Date Filed: 10/27/2021

No. 21-10449
IN THE

United States Court of Appeals for the Fifth Circuit

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

NexPoint Advisors, L.P.; Highland Capital Management Fund Advisors, L.P.; Highland Income Fund; NexPoint Strategic Opportunities Fund; Highland Global Allocation Fund; NexPoint Capital, Incorporated; James Dondero; The Dugaboy Investment Trust; Get Good Trust,

Appellants ,

vs.

Highland Capital Management, L.P.,

Appellee.

On direct appeal from the United States Bankruptcy Court for the Northern District of Texas at No. 19-34054-sgj11

OPPOSITION OF APPELLANTS HIGHLAND INCOME FUND, NEXPOINT STRATEGIC OPPORTUNITIES FUND, HIGHLAND GLOBAL ALLOCATION FUND AND NEXPOINT CAPITAL, INC., TO MOTION TO DISMISS APPEAL AS EQUITABLY MOOT

A. Lee Hogewood, III
Emily Mather
K&L GATES LLP
4350 Lassiter at North Hills Ave.
Suite 300
Raleigh, N.C. 27609
(919) 743-7306
lee.hogewood@klgates.com
emily.mather@klgates.com

David R. Fine
K&L GATES LLP
Market Square Plaza
17 North Second St.
18th Floor
Harrisburg, PA 17101
(717) 231-5820
david.fine@klgates.com

Counsel for Appellants Highland Income Fund, NexPoint Strategic Opportunities Fund, Highland Global Allocation Fund and NexPoint Capital, Inc.

19340542110270000000000007

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Appellants
Highland Income Fund; NexPoint Strategic Opportunities Fund; Highland Global Allocation Fund; and NexPoint Capital, Inc.

Counsel:
K&L GATES LLP
A. Lee Hogewood, III
Artoush Varshosaz
David R. Fine
Emily K. Mather

Appellee
Highland Capital Management, L.P.

Counsel:
PACHULSKI STANG ZIEHL & JONES LLP
Jeffrey N. Pomerantz
John A. Morris

HAYWARD PLLC
Melissa S. Hayward
Zachery Z. Annable

ROBBINS, RUSSELL, ENGLERT, ORSECK & UNTEREINER LLP
Roy Theodore Englert Jr.
John B. Goerlich

Other Appellants:

1. James Dondero

Counsel:
BONDS ELLIS EPPICH SCHAFER JONES LLP
Clay M. Taylor
Bryan C. Assink

2. Get Good Trust
The Dugaboy Investment Trust

Counsel:
HELLER, DRAPER & HORN, L.L.C.
Douglas S. Draper
Leslie A. Collins
Greta M. Brouphy

3. NexPoint Advisors, L.P.
Highland Capital Management Fund Advisors, L.P.

Counsel:
MUNSCH HARDT KOPF & HARR, P.C.
Davor Rukavina

October 27, 2021 /s/ David R. Fine

TABLE OF CONTENTS

Introduction 1

Statement of the Case 2

Argument 4

I. This Court has appropriately been reluctant to employ the doctrine of equitable mootness. 4

II. The Court should not find the Funds' challenge to the Plan's exculpation and injunction provisions equitably moot.............6

III. The Court should not find the Funds' challenge to the Plan's gatekeeper provision equitably moot.................................... 13

IV. The Court should not find the Funds' challenge to discrete factual findings equitably moot. 14

Conclusion 15

TABLE OF AUTHORITIES

Page(s)

Cases

In re CJ Holding Co., 597 B.R. 597 (S.D. Tex. 2019) 14

Colorado River Water Cons. Dist. v. United States,
424 U.S. 800 (1976) 5

Feld v. Zale Corp. (In re Zale Corp.), 62 F.3d 746 (5th Cir. 1995) 8

In re Hilal, 534 F.3d 498 (5th Cir. 2008) 5, 8, 9

In re Manges, 29 F.3d 1034 (5th Cir. 1994) 5, 8

In re Pac. Lumber Co., 584 F.3d 229 (5th Cir. 2009) .... *passim*

In re Pilgrim's Pride Corp.,
No. 08-45664, 2010 WL 200000 (Bankr. N.D. Tex. Jan. 14,
2010) 7

In the Matter of Sneed Shipbuilding, Inc.,
916 F.3d 405 (5th Cir. 2019) 1, 4

In re Texas Grand Prairie Hotel Realty, L.L.C.,
710 F.3d 324 (5th Cir. 2013) 9

In re Vitro S.A.B. de CV, 701 F.3d 1031 (5th Cir. 2012) 7

INTRODUCTION

Highland Capital Management L.P. (the "Debtor") seeks to avoid appellate review of discrete but unlawful provisions in its confirmed bankruptcy plan by resorting to equitable mootness, which this Court has recognized to be both controversial and without a basis in the Bankruptcy Code. *In the Matter of Sneed Shipbuilding, Inc.*, 916 F.3d 405, 408-09 (5th Cir. 2019). And, while the Court has recognized equitable mootness, it has been more hesitant to use it than have other circuits, warning that it should be used—if at all—as a "scalpel rather than an axe." *In re Pac. Lumber Co.*, 584 F.3d 229, 240 (5th Cir. 2009). The Debtor wields equitable mootness with none of the caution or precision this Court's authorities require.

As Highland Income Fund; NexPoint Strategic Opportunities Fund; Highland Global Allocation Fund; and NexPoint Capital, Inc. (collectively, the "Funds"), demonstrate below, their targeted appeal does not implicate the fundamental concerns underlying equitable mootness, and their challenge closely resembles one that the Court determined was not equitably moot in *Pacific Lumber*.[1] In that case, the Court held that there was nothing equitable in allowing unlawful plan releases and exculpation provisions to go unreviewed. The same is true here.

