No. 19-34054-sgj-11**
) Chapter 11
)
HIGHLAND CAPITAL) Dallas, Texas
MANAGEMENT, L.P.,) Monday, July 19, 2021
) 9:30 a.m. Docket
Debtor.)
) - DEBTOR'S MOTION FOR ENTRY OF
) ORDER AUTHORIZING CREATION
) OF AN INDEMNITY SUB-TRUST
) (2491)
) - FOURTH INTERIM APPLICATION
) FOR COMPENSATION OF
) PACHULSKI STANG ZIEHL &
) JONES, LLP (2480)
)

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.

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1 DALLAS, TEXAS - JULY 19, 2021 - 9:38 A.M.

2 THE COURT: All right. We have a couple of settings
3 in Highland this morning, Case No. 19-34054. Who do we have
4 appearing for the Debtor this morning?

5 MR. POMERANTZ: Good morning, Your Honor. Jeff
6 Pomerantz and John Morris appearing on behalf of the Debtor.
7 Pachulski Stang Ziehl & Jones.

8 THE COURT: Good morning. All right. For our
9 Objectors in the -- we'll call it Indemnity Sub-Trust Motion,
10 who do we have appearing for Mr. Dondero?

11 MR. TAYLOR: Good morning, Your Honor. Clay Taylor
12 on behalf of Mr. Dondero.

13 THE COURT: All right. And do we have Mr. Dondero
14 appearing this morning?

15 MR. TAYLOR: I saw his name in the participants and
16 he told me he would be here.

17 THE COURT: All right. Mr. Dondero, can you confirm
18 you're out there?

19 (No response.)

20 THE CLERK: He's still on mute.

21 THE COURT: He's on mute, apparently. Mr. Dondero,
22 can you make your appearance, please? You're on mute.

23 (No response.)

24 THE COURT: All right. Well, we'll try again in a
25 few moments. Let me get other appearances. Dugaboy

1 Investment Trust. Do we have Mr. Draper appearing?

2 MR. DRAPER: Yes, Your Honor. Douglas Draper is
3 here. And Nancy Dondero is available -- is on.

4 THE COURT: All right. Ms. Dondero, can you make
5 your appearance so we have it on the record, please?

6 MS. DONDERO: I'm here, Your Honor. Good morning.

7 THE COURT: Good morning. All right. For the
8 Advisors, do we have Mr. Rukavina appearing?

9 MR. RUKAVINA: Yes, Your Honor. Good morning. Davor
10 Rukavina for NexPoint Advisors, LP and Highland Capital
11 Management Fund Advisors, LP.

12 THE COURT: All right. Good morning. The Creditors'
13 Committee filed a joinder, I saw, Friday. Who do we have
14 appearing for the Creditors' Committee?

15 MR. CLEMENTE: Good morning, Your Honor. Matthew
16 Clemente from Sidley Austin on behalf of the Committee.

17 THE COURT: Good morning.

18 All right. Let's try again. Mr. Dondero, have you gotten
19 your audio to work?

20 (No response.)

21 THE COURT: Mr. Dondero?

22 MR. TAYLOR: I just saw him go off of mute. And now
23 he's back on mute. There we go.

24 THE CLERK: He's off mute now.

25 THE COURT: Okay. You're off mute. Are you there,

1 Mr. Dondero?

2 MR. DONDERO: Hello?

3 THE COURT: All right.

4 MR. TAYLOR: Jim, we can hear you.

5 THE COURT: Mr. Dondero, we could not hear you
6 appearing earlier. So you're there with us now, correct?

7 (No response.)

8 THE CLERK: He's back on mute.

9 THE COURT: Okay. Well, my court reporter says he's
10 back on mute. So, you confirm, Mr. Taylor? I -- my pictures
11 don't always pop up until a person is doing a substantial
12 amount of talking, so I didn't ever see him. Is he there?

13 THE CLERK: He's on mute.

14 MR. TAYLOR: I recognized his voice when he did say
15 hello, Your Honor. He does appear to be having some technical
16 difficulties, but I could see that his phone is on there and I
17 recognized his voice, Your Honor.

18 THE COURT: Okay. All right. Well, is there anyone
19 else who wished to appear?

20 MS. LAMBERT: Judge Jernigan, this is Lisa Lambert
21 for the United States Trustee.

22 THE COURT: Thank you, Ms. Lambert.

23 All right. Well, we have two matters. I'll start with
24 the Fourth Interim Fee Application of Pachulski Stang. I show
25 we had no objections to that. And I have reviewed it. I

1 don't have any questions or concerns at this time. But is
2 there anything we need to take up on that? Did we have any
3 informal comments, by chance, that we need to address?

4 MR. POMERANTZ: Your Honor, we have not received any
5 comments at all, or any objections, as Your Honor noted.

6 THE COURT: Okay. Anyone wish to say anything at
7 this time on this interim fee application?

8 (No response.)

9 THE COURT: All right. Well, I will approve these
10 fees and expenses on an interim basis as reasonable and
11 necessarily incurred. And so, Mr. Pomerantz, your office may
12 submit an order on that.

13 MR. POMERANTZ: Thank you very much, Your Honor.

14 THE COURT: All right. Well, shall we turn now to
15 the Indemnity Sub-Trust Motion? How would you like to
16 proceed?

17 MR. POMERANTZ: Your Honor, I would plan to provide
18 probably a 15- to 20-minute opening statement. I neglected to
19 mention that James Seery, the Debtor's CEO, is present on the
20 Webex. I think you can see his picture. And we will put his
21 testimony on to provide the evidentiary support. And then
22 after, I assume, the Objectors make their opening statements,
23 we would proceed to the evidence, and then ultimately closing
24 arguments.

25 THE COURT: All right. You may proceed.

1 MR. POMERANTZ: We anticipate probably around a half
2 hour or so of testimony. So, between opening, testimony, and
3 closing, our side will be done in less than an hour and a
4 half.

5 THE COURT: All right.

6 MR. DONDERO: Your Honor, I'm here. I've been --
7 Your Honor?

8 THE COURT: Yes.

9 MR. DONDERO: Can you hear me?

10 THE COURT: Yes.

11 MR. DONDERO: Okay. I've been here. I just had a
12 hard time getting my audio to work.

13 THE COURT: Oh, you were having trouble with your
14 audio; is that what you said?

15 MR. DONDERO: But I'm here.

16 MR. POMERANTZ: Thank you, Your Honor. May I
17 proceed?

18 THE COURT: You may.

19 MR. RUKAVINA: And Your Honor, Davor -- Your Honor,
20 Davor Rukavina. Just to provide the Court with some guidance,
21 we have agreed that I will be basically arguing for the
22 Objectors, to streamline the matter.

23 And if it helps the Court and Mr. Pomerantz, I mean, it's
24 his record, but our objection, now that they've clarified
25 certain matters in their reply relating to the exit financing,

1 our objection really is a legal one as to whether (1) this is
2 a plan modification; and (2) if it is, whether it satisfies
3 the Code.

4 So that's, that's all I have right now, Judge.

5 MR. POMERANTZ: Thank you, Your Honor. May I
6 proceed?

7 THE COURT: You may. Thank you.

8 MR. DRAPER: Your Honor, this is Douglas Draper. Can
9 I make one comment also?

10 THE COURT: Go ahead.

11 MR. DRAPER: They have clarified a section -- they've
12 clarified a section, and all I would request, Mr. Pomerantz,
13 that in your Footnote 10 where you talk about the exit
14 financing versus the indemnification note, that the term sheet
15 be modified so that it shows that it's unsecured and that
16 distributions can be made with the consent of Blue Torch
17 Capital, so the attached term sheet mirrors what you have in
18 Footnote 10.

19 MR. POMERANTZ: Your Honor, may I proceed?

20 THE COURT: You may.

21 MR. POMERANTZ: Thank you.

22 OPENING STATEMENT ON BEHALF OF THE DEBTOR

23 MR. POMERANTZ: Your Honor, we're here in connection
24 with the Debtor's motion for entry of an order authorizing the
25 creation of an Indemnity Sub-Trust and entry into the

1 Indemnity Trust Agreement.

2 As I will discuss in a few minutes in more detail, with
3 the Fifth Circuit's denial of the request for a stay of the
4 confirmation order pending appeal, the Court's approval of the
5 structure for satisfaction of potential indemnification claims
6 that may arise after the effective date as set forth in the
7 motion is the last step before the Debtor's plan is expected
8 to become effective. The Debtor anticipates that the
9 effective date will occur on or about the first week of
10 August.

11 The Debtor intends to call Mr. Seery as a witness in
12 support of the motion to provide evidentiary support.

13 The Debtor has also filed exhibit lists at Document -- at
14 Docket No. 2572, which provides the documentary evidentiary
15 support for the motion.

16 But before we call Mr. Seery as a witness, I wanted to
17 provide the Court with the background of what brought the
18 Debtor to file the motion and to address the lone objection
19 that we have received to the motion.

20 The plan contemplates the creation of a Reorganized
21 Debtor, a Claimant Trust, and a Litigation Trust, to carry on
22 the business of monetizing the Debtor's assets after the
23 effective date, for the benefit of creditors, as provided
24 under the plan.

25 When the Court confirmed the plan, it approved the

1 Reorganized Debtor Limited Partnership Agreement, the Claimant
2 Trust Agreement, and the Litigation Sub-Trust, documents that
3 were filed as part of the plan supplement in support of
4 confirmation.

5 Relevant to the motion, Your Honor, and before the Court
6 are the provisions in each of these documents which provide
7 for the indemnification for parties that would act on behalf
8 of these entities after the effective date.

9 Section 8.2 of the Claimant Trust Agreement and the
10 Litigation Trust Agreement, and Section 10(b) and 10(c) of the
11 Reorganized Debtor Limited Partnership Agreement, each provide
12 broad indemnification rights to, among others, the Claimant
13 Trustee, the Litigation Trustee, the Claimant Trust Oversight
14 Board, and the employees, agents, or professionals of the
15 foregoing.

16 These documents are Exhibits 4, 5, and 6 on the Debtor's
17 witness and exhibit list.

18 Each of these provisions are standard corporate provisions
19 used to indemnify parties acting in furtherance in the course
20 of their duties as corporate representatives of the various
21 entities.

22 The plan and the corporate documents also provide a
23 mechanism for the satisfaction of these indemnifications
24 obligations.

25 I would like to put up on the screen the language of the

1 first paragraph after Article IV(B) (5) (ix) of the plan at this
2 time. And this document, which I ask Ms. Canty to put on, can
3 be found at Exhibit 4 of Docket 2572, which is the order
4 confirming the plan, on Page 125 of 161.

5 THE COURT: Okay.

6 MR. POMERANTZ: As Your Honor sees, this provision
7 provides the Claimant Trustee may establish a reserve for the
8 payment of Claimant Trust expenses, including, without
9 limitation, any reserve for potential indemnification claims,
10 as authorized and provided under the Claimant Trust Agreement.

11 Accordingly, the plan provision provides that the Claimant
12 Trustee may establish a reserve for the payment of
13 indemnification claims expected to occur or potentially would
14 occur.

15 Next, I would like to put up on the screen the language of
16 Section 6.1(A) (d) of the Claimant Trust Agreement, which can
17 be found at Exhibit 4 of Docket 2572, and it's on Page 29 of
18 the Claimant Trust Agreement. And in there, Your Honor, the
19 preamble to the section says that, notwithstanding anything to
20 the contrary herein, the Claimant Trustee shall distribute to
21 the holders of trust interests at least annually the cash on
22 hand, net of any amounts that are -- and now the bolded
23 language -- necessary to satisfy or reserve for other
24 liabilities incurred or anticipated by the Claimant Trustee,
25 in accordance with the plan and this agreement, including, but

1 not limited to, indemnification obligations and similar
2 expenses, in such amounts and for such period of time as the
3 Claimant Trustee determines in good faith may be necessary and
4 appropriate, which determination shall not be subject to the
5 consent of the Oversight Board, may not be modified without
6 the express written consent of the Claimant Trustee, and shall
7 survive termination of the Claimant Trustee.

8 Accordingly, Your Honor, this provision demonstrates that
9 the Claimant Trust provides that distributions to trust
10 beneficiaries will be net of any reserves that the Claimant
11 Trustee decides are necessary to reserve for potential
12 indemnification claims.

13 The Litigation Trust contains a similar provision at
14 Section 6.1(c). I won't put that up on the screen, but it can
15 be found at Exhibit 5 of Docket No. 2572 on Page 16.

16 And, similarly, 5 -- Section 5(b) of the Reorganized
17 Debtor Limited Partnership Agreement provides that the
18 Claimant Trust may make additional capital contributions as
19 necessary to the Reorganized Debtor to pay indemnification
20 costs. And that document can be found at Exhibit 6 of Docket
21 2572 on Page 4.

22 So, what do these provisions make clear to creditors under
23 the plan? It makes clear that the Reorganized Debtor, the
24 Claimant Trust, and the Litigation Trust have broad
25 indemnification obligations, and reserves in any amount

1 determined by the Claimant Trustee can be established to
2 satisfy such claims before any distributions are made to the
3 beneficiaries of the Claimant Trust, as the Court will recall
4 in the extensive testimony at the confirmation hearing in
5 connection with the Debtor's efforts to obtain directors' and
6 officers' insurance coverage, to, in effect, underwrite the
7 post-effective date indemnification obligations of the Debtor.

8 As the Court will also recall, obtaining D&O coverage
9 acceptable to the Debtor was added as a condition to the
10 effective date in the Fifth Amended Plan filed with the Court
11 on January 22nd, 2021, which is attached to the confirmation
12 order, which is Exhibit 3 of the Debtor's exhibits.

13 You will hear testimony from Mr. Seery consistent with the
14 testimony provided at confirmation that the litigiousness of
15 Mr. Dondero and his related entities prevented the Debtor from
16 obtaining D&O coverage unless the plan included a gatekeeper
17 provision in the confirmation order and the gatekeeper
18 provision remained in full force and effect after entry of the
19 confirmation order.

20 You will hear testimony from Mr. Seery that, following the
21 appeal of the confirmation order, which, of course, prevented
22 the confirmation order from becoming a final order, the Debtor
23 decided that it would not take the risk of going effective if
24 the confirmation order could be reversed on appeal and the
25 gatekeeper provision potentially eliminated from the plan if

1 the appeal was successful.

2 You will hear testimony that, based upon the potential for
3 the plan not becoming effective until the appeals process was
4 exhausted, the Committee urged the Debtor to retain an
5 additional broker to investigate whether D&O coverage could be
6 obtained from carriers that had not been previously contacted
7 by Aon, the Debtor's insurance broker.

8 You will hear testimony that the Debtor, working closely
9 with the Committee and Allianz, which was the new insurance
10 broker identified by the Committee, was able to obtain
11 interest from certain carriers to provide D&O insurance
12 without the requirement of the confirmation order becoming
13 final.

14 You will hear testimony that the Debtor and the Committee
15 pursued potential D&O insurance from these carriers, and that
16 as a result of those communications these carriers were
17 willing to provide D&O insurance coverage, subject to
18 acceptable documentation.

19 But you will also hear testimony, Your Honor, from Mr.
20 Seery that the Debtor, in consultation with the Committee,
21 determined that the cost for providing that coverage was going
22 to be prohibitive, given the D&O insurance that was being
23 offered, and also presented the possibility of certain gaps in
24 coverage, creating risks to the post-effective date corporate
25 structure.

1 Based upon these events, Mr. Seery will testify that,
2 because the parties wanted to proceed to the effective date
3 before the appellate process ran its course, the Debtor and
4 the Committee began exploring alternatives to D&O insurance to
5 underwrite the risks associated with potential indemnification
6 claims. And the result of that process, Your Honor, is the
7 Indemnity Trust Term Sheet that was filed with the motion.
8 The principal terms are set forth in the term sheet and
9 consist of the following:

10 The Claimant Trust will fund the Indemnity Trust with \$25
11 million to satisfy indemnification claims that are not paid by
12 the Claimant Trust, the Litigation Trust, or the Reorganized
13 Debtor.

14 The initial funding shall be in the amount of \$2-1/2
15 million, and subsequent funding will be in the amount \$22-1/2
16 million in the form of an Indemnity Trust Note, subject to the
17 liquidity needs and requirements of the exit lender.

18 Although initially proposed to be a secured note, I'll
19 represent on the record now that the Indemnity Trust Note will
20 not be secured. It will be unsecured.

21 The Indemnity Trustee has not yet been identified, but it
22 will be an institutional corporate trustee, which is a
23 regulated depository institution, or an affiliate thereof.

24 And the cost of the Indemnity Trust will not be more than
25 \$150,000 per year.

1 The Indemnity Trust Administrator will be Mr. Seery.

2 The beneficiaries of the Indemnity Trust will be the
3 parties with indemnification rights under the post-effective
4 date corporate documents that I went through a few minutes
5 ago.

6 The Indemnity Trust will expire on the earlier of the date
7 that all indemnification rights expire for the indemnified
8 parties and the consent of the Claimant Trust and the
9 Indemnity Trust Administrator.

10 Any money remaining in the Indemnity Trust upon expiration
11 will be transferred to the Claimant Trust, or if the Claimant
12 Trust is no longer in existence, it will be used to make
13 distributions to Claimant Trust beneficiaries in accordance
14 with Section 9.2 of the Claimant Trust Agreement.