[1] The other appellants have filed a separate, joint response to the Debtor's motion in which they make a number of well-considered arguments. The Funds file this separate response not because they disagree with the other appellants but because they are separate entities that have raised their own, narrow set of appellate issues.

Moreover, the Funds have challenged certain of the Bankruptcy Court's incorrect and unsupported factual findings that relate to the legal issues on appeal and that threaten collateral consequences. The Debtor makes no argument that this challenge is equitably moot.

There are important legal and factual issues this Court can and should resolve on the merits, and the Debtor should not be able to evade that review. The Funds ask the Court to deny the motion to dismiss.

STATEMENT OF THE CASE

The Funds have set out a comprehensive statement of the case in their opening merits brief, and they incorporate that statement by reference here.

It is, however, necessary to emphasize one way in which the Debtor has mischaracterized the record. In trying to set the stage for its later argument that the exculpation and injunction provisions are integral to the plan, the Debtor characterizes and criticizes James Dondero's approach to litigation. But the Funds are not Mr. Dondero, and the Debtor's characterization of that strategy, even if accurate, cannot be imputed to the Funds. The Debtor cannot point to any evidence that the Funds have been litigious and, indeed, they have not been. The Debtor refers to the Bankruptcy Court's findings at Paragraphs 77 and 78 of the confirmation order regarding purportedly litigious or harassing conduct, but those findings deal almost entirely

with Mr. Dondero's actions. The Bankruptcy Court incorrectly treated the Funds' legitimate confirmation objections as filings by "Dondero Related Entities" and as evidence that those entities sought to preserve their right "to continue their litigation against the Debtor."[2] But the Funds have not been litigious, and they cannot be faulted for objecting to unlawful plan provisions that interfere with their ability to protect their interests.

The Debtor tries to paper over the lack of record support for any suggestion that the Funds have been (or will be) inappropriately litigious by pointing to the Bankruptcy Court's sweeping statement that Mr. Dondero is a "serial litigator" who owns or controls the other appellants and that all appellants are "marching pursuant to the orders of Mr. Dondero."[3] But, as the Funds explain in their opening merits brief, the Bankruptcy Court's factual assertion that they are in some sense controlled by Mr. Dondero is without support in the record, and there is no evidence that the Funds would initiate litigation at Mr. Dondero's instigation. The Funds are, as they must be by statute, independent, and the Debtor notably points to no instance in which the Funds have taken any litigation step at Mr. Dondero's instruction or request.

---

[2] Confirmation Order at ¶ 77. ROA.59.

[3] Confirmation Order at ¶ 19. ROA.23.

As demonstrated below, the question of equitable mootness must be tested on a claim-by-claim basis. It should also be considered with a focus on the record as it relates to specific appellants and without lumping the appellants together as the Debtor persuaded the Bankruptcy Court to do. This Court should reject the Debtor's invitation to multiply the Bankruptcy Court's legal and factual errors. The Funds respectfully request that this Court deny the motion to dismiss.

ARGUMENT

I. This Court has appropriately been reluctant to employ the doctrine of equitable mootness.

The equitable-mootness doctrine has no basis in either the Constitution or the Bankruptcy Code. *See Pac. Lumber*, 584 F.3d at 240. Indeed, "mootness" is perhaps an inapt label for the doctrine since it is almost the opposite of traditional Article-III mootness. In Article-III mootness, there is no longer a live case. In equitable mootness, there is a live controversy, but a court may decide that an approved bankruptcy plan should not be disturbed. *See Sneed Shipbuilding*, 916 Fd.3d at 408. However, because federal courts "have a virtually unflagging obligation" to exercise their Article-III jurisdiction, *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800, 817

(1976), the Court should be—and has been—cautious about employing equitable mootness to deny review of a bankruptcy court order.

Equitable mootness is a prudential doctrine *sometimes* employed in response to the particular necessities surrounding a confirmed bankruptcy plan, most notably when a plan has been so substantially consummated that a court cannot order effective relief. *See In re Hilal*, 534 F.3d 498, 500 (5th Cir. 2008). The Court has established a three-part test: (1) did the appellant seek a stay pending appeal, (2) has the plan been substantially consummated and (3) would the relief sought on appeal affect the rights of parties not before the court or the success of the plan. *See In re Manges*, 29 F.3d 1034, 1039 (5th Cir. 1994). The Court noted in *Pacific Lumber* that

> [t]o these cautions regarding equitable mootness must finally be added the impact of the new statutory provision for certification of bankruptcy appeals directly to the court of appeals. 28 U.S.C. § 158(d)(2). The twin purposes of the provision were to expedite appeals in significant cases and to generate binding appellate precedent in bankruptcy, whose caselaw has been plagued by indeterminacy. H.R. Rep. No. 109-31 pt. I, at 148 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 206. *Congress's purpose may be thwarted if equitable mootness is used to deprive the appellate court of jurisdiction over a properly certified appeal.*

584 F.3d at 241-42 (emphasis added). Both rationales apply in this case. The parties—including the Debtor—agreed to expedite this Court's review by seeking leave for a direct appeal. But now the Debtor seeks to evade even that

expedited review by resorting to a doctrine that this Court applies narrowly. Moreover, the Bankruptcy Court allowed broader exculpation and releases than this Court has ever approved, but the Debtor contends that the Court may not now determine if the Bankruptcy Court went too far and provide circuit-wide guidance on the issue.

II. The Court should not find the Funds' challenge to the Plan's exculpation and injunction provisions equitably moot.

The Funds argued in Section I of their opening brief that the exculpation and injunction provisions in the Plan run afoul of this Court's precedent.[4] Specifically, the Plan exculpates not only the Debtor, but also the Committee