15 Your Honor, the Debtor received one objection to the
16 motion, a joint objection filed by James Dondero, the Dugaboy
17 Trust, NexPoint Advisors, and Highland Capital Fund Advisors.
18 They claim that the creation of the Indemnity Trust is a plan
19 modification which must meet the statutory requirements of
20 Section 1127 of the Bankruptcy Code.

21 The objection is the latest in a series of frivolous
22 roadblocks that the Dondero entities are trying to place in
23 the way of the plan becoming effective. And Your Honor, the
24 irony is not lost on the Debtor, and I'm sure it's not lost on
25 the Court, that the Dondero entities' vexatious litigation

1 strategy has directly caused cost-effective D&O insurance to
2 be unavailable to the estate to underwrite the potential
3 litigation claims arising from potential claims by the Dondero
4 entities, which has necessitated pursued of an alternative
5 structure, and yet it is the Dondero entities, under the guise
6 of protecting the interests of general unsecured creditors,
7 that are challenging this alternative.

8 And while, Your Honor, I will not belabor the standing
9 issues that we have talked about on many occasions when the
10 Dondero entities have sought to pursue frivolous objections
11 under the pretext of protecting general unsecured creditors, I
12 do once again want to point the Court to the claims that each
13 of these parties have against the Debtor's estate. And I
14 won't go through them in detail, but attached to the Debtor's
15 reply as Exhibit A is a list of all claims the Objectors
16 assert against the Debtor's estate. The information on that
17 chart was derived from filings that Dugaboy, NexPoint
18 Advisors, and Highland Capital Management Fund Advisors made
19 in response to this Court's order requiring disclosures,
20 except with respect to Mr. Dondero's claims, as he did not
21 make a filing.

22 Objectors do not have any legitimate claims against the
23 Debtor that will be allowed. They will not be beneficiaries
24 of the Claimant Trust, they will not receive distributions
25 under the plan, and do not have their pecuniary rights

1 affected by the motion.

2 The Debtor understands that the Court will likely continue
3 to rule that the Objectors have technical tenuous standing to
4 assert the objection, but the Debtor once again, as we have
5 done previously, asks that the Court view such objections
6 through the lens of what interests the Objectors really have
7 in this case.

8 With that said, Your Honor, I would like to now turn to
9 the particular objections raised by the Objectors.

10 The Objectors argue that the motion constitutes an
11 impermissible amendment to the plan without following the
12 statutory guidelines.

13 The Debtor and the Objectors appear to agree that the
14 appropriate standard for the Court to use in determining
15 whether the plan -- the motion constitutes a plan amendment is
16 whether the motion fundamentally alters the legal relationship
17 between the Debtor and its creditors. The Debtor disagrees
18 with the Objectors' argument that the creation of an indemnity
19 trust is such a fundamental change, implicating the statutory
20 plan modification provisions.

21 First, Objectors argue that the plan required the Debtor
22 to obtain D&O insurance and that the decision to obtain -- to
23 not obtain D&O insurance and pursue an alternative is a
24 modification to the plan.

25 Objectors, however, misrepresent what the plan provides.

1 Article VIII(A) of the plan contains the conditions to the
2 effective date. I would like now to put up on the screen that
3 portion of Article VIII(A) that talks about D&O insurance.
4 And that can be found at Exhibit 4 of Docket 2572, which is
5 the order confirming the plan, at Page 143 of 161.

6 Your Honor sees it says a condition of the effective date
7 is that the Debtor shall have obtained applicable directors'
8 and officers' insurance coverage that is acceptable to each of
9 the Debtor, the Committee, the Claimant Trust Oversight
10 Committee, the Claimant Trustee, and the Litigation Trustee.

11 Accordingly, Your Honor, Article VIII(A) conditions the
12 effective date on acceptable D&O insurance but does not
13 require it.

14 I would now like to put up on the screen Article VIII(B)
15 of the plan, which is entitled Waiver of Conditions. And Your
16 Honor, Article VIII(B) entitles the Debtor and the Committee
17 to waive any conditions to the effective date -- of course,
18 other than entry of a confirmation order -- and allows them to
19 waive the requirement of obtaining D&O insurance. And that is
20 exactly what the Debtor and the Committee will agree to do if
21 the Court grants the motion. No court approval is required to
22 waive that condition.

23 Accordingly, Your Honor, there is no argument that the
24 Debtor's decision not to pursue D&O coverage is a modification
25 to the plan because the plan requires D&O coverage to be

1 obtained.

2 Second, Your Honor, Objectors argue that because the plan
3 does not specifically mention the creation of an Indemnity
4 Trust, that its creation now is a plan modification. The
5 Movants are incorrect. While the plan only mentions the
6 Reorganized Debtor, the Claimant Trust, and the Litigation
7 Trust, Objectors cannot point to anything in the plan that
8 restricts the creation of any other entities.

9 More importantly, there is language in Article IV(D) of
10 the plan which covers company action that could be taken to
11 implement the plan, that authorizes the Debtor to execute
12 documents necessary or appropriate to carry out the provisions
13 of the plan.

14 And I would now like to put up on the screen Article
15 IV(D), which can be found at Exhibit 4 of Docket No. 2572,
16 which is the order confirming the plan, and this is at Page
17 131 of 161. And I will read the highlighted section: Each of
18 the Debtor, the Reorganized Debtor, and the Trustees, as
19 applicable, may take any and all actions to execute, deliver,
20 file or record any such contracts, instruments, releases and
21 other agreements or documents and take any such actions as may
22 be necessary or appropriate to effectuate and implement the
23 provisions of the Plan, the Claimant Trust Agreement, the
24 Reorganized Limited Partnership Agreement, or the New GP LLC
25 Documents.

1 Your Honor, there can be no serious argument that the
2 Indemnity Trust Agreement is not an agreement or document that
3 is necessary or appropriate to effectuate or implement the
4 provisions of the plan, or that the creation of the Indemnity
5 Trust -- therefore, it's a modification of the plan.

6 Third, Your Honor, the Objectors argue that the Indemnity
7 Trust improperly subordinates the priority of the claims of
8 the trust beneficiaries to obligations under the
9 Indemnification Funding Note. This argument reflects a
10 fundamental misunderstanding of the plan and the structural
11 priority for trust expense claims which exists in the plan
12 regardless of the motion.

13 As we discussed previously, Your Honor, the plan, the
14 Claimant Trust, and the Litigation Trust all permit the
15 creation of reserves for post-effective date expenses,
16 including potential indemnification claims, and the creation
17 of those reserves in amounts the Claimant Trustee determines,
18 in his sole discretion, before any distributions are made to
19 trust beneficiaries.

20 Accordingly, the Indemnity Trust structure is not
21 inconsistent with the priorities set forth in the plan or the
22 trust at all. It is simply the chosen mechanism by the Board,
23 in consultation with the Committee, to fund the payment of
24 potential indemnification claims.

25 Objectors' last argument is that the Indemnity Trust is

1 inconsistent with the terms of the exit financing. You will
2 hear testimony from Mr. Seery that the projections which were
3 introduced as evidence to support the exit financing
4 contemplated that on the effective date the Debtor would fund
5 the Indemnity Trust with \$2-1/2 million.

6 You'll hear testimony that the initial funding was less
7 than what the cost of the D&O insurance coverage would have
8 been.

9 And you'll hear testimony that the funding of the
10 Indemnification Funding Note will be from asset sale proceeds
11 and not from proceeds of the exit financing, and that the use
12 of those proceeds will be subject to (a) the asset coverage
13 ratio covenants in the existing financing; and (b) the
14 Claimant Trust liquidity needs.

15 In conclusion, Your Honor, the standard upon which the
16 Court should evaluate the motion is whether creation and
17 implementation of the Indemnity Trust is appropriate under
18 Section 363(b) of the Bankruptcy Code, either because it is an
19 act taken in the ordinary course of its business or it's a
20 proper exercise of the Debtor's business judgment for use of
21 property outside of the ordinary course of business. The
22 Debtor will be -- clearly be able to meet its burden, and
23 requests that the Court overrule the objection and grant the
24 motion, which will pave the way for the effective date to
25 finally occur.

1 That concludes my opening statement, Your Honor.

2 THE COURT: All right. Thank you.

3 Mr. Rukavina?

4 MR. RUKAVINA: Thank you, Your Honor.

5 Mr. Vasek, if you'll please pull up the plan.

6 OPENING STATEMENT ON BEHALF OF THE OBJECTORS

7 MR. RUKAVINA: Your Honor, I think this is the
8 operative language. This -- Mr. Vasek, can you move that
9 thing right there? I can't see the page.

10 Well, Your Honor, this is Page 126 of the confirmation
11 order. And it reads: The Claimant Trust Agreement and
12 Litigation Sub-Trust Agreement may include reasonable and
13 necessary provisions that allow for indemnification by the
14 Claimant Trust in favor of the Claimant Trustee, the
15 Litigation Trustee, and the Claimant Trust Oversight Board.

16 So far, so good, for the Debtor.

17 But then it says: Any such indemnification shall be the
18 sole responsibility of the Claimant Trust and payable solely
19 from the Claimant Trust assets.

20 Your Honor, that is in the confirmed plan, and it is -- on
21 Page 29 of the confirmed plan is Article V that talks about
22 the Claimant Trust Agreement and Litigation Sub-Trust
23 Agreement.

24 So I do respectfully submit -- and Mr. Vasek, you can pull
25 that down -- I do respectfully submit, Your Honor, that we do

1 have language in the plan that is very clear that any
2 indemnification is solely the responsibility of the existing
3 trust, not a newly-created trust.

4 So to the extent that the Debtor can basically do anything
5 under a confirmed plan that's not prohibited by the plan, I
6 think we have that here. So that's my first argument, Your
7 Honor.

8 And now to the second argument. It really, I think, is
9 the core of the argument, which is the certificate of service
10 filed in support of this motion. Your Honor, that certificate
11 of service is at Docket 2509, and it shows that the Debtor
12 served its motion on the service list consisting of the
13 attorneys and the parties that filed notices of appearance,
14 and that does include some creditors, but then the Debtor
15 served its motion on -- we can count it -- less than twelve
16 creditors, Your Honor. That's Exhibit B. Exhibit B to Docket
17 No. 2509 is the list of creditors served with this motion.
18 That is far, far, far, far fewer creditors than were served
19 with the plan and the disclosure statement.

20 So if you -- if we have a plan modification, then the
21 Debtor is violating 1127(c), because 1127(c) says that the
22 plan modification must be served on basically everyone that's
23 entitled to vote.

24 Furthermore, under 1127(d), the Court is to afford
25 creditors a chance to switch their vote if this is a plan

1 modification. So it comes down to, is this a plan
2 modification?

3 And Your Honor, of course, is familiar with the *U.S. Brass*
4 case. In that case, provisions in a plan providing for the
5 liquidation of claims by way of a judicial trial were changed
6 after confirmation with an arbitration provision. And the
7 Fifth Circuit agreed that that was a modification.

8 Now, in that case, the plan had been substantially
9 consummated, so the modification could not be approved. We're
10 not arguing that this here has been substantially consummated.
11 It has not. The Debtor can, we believe, under 1127(b), modify
12 the plan, but it has to follow the process. Creditors should
13 be given a chance to change their vote and we should be given
14 a chance to argue why the plan shouldn't be modifiable with
15 this modification.

16 So, Your Honor, with respect to the language in the plan
17 that I've shown you, with respect to the fact that now a new
18 trust is being created, assets of the Creditor Trust -- up to
19 \$25 million worth -- are now being funded into the new trust,
20 and resting on the lessons of *U.S. Brass*, this is a plan
21 modification. And because it hasn't been solicited and served
22 on the vast bulk of creditors, on its face this plan
23 modification cannot be approved.

24 Thank you, Your Honor.

25 THE COURT: All right. Thank you.

1 Does the Committee want to weigh in?

2 MR. DRAPER: Your Honor, this --

3 THE COURT: Who's that speaking?

4 MR. CLEMENTE: Yes. Good morning.

5 MR. DRAPER: This is Douglas --

6 MR. CLEMENTE: I'm sorry. Good morning, Your Honor.

7 Do you want to hear from me, or shall I wait?

8 THE COURT: Well, Mr. -- I think maybe I heard Mr.
9 Draper weighing in. I thought that I had heard Mr. Rukavina
10 was going to speak for the three sets of Joint Objectors. Did
11 I misunderstand?

12 MR. DRAPER: Your Honor, I had raised one issue
13 before, and it's a very minor issue, and I think they've taken
14 care of it. I just want to be sure that it's taken care of.

15 The term sheet require -- had a secured provision for the
16 note that's here. I understand from Mr. Pomerantz two things.
17 Number one, that they're modifying that provision so the term
18 sheet will now say that the note is unsecured; and number two,
19 any distributions will be subject to the terms of the exit
20 loan. I think he used the term subject to liquidity
21 requirements as well as provisions set forth in the exit loan
22 with respect to debt coverage ratios.

23 And that's all I'm asking. Because I am a creditor of
24 Trussway, and I'm concerned that the exit loan will be
25 tripped. And if that's taken care of, that's -- that's my

1 issue right there.

2 THE COURT: Okay. Mr. Pomerantz?

3 MR. POMERANTZ: Your Honor, we don't -- yeah, we
4 don't intend to modify the term sheet. We are working on
5 final documents. And as I've indicated in the motion and as I
6 indicated in my opening comments, there will not be any
7 security for the Indemnification Funding Note, and I've
8 indicated how it is in turn to be funded.

9 As you can imagine, Blue Torch Capital is very keenly
10 interested in what's happening, and the Debtor has no interest
11 or intent of entering into a trust agreement that is going to
12 be violative.

13 So Mr. Draper should rest assured that we will take care
14 of that and we will not be doing anything to violate the terms
15 of the Blue Torch Capital financing with the Indemnity Trust
16 Agreement.

17 THE COURT: All right. Thank you. And your reply
18 that was filed late Friday afternoon, I believe, indicated
19 it's not going to be a secured note, the \$22.5 million note.
20 That had been changed as of Friday, at least. Mr. Pomerantz?
21 I mean, as far as putting it on the record, I believe you put
22 --

23 MR. POMERANTZ: That --

24 THE COURT: -- you put it on the record as of Friday.

25 MR. POMERANTZ: Yes. That is correct.

1 THE COURT: Okay.

2 MR. POMERANTZ: Yes. I put it on the record as of
3 Friday. Mr. Draper noted that it was on the record. I think
4 he wanted modifications to the term sheet. I indicated we
5 wouldn't be modifying the term sheet. But to allay his
6 concerns, I repeated my comment in my opening statement, and
7 again I will represent to him and to the Court that the final
8 indemnity funding agreement will not have a secured mechanism
9 for that note.

10 THE COURT: All right. Thank you. Mr. Clemente?

11 OPENING STATEMENT ON BEHALF OF THE UNSECURED CREDITORS'
12 COMMITTEE

13 MR. CLEMENTE: Yes, Your Honor. Matt Clemente;
14 Sidley Austin; on behalf of the Committee. And I'll be very
15 brief, because, as usual, Mr. Pomerantz was very thorough.

16 But for the record, the Committee supports the approval of
17 the Indemnity Sub-Trust motion, Your Honor. As Mr. Pomerantz
18 referred to and as the testimony will bear out, the Committee
19 was actively involved in the search for D&O coverage. And as
20 the Debtor points out in its response, the Committee brought
21 an additional insurance broker to the situation to ensure that
22 the full depths of the D&O market were fully plumbed.

23 The Committee, in particular, given its members' history
24 with litigating with Mr. Dondero, understood the critical
25 importance of ensuring that the Claimant Trustee, the

1 Oversight Board Members, and others who will be working on a
2 post-effective date basis are covered by an indemnity that is
3 meaningful and which will (audio gap) good.

4 And Your Honor, this is, in fact, reflected in the
5 carefully-crafted structure -- Mr. Pomerantz walked the Court
6 through the exact language -- but the carefully-crafted
7 structure of the Claimant Trust and its waterfall provisions,
8 which provide that the Claimant Trust expenses, which include
9 indemnity obligations, are to be satisfied first, and,
10 importantly, reserved for before any distributions are made to
11 the Claimant Trust beneficiaries.

12 That's exactly what was negotiated for, Your Honor, and it
13 made sense in the context. And as Mr. Pomerantz said, that's
14 a very typical way that these types of structures are set up.
15 And it's under that portion of the waterfall, Your Honor, that
16 the Indemnity Sub-Trust fits. It is simply a mechanism that
17 implements that which this Court has already approved.

18 And it's a collateral mechanism, if you will, Your Honor.
19 It doesn't create an entity that has an obligation separate
20 and apart from the Claimant Trust for the indemnity. It's
21 simply a mechanism that reflects the fact that a reserve has
22 been created and that that money is sitting there and that
23 reserve is being funded by Claimant Trust assets, which is --
24 perfectly complies with the provisions of the plan.

25 Your Honor, in short, there is no modification of the

1 plan. There is no alteration of the rights of creditors,
2 including their rights to distributions.

3 And regarding D&O insurance, Your Honor, again, as Mr.
4 Pomerantz pointed out, the fact that it was a condition
5 precedent doesn't change the result: It was expressly
6 provided that it could be waived for this -- for this very
7 reason, Your Honor, which is, going into the situation, we
8 understood it may be very difficult to procure acceptable D&O
9 insurance. And as it turns out, that actually happened. Yet
10 the other carefully-crafted provisions of the plan and the
11 Claimant Sub-Trust worked as designed, as approved by Your
12 Honor, and as voted on by the overwhelming number of creditors
13 in the case, and that is to allow for a reserve, and then
14 merely the creation of this mechanism to capture that reserve.

15 So, in short, Your Honor, the Committee fully supports the
16 entry of the Debtor's motion approving the Indemnity Sub-
17 Trust. Thank you, Your Honor.

18 THE COURT: Thank you. All right. Are you ready to
19 call Mr. Seery, Mr. Pomerantz?

20 MR. MORRIS: Yes, Your Honor. Your Honor, this is
21 John Morris from Pachulski Stang.

22 THE COURT: All right. You're going to --

23 MR. MORRIS: For the Debtor.

24 THE COURT: Okay.

25 MR. MORRIS: Yes.

1 THE COURT: Good morning.

2 MR. MORRIS: I'll take care of the evidentiary
3 portion of the hearing.

4 THE COURT: All right. So, are you ready to call Mr.
5 Seery?

6 MR. MORRIS: I am. The Debtor would like to call as
7 its first witness -- actually, its only witness -- James
8 Seery.

9 THE COURT: All right. Mr. Seery?

10 MR. SEERY: Good morning, Your Honor.

11 THE COURT: Good morning. Please raise your right
12 hand.

13 (The witness is sworn.)

14 THE COURT: All right. Thank you. You may proceed.

15 MR. MORRIS: Your Honor, before I begin to inquire,
16 the Debtor respectfully moves for admission into evidence
17 Exhibits 1 through 6, which can be found at Docket No. 2572.

18 THE COURT: All right. Any objection?

19 (No response.)

20 THE COURT: All right. Hearing no objection, I will
21 admit Exhibits 1 through 6 at 2572.

22 MR. MORRIS: Thank you, Your Honor.

23 (Debtor's Exhibits 1 through 6 are received into
24 evidence.)

25 JAMES P. SEERY, DEBTOR'S WITNESS, SWORN

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1 DIRECT EXAMINATION

2 BY MR. MORRIS:

3 Q Good morning, Mr. Seery.

4 A Good morning, Mr. Morris.

5 Q Can you hear me?

6 A I can indeed.

7 Q Okay. Let's just start with some background as to why
8 we're here. Are you generally familiar with the Debtor's plan
9 of reorganization that was confirmed by the Bankruptcy Court?

10 A Yes.

11 Q Are you generally familiar with the ancillary documents
12 that were created to implement the Debtor's plan?

13 A Yes.

14 Q Are you able to identify the documents that are relevant
15 to the hearing today?

16 A I can, yes.

17 Q Go ahead.

18 A I have a little bit of an echo. I'm not sure if anyone
19 has it.

20 THE WITNESS: Can you hear me, Your Honor?

21 THE COURT: I can. I hear the echo. It's not bad,
22 but it's just a little bit there. I don't --

23 MR. MORRIS: I can turn off my air conditioner.

24 Maybe that has something to do with it. If you'd just give me
25 one moment.

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1 THE COURT: Okay.

2 (Pause.)

3 MR. MORRIS: Hopefully, that's better.

4 THE COURT: Okay. We'll try again.

5 BY MR. MORRIS:

6 Q Okay. Mr. Seery, can you please identify the ancillary
7 documents that were created to implement the plan?

8 A Well, maybe the easiest way is to start with the key
9 document, which is the plan. And then the plan establishes a
10 Claimant Trust, and there's a Claimant Trust Agreement that
11 governs the Claimant Trust.

12 And then there's a Litigation Sub-Trust, which is the
13 Litigation Sub-Trust Agreement.

14 And, of course, the Debtor will be the Reorganized Debtor,
15 and that is the Amended Limited Partnership Agreement of the
16 Debtor.

17 MR. MORRIS: Okay. Your Honor, those -- those three
18 documents can be found at Exhibits 4, 5, and 6.

19 THE COURT: Okay.

20 MR. MORRIS: And I'm going to refer to them going
21 forward as the Plan Implementation Documents.

22 BY MR. MORRIS:

23 Q Mr. Seery, are you generally aware that the Plan
24 Implementation Documents call for the indemnification of
25 certain parties tasked with implementing the Debtor's plan?

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1 A I am, yes. As Mr. Pomerantz described at the -- in the
2 opening, the Amended Limited Partnership Agreement contains a
3 broad indemnity, as does the Claimant Trust Agreement, as does
4 the Litigation Sub-Trust Agreement. And those are pretty
5 standard indemnities for those who would operate these types
6 of companies or vehicles.

7 Q And at the time of confirmation, how were those
8 indemnification obligations expected to be satisfied?

9 A Well, first -- first and foremost, from the liquidity that
10 the Debtor, the Claimant Trust, or the Litigation Sub-Trust
11 has. So those will be the first place that we go to satisfy
12 those obligations. And, in fact, pre-effective date, the
13 Debtor has been spending its resources defending various
14 litigations that may impact certain of the folks that would be
15 indemnified.

16 Second, we contemplated accessing insurance markets for
17 directors' and officers' insurance coverage, understanding
18 that that would be difficult. The Debtor had not previously
19 been third-party-insured for these type of risks. They had
20 been either internal -- for example, even on health insurance,
21 the Debtor self-insures, uses a self-insurance vehicle -- but
22 on D&O, the Debtor previously used a Dondero-controlled entity
23 to provide D&O insurance.

24 Q And has the Debtor, after the confirmation hearing --
25 we'll get into it in more detail, but just generally -- after

1 the confirmation hearing, did the Debtor attempt to obtain D&O
2 insurance to secure the indemnification obligations?

3 A Both before and after the confirmation hearing and the
4 confirmation order. In the hearing, Mr. Tauber from Aon at
5 the time testified about efforts and what the insurance
6 markets look like.

7 For clarification -- and I may get it wrong, because I'm
8 -- this is -- I've learned it as we go through -- through the
9 -- over the last 25 years or so. They call them insurance
10 markets, and they go out as a broker and look to their -- the
11 carriers in those markets to provide insurance, whether at the
12 first layer or the second layer, et cetera.

13 Q And do you recall at confirmation what impediments were
14 described to the Court in terms of obtaining D&O insurance at
15 that time?

16 A Yes. I think the main impediment which was discussed by
17 Mr. Tauber is what they colloquially refer to in insurance
18 markets as the Dondero Exclusion. Basically, getting coverage
19 to cover Mr. Dondero's actions is very difficult because of
20 his litigious nature. And so one of the keys was to build in
21 and continue the gatekeeper function.

22 When we filed -- when we got involved in the case as
23 independent directors, and as my elevation to CEO and CRO, and
24 we've talked about this in court numerous times, I required
25 the gatekeeper provisions to be put into the agreements.

1 Indeed, those were key when we first got D&O coverage for the
2 new board. Without that, I don't think we would have gotten
3 it. And Mr. Tauber testified with respect to exit that the
4 gatekeeper provision would be required.

5 Q Did the Debtor learn after confirmation that Mr. Dondero
6 and certain entities that he owns and controls appealed the
7 confirmation order?

8 A Yes.

9 Q And did that -- did those appeals have any impact on the
10 Debtor's method for securing the indemnity obligations? And
11 its attempt to get D&O insurance?

12 A Yes, they did. Aon was out in its markets seeking to get
13 full coverage, as we were looking for at the time, and was
14 having trouble, particularly with the secondary layers of
15 coverage. That related to both the risk around gatekeeper as
16 well as general concerns around litigation post-effective
17 date. And so we were not able with Aon at that time to be
18 able to get the D&O coverage that we were looking for.

19 To be sure, it's not just a Highland issue or a Dondero
20 issue. Markets for D&O insurance, as Mr. Tauber testified at
21 confirmation, are tight.

22 Q And what did the Debtor do in response to the issues
23 presented by the notice of appeal, at least with respect to
24 the securing -- securing assets for the indemnification
25 obligations?

1 A Well, the board -- the Debtor's board considered the
2 various options. And those options would be to get inferior
3 coverage, coverage that perhaps didn't -- didn't actually
4 protect those working for the estate in an appropriate manner.
5 And then also consulted with the Committee on the delays
6 attendant or caused by the inability to get the appropriate
7 coverage.

8 The Committee did propose that we look at an additional
9 broker who they had some -- one of the members had had some
10 success with, Allianz, to go out and try to access different
11 markets. We certainly didn't want to have confusion in the
12 markets. So we signed a new broker of record retention
13 agreement with Allianz. This is after Aon had already
14 surveyed their markets. And Allianz went out and looked for
15 additional carriers that might be able to provide appropriate
16 and effective D&O coverage.

17 Q And what role did the Debtor play in trying to secure D&O
18 coverage post-confirmation? How -- just describe for the
19 Court how the -- how the Debtor and the UCC interacted in the
20 process.

21 A Very cooperatively. The Debtor and the UCC, including the
22 UCC's professionals, worked closely providing information to
23 Allianz, assisting Allianz with describing what the risk
24 levels were, going through case issues, the appeal issues, the
25 gatekeeper. And Allianz went out and surveyed the markets

1 that it had particular relationships with that may have been
2 different than where Aon had gone previously.

3 Q And ultimately did the Committee and the Debtor come to
4 any conclusions as to whether or not there was sufficient and
5 adequate and reasonable D&O insurance available to cover the
6 indemnification obligations?

7 A We did. And despite Allianz's best efforts, and they did
8 -- they did find coverage, it really was (1) insufficient in
9 terms of the gaps that it created, in our view; and (2) it was
10 expensive. And so we looked at it from a cost-benefit
11 perspective and the protections that the folks working for the
12 estate and for the trusts would need, the various (garbled)
13 would need, and we determined with the Committee that we
14 should investigate alternative structures.

15 Q And is the Indemnity Trust that's before the Court the
16 alternative that was ultimately selected by the Committee and
17 the Debtor?

18 A That's correct.

19 Q And can you explain to the Court or provide to the Court
20 information as to the role that the Debtor's board played, the
21 Strand Advisors board played in considering and adopting this
22 particular alternative?

23 A Yes. Yeah. Basically, the structure is, I guess, not
24 completely foreign. Sidley Austin has a -- one of the top
25 insurance practices. We consulted with their structuring

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1 lawyers about alternatives to D&O coverage. John Dubel, who's
2 a co-board member or independent board member with me, has
3 extensive experience as a director and officer in distress
4 situations and has a real hands-on understanding of both D&O
5 coverage as well as alternative structures. And with Sidley
6 Austin, we began to investigate alternatives structures to see
7 if we could provide the same type of protections that are
8 built into the plan that we'd originally contemplated to be
9 third-party D&O with a self-insurance trust structure.

10 Q Are you generally familiar with the term sheet and the
11 terms that have been agreed upon with respect to the
12 contemplated Indemnity Trust?

13 A I am.

14 MR. MORRIS: Can we just put them up on the screen?
15 I believe it's Exhibit 1, Your Honor.

16 THE COURT: Okay.

17 MR. MORRIS: Okay. And if we could just scroll down
18 a bit.

19 BY MR. MORRIS:

20 Q Are you familiar with this document, Mr. Seery?

21 A I am, yes.

22 Q Okay. Can you just describe for the record what this
23 document is, to the best of your understanding?

24 A This is a detailed term sheet which lays out the structure
25 of the Indemnity Trust and how it would work to provide

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1 support for the indemnification obligations that the
2 Reorganized Debtor, the Claimant Trust, and the Litigation
3 Sub-Trust have to various covered parties.

4 Q And did you -- did you personally negotiate this term
5 sheet on behalf of the Debtor?

6 A I did, yes.

7 Q And was it negotiated with the UCC?

8 A It was, yes.

9 Q Okay. And to address Mr. Draper's point, can you confirm
10 has a factual matter that the note contemplated by this term
11 sheet is going to be unsecured?

12 A Right now, that -- that is the case, and there's no real
13 reason to change that. There's no -- there's no particular
14 difference, frankly, between secured and unsecured, other than
15 difficulty of securing it while negotiating with Blue Torch to
16 create security interest for Blue Torch.

17 So we want to make sure that, as we put this trust
18 structure in place, first and foremost, we always have
19 liquidity to operate the Reorganized Debtor and the Claimant
20 Trust and the Litigation Sub-Trust. Want to make sure that we
21 don't trip any covenants. The idea that we would execute an
22 agreement with Blue Torch and then trip it on execution is,
23 frankly, silly, and it won't happen.

24 So we decided that, while we initially contemplated a
25 secured structure, we really didn't need it. It didn't

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1 provide any true incremental benefit to the beneficiaries of
2 the trust, and we determined that we could do it on an
3 unsecured basis, which is how we intend to do it now.

4 Q Okay. And the lender has consented to that approach?

5 A Yes. I think, again, the key issues that we'll work with
6 through with the lender are assuring that we don't fund -- we
7 don't have cash that is inefficiently being used. We don't
8 want to fund and we won't fund a trust note if it's going to
9 somehow trip our liquidity covenants, which we expect to have
10 a liquidity covenant in the facility.

11 Q All right.

12 MR. MORRIS: Ms. Canty, you can take this down.

13 Thank you very much.

14 BY MR. MORRIS:

15 Q Let's just talk for a moment about some of the
16 implications that arise from the Indemnity Trust document. Do
17 you have an understanding as to whether the Debtor was
18 required, under the plan of reorganization, to purchase D&O
19 insurance?

20 A I do, yes.

21 Q And --

22 A The Debtor was not required to get it. Frankly, I would
23 require something. And it's a waivable condition to get
24 insurance. We could do it through reserves. We could do it
25 through a self-insurance structure. We could do it through

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1 third-party D&O. We could mix and match D&O coverages.

2 Simply stated, that's the way, you know, most companies,
3 whether they go through a distress situation or are strong, go
4 out and look for the different markets, depending on the --
5 for D&O, depending on the conditions of those markets. So the
6 plan contemplated getting D&O insurance. Frankly, the benefit
7 is -- runs to me and to the others who are running the trusts
8 as well as the Reorganized Debtor, and is a waivable
9 condition.

10 Q And did, as a matter of fact, the Debtor and the UCC agree
11 to waive that condition?

12 A Yes. Very specifically, so long as we could ensure that
13 we could reserve for, protect, and indemnify the
14 indemnification obligations that each of the trusts and the
15 Reorganized Debtor have to those running it.

16 Q So, stated another way, is it fair to say that the
17 agreement on the waiver is conditioned on the approval of this
18 motion?

19 A Yes.

20 Q Okay. Why did the Debtor agree to waive the condition set
21 forth in the plan to the effective date?

22 A Well, from the Debtor's perspective, or at least from my
23 perspective, the cost of insuring myself and others is not as
24 important, generally, when I just think about my own -- the
25 benefit that I would get from these structures, but it's

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1 important to the creditors. And so, in my role, in my
2 obligations to make sure that we consider the best way to do
3 things, the most effective way to do things that are required
4 under the plan or under the trust agreements, for the benefit
5 of the beneficiaries of the trusts, we determined that this
6 was a more cost-effective way to do it.

7 Q Speaking of costs, were the costs -- do you know whether
8 the costs of the contemplated Indemnity Trust were -- were
9 considered in the exit financing motion?

10 A Oh, yeah. Absolutely. So, part of our liquidity, in our
11 discussions with Blue Torch, are to make sure that we fund the
12 initial payment. When we work through anything that's owed on
13 the indemnification note, we'll work with Blue Torch to the
14 extent that their covenants might be implicated. But we don't
15 intend to trip those.

16 So it's very much contemplated by the exit financing. We
17 do intend to -- money is fungible. We do intend to fund it
18 with proceeds from the -- from the exit financing for the
19 initial \$2-1/2 million, and then we'll fund the balance of the
20 note over time.

21 Q And what's the source of funding for the note?

22 A That will be from the Debtor's liquidity to be generated
23 from either asset sales or from the Sub-Trust's distribution
24 of litigation proceeds.

25 Q Okay. Just a last couple of questions. Why did the

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1 Debtor decide to seek court approval of this particular
2 structure?

3 A Well, first and foremost, we want to make sure that
4 everybody knows what we're doing. We have felt, since the
5 start of the case, that transparency is essential.
6 Transparency was not a hallmark of this estate prior to our
7 involvement. Wanted to make sure that we let both the Court
8 and the beneficiaries know exactly what we were doing, even
9 though we'd already negotiated it with the Committee.

10 Secondly, arguably, this is a little bit different and out
11 of the ordinary course until we exit, so while in the case we
12 wanted to get approval of the -- of the Indemnity Trust
13 Agreement.

14 Q Does the Debtor believe that the adoption of the Indemnity
15 Trust is a proper exercise of its business judgment and is in
16 the best interests of the Debtor's estate?

17 A Absolutely. Look, we -- we carefully reviewed insurance
18 alternatives. Multiple brokers' D&O. We consulted with
19 insurance experts, including Aon, Allianz, DSI, and FTI, and
20 the people at those firms that are involved in insurance, as
21 well as the Pachulski Stang firm. The board considered each
22 of those alternatives. We consulted with an insurance -- an
23 alternative insurance structuring expert in Sidley Austin. As
24 I said earlier, they have one of the biggest and best
25 practices in this area. We compared the various alternatives

1 and their costs. And then we determined that the Indemnity
2 Trust structure was the best, most efficient coverage
3 mechanism to meet indemnity obligations for both the Debtor as
4 well as the Sub-Trusts.

5 MR. MORRIS: Your Honor, I have no -- I have no
6 further questions.

7 THE COURT: All right. Pass the witness. Mr.
8 Rukavina?

9 MR. RUKAVINA: Your Honor, I have no questions of
10 this witness.

11 THE COURT: All right. Mr. Clemente, any questions
12 from you?

13 MR. CLEMENTE: No, Your Honor. Thank you.

14 THE WITNESS: One point, Your Honor, that I should
15 make, and I should have stated earlier, just in understanding
16 the Indemnity Trust Agreement and structure: There may be
17 opportunities, as the D&O market opens up, to replace the
18 Indemnity Trust with a D&O coverage that is more efficient,
19 and we will continue to look at those opportunities. So if it
20 provides the kind of protections that we need and it's less
21 expensive, we'll certainly seek those. And we intend, at the
22 end, certainly, even if we keep the Indemnity Trust in place
23 until the monetizations are all done, we intend to look for
24 insurance coverage that would appropriately replace the
25 Indemnity Trust if that's a more efficient vehicle.

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1 THE COURT: All right. Thank you. All right.

2 MR. POMERANTZ: Your Honor, with that, the Debtor
3 rests.

4 THE COURT: Okay.

5 MR. POMERANTZ: And I'm prepared to proceed to
6 closing argument, unless Your Honor has any questions before I
7 do so.

8 THE COURT: All right. Well, thank you, Mr. Seery,
9 for your testimony.

10 (The witness is excused.)

11 THE COURT: Just to double-check, do we have any
12 evidence from the Objectors?

13 MR. RUKAVINA: Yes, Your Honor. It's just documents
14 that are filed with the Court, really, and the transcript of
15 the confirmation hearing. It's Exhibits A through O on Docket
16 2575, which I would move for the admission of.

17 MR. POMERANTZ: No objection, Your Honor.

18 THE COURT: All right. A through O at 2575 are
19 admitted.

20 (Objectors' Exhibits A through O are received into
21 evidence.)

22 THE COURT: All right. I'll hear closing argument.

23 MR. RUKAVINA: Your Honor, that's our evidence, so
24 we're prepared --

25 THE COURT: All right. I'll hear closing arguments.

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1 Mr. Pomerantz?

2 CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

3 MR. POMERANTZ: Thank you, Your Honor. Before I
4 proceed with my prepared closing argument, I just wanted to
5 address a couple of the comments that Mr. Rukavina made in his
6 opening.

7 THE COURT: Okay.

8 MR. POMERANTZ: First, Mr. Rukavina put on the screen
9 language which I suspect he thought was the smoking gun to
10 indicate that this is a plan modification by saying that the
11 indemnification obligations had to be satisfied by Claimant
12 Trust assets. Well, that's exactly how the plan works, Your
13 Honor. The structure, if Your Honor will recall, is that the
14 Claimant Trust, as the sole limited partner of the Reorganized
15 Debtor, can contribute money to the Reorganized Debtor on
16 account of any obligations of the Reorganized Debtor. And
17 then there is the Sub-Trust, which is the Litigation Sub-
18 Trust. And, again, the Claimant Trust can resolve claims that
19 the Sub-Trust has.

20 In fact, the money that's coming for the initial
21 downstroke of the \$2-1/2 million is money coming from the
22 Claimant Trust. And the \$22-1/2 million is going to come from
23 the proceeds of asset sales, as Mr. Seery identified in his
24 testimony, which will be from Claimant Trust assets.

25 So there's nothing inconsistent with the language Mr.

1 Rukavina put on the screen. In fact, the majority of assets
2 are housed at the Claimant Trust, and those are the assets
3 that are going to be used to satisfy indemnification
4 obligations.

5 Mr. Rukavina also pointed to the *U.S. Brass* case from the
6 Fifth Circuit, but, of course, that case is distinguishable
7 when you read it. In that case, the plan provided that claims
8 between the debtor and Shell would be litigated in a court of
9 competent jurisdiction. And that was an extremely important
10 provision, because the insurers were concerned that the debtor
11 and Shell would somehow conspire and have claims which would
12 then allow the parties to seek access to the insurance
13 coverage.

14 So the insurer withdrew its objection to the plan based
15 upon the inclusion in the plan of the requirement that claims
16 be adjudicated by a court of competent jurisdiction.

17 So what happens after? Well, after the plan was
18 consummated, which was an independent basis for denying the
19 motion, but after the plan was consummated the debtor and
20 Shell reach an agreement. And they reach an agreement and
21 said that the claims between them will be adjudicated by
22 arbitration.

23 Well, of course, the insurer objected, because that was
24 the fundamental basis upon which they objected to the plan.
25 So the Fifth Circuit determined that that had to be a plan

1 modification. Of course, it couldn't approve it because it
2 had been substantially consummated, but it was changing a
3 fundamental right, the fundamental right that the insurer
4 expected would occur under the plan, which was adjudication in
5 a competent -- by a court of competent jurisdiction, to
6 prevent there to be some collusion.

7 Mr. Rukavina did not, in his opening, and I suspect will
8 not be able to in his closing, point to anything that's
9 happening in the Indemnity Trust that is remotely similar. So
10 while, yes, it stands for the general proposition, which we
11 don't dispute, that if you change the fundamental rights of a
12 creditor, it's a plan modification and has to comply with the
13 statute, it's not at all relevant.

14 So, Your Honor, in closing, the Debtor seeks approval of
15 the motion as a valid exercise of the Debtor's business
16 judgment under Section 363 of the Bankruptcy Code. The Court
17 heard testimony from Mr. Seery regarding the circumstances
18 which led to the Debtor's decision to seek approval of the
19 Indemnity Trust motion and ultimately agree to waive the
20 condition to the effective date regarding D&O insurance.

21 Mr. Seery's uncontroverted testimony was that, as a result
22 of the litigiousness of Mr. Dondero and his related entities,
23 the Debtor was not able to obtain cost-effective D&O insurance
24 that adequately provided insurance for post-effective date
25 indemnity obligations.

1 Mr. Seery's uncontroverted testimony was that the Debtor
2 and the Committee jointly agreed to pursue the Indemnity Trust
3 concept as a more cost-effective mechanism.

4 And Mr. Seery's uncontroverted testimony was that the
5 initial funding of the Indemnification Trust was contemplated
6 in connection with the projections supporting the exit
7 financing approved by the Court.

8 Mr. Seery's uncontroverted testimony was that future
9 funding of the indemnification note would be made consistent
10 with requirements of the covenants in the exit financing and
11 the Debtor's liquidity.

12 Accordingly, Your Honor, Your Honor has a sufficient
13 evidentiary basis, both in the testimony of Mr. Seery and the
14 documents that have been admitted into evidence, to establish
15 that the creation of the Indemnity Trust is a valid exercise
16 of the Debtor's business judgment.

17 In addition, based upon the plan, the Claimant Trust
18 Agreement, the Litigation Sub-Trust, and the Reorganized
19 Debtor Limited Partnership Agreement, the Court has the
20 necessary support to determine that the motion is not a plan
21 modification. Nothing in the motion or the Indemnity Trust
22 Term Sheet modifies the respective rights of the Debtors and
23 the creditors. Creditors always knew that potential
24 indemnification claims would be paid or reserved for ahead of
25 distributions to Claimant Trust beneficiaries.

1 The Claimant Trust has discretion under the post-effective
2 date documents to create the reserves, and that is precisely
3 what is happening pursuant to the Indemnity Trust concept.

4 Accordingly, Your Honor, we ask that the Court determine
5 that the motion is not a plan modification, is a valid
6 exercise of the Debtor's business judgment, and is supportable
7 under Section 363(b), and that the Court overrule the
8 objection to the motion and grant the motion.

9 That concludes my presentation, Your Honor.

10 THE COURT: All right. Mr. Rukavina?

11 CLOSING ARGUMENT ON BEHALF OF THE OBJECTORS

12 MR. RUKAVINA: Thank you, Your Honor. I won't be
13 repetitive.

14 Section 363 cannot be used to override Section 1127. In
15 other words, if this is a plan modification, then the Debtor's
16 business judgment rule -- and we are not contesting the
17 business judgment rule on a factual basis -- it simply has no
18 relevance. If there is a plan modification, this needs to go
19 out to the creditors.

20 And it's not an academic exercise in this case. Mr.
21 Pomerantz is fond of saying that our pleadings are frivolous,
22 but they're not. We've already established that there was a
23 problem with the secured/unsecured function. That's being
24 clarified for everyone's benefit. And it's not frivolous
25 because Your Honor will recall you confirmed the plan on cram-

1 down. You confirmed the plan because one or two other classes
2 accepted the plan. Without that -- for example, the senior
3 secured claim -- without that, the plan could not have been
4 confirmed.

5 So our position -- it ought not to be offensive -- serve
6 this on all the creditors, give them a reasonable time under
7 1127(d) to change their vote if they want to, and let's come
8 back here in a reasonable time -- I'm not saying 60 days; we
9 can do this quickly -- and see what the creditors say.

10 And with respect to whether it is a plan modification, I
11 can't overstress the obvious, Your Honor. The plan calls for
12 two trusts that are funded with certain assets. Now they're
13 going to have three trusts that are funded with different
14 assets. Yes, the plan provided for indemnification. That is
15 correct. And I don't understand why they need this mechanism
16 because, yes, the plan provides for a reserve for
17 indemnification.

18 But you're creating a new legal entity. You're bringing
19 in a new fiduciary, who is as yet unknown. That fiduciary
20 will have possession and title over property under the plan
21 that belongs right now to Unsecured Creditors. The plan
22 language that I showed you, it is a smoking gun, it is,
23 because we are now changing that plan language. And we have
24 *U.S. Brass*, which, respectfully, creates a very low floor here
25 for what is and is not a plan modification.

1 plan that contained this structure, and the structure said
2 very clearly, before distribution comes to you, Claimant Trust
3 expenses, which include indemnity obligations or reserves for
4 indemnity obligations, are going to be either paid or funded.

5 That's all the Indemnity Trust structure does. It doesn't
6 alter the fundamental expectation of distributions or the
7 amount of distributions. Unfortunately, as the testimony
8 showed -- and the Committee was very active in this process; I
9 personally learned a lot about the D&O market going through
10 this process -- we were unable to procure D&O insurance. But
11 again, from a fundamental right and expectation of the
12 creditors' perspective, it was not an absolute requirement
13 that D&O insurance be obtained. It was merely a condition
14 precedent that could be waived, waived by the Debtor with the
15 consent of the Committee. And that's the direction that we
16 are now headed in, Your Honor.

17 So, in short, there simply isn't a change to the
18 fundamental rights of the creditors, or their expectation,
19 frankly. And the overwhelming number, in terms of amount of
20 creditors out of claims, voted in favor of the plan.

21 So, from my perspective, I think, Your Honor, we're close.
22 I think this may be the last or hopefully the last hurdle that
23 we have to have an effective date. And, again, from my
24 perspective, the Indemnity Sub-Trust does not constitute a
25 plan modification. It's something that the Committee is very

1 supportive of and would ask Your Honor to approve and overrule
2 the objection.

3 Unless Your Honor has questions for me, those are all of
4 my comments.

5 MR. POMERANTZ: Your Honor, I have one point to add.
6 Mr. Rukavina implied -- and you know, there's no reason for
7 him to know differently -- that it was his objection that
8 caused the note to be unsecured. That, in fact, is not true.
9 The Debtor, in determination, in discussions with Blue Torch,
10 figured that the security would be more trouble than it's
11 worth. Mr. Seery made the determination, in consultation with
12 the Committee, that it would not be secured. And that
13 decision was made in advance of receiving the objection.

14 That's all I needed to say, Your Honor.

15 THE COURT: Okay. Thank you.

16 All right. I am going to approve the motion and overrule
17 the objections.

18 First, I overrule the objection notion that 1127 applies
19 here, that this is a proposed plan modification post-
20 confirmation. I think, clearly, the plan -- this is certainly
21 within the literal terms of the plan, what is happening here.
22 As pointed out in opening argument, the plan at Article
23 IV(B) (5) contained a provision addressing that a reserve might
24 be established for potential indemnification claims. Then, as
25 pointed out, Section 6.1(a) and (d) of the Claimant Trust

1 Agreement contemplated a potential reserve. The Litigation
2 Trust Agreement also contemplated it. The Limited Partnership
3 Agreement for the Reorganized Debtor contemplates it. And I
4 don't think what we have here with this new Indemnification
5 Sub-Trust is anything that goes materially astray from the
6 concepts built into the plan.

7 As Mr. Rukavina argued, you do have that section on Page
8 126 of the plan suggesting indemnification would come solely
9 from the Claimant Trust, would be the responsibility of the
10 Claimant Trust. But again, I don't find this concept of the
11 Indemnity Sub-Trust to be contrary to that. It was the
12 evidence and representation that the assets will actually be
13 coming from the Claimants Trust.

14 Moreover, as pointed out in the presentations, there's
15 certainly nothing in the plan that explicitly prohibits this
16 mechanic of an Indemnification Trust. Parties cited to
17 Article IV(D) of the plan, which is a provision that
18 essentially allows implementation actions, mechanics,
19 documents, in furtherance of the plan. And I find that's
20 exactly what this is.

21 So, to be clear, this concept is not so fundamental as to
22 impact creditor recoveries, change the structure of the plan,
23 or alter the expectations of any of the parties affected by
24 the plan.

25 I'll next address the condition to the effective date that

1 the Debtor get D&O coverage. As clearly pointed out in the
2 arguments, this was a waivable condition. And the Debtor had
3 the ability to waive it without even asking court approval, in
4 consultation with the Creditors' Committee. The Creditors'
5 Committee supports this concept.

6 So all of this to say I don't find anything really runs
7 afoul of the plan or the confirmation order. And, in fact, we
8 are within the bounds of the plan in having this concept
9 suggested.

10 So I find 363(b)(1) is actually the statute that applies
11 here, and I find that the evidence demonstrated this is a
12 valid exercise of business judgment. Certainly, sound
13 business justification, there's a sound business justification
14 supporting it.

15 Among the evidence that was compelling here was the
16 evidence of Mr. Seery that he and Mr. Dubel shopped the market
17 extensively for D&O insurance. They consulted experts. And
18 the evidence was credible that they had a tough time finding a
19 D&O option that wasn't very expensive, and just generally not
20 very favorable. His testimony was that the markets are tight
21 right now for D&O insurance generally, but then you've got the
22 added overlay of this what was referred to as a Dondero
23 Exclusion in the marketplace that makes insurance, D&O
24 insurance a tougher buy in this context.

25 I found it compelling that Mr. Seery noted that previously

1 the Debtor used a Dondero-controlled entity to provide D&O
2 insurance, and his testimony was that the Debtor self-insured
3 as to all other insurance except D&O insurance. So this is
4 further evidence of why it was a challenge to get D&O
5 insurance. There were no options at this time that seemed
6 palatable. And therefore Plan B, if you will, which is not a
7 plan modification, was constructed where, well, we'll just
8 have this Indemnity Sub-Trust. So, reasonable business
9 judgment all across the board.

10 So, with that, I do approve this mechanism. So I ask
11 Debtor's counsel to please upload an order.

12 Do we have any other business in Highland before we
13 adjourn?

14 MR. POMERANTZ: No, we don't, Your Honor. We will
15 upload an order, and we hope Your Honor feels better as well.

16 THE COURT: Okay.

17 (Proceedings concluded at 10:55 a.m.)

18 --oOo--

19

20 CERTIFICATE

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

23 **/s/ Kathy Rehling**

07/21/2021

24

Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

25

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

In re:)
) Chapter 11
)
HIGHLAND CAPITAL MANAGEMENT, L.P.) Case No. 19-34054 (SGJ11)
)
Debtor.)
)
)
_____)

NOTICE OF APPEAL

COME NOW Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., and The Dugaboy Investment Trust (the “Appellants”), creditors and parties in interest in the above-captioned bankruptcy case (the “Bankruptcy Case”) of debtor Highland Capital Management, L.P. (the “Appellee”), and, pursuant to 28 U.S.C. § 158(a), hereby appeal to the United States District Court for the Northern District of Texas that certain *Order Approving Debtor’s Motion for Entry of an Order (I) Authorizing the (A) Creation of an Indemnity Subtrust and (B) Entry into an Indemnity Trust Agreement and (II) Granting Related Relief* (the “Order”) entered by the Bankruptcy Court on July 21, 2021 at docket no. 2599 in the Bankruptcy Case.

A copy of the Order is attached hereto as Exhibit “A.”

The names of the parties to the Order, and the contact information for their attorneys, are as follows:

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RESPECTFULLY SUBMITTED this 4th day of August, 2021.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this the 4th day of August, 2021, true and correct copies of this document were electronically served by the Court's ECF system on parties entitled to notice thereof, including on counsel for the Appellee.

By: /s/ Julian P. Vasek

Julian P. Vasek, Esq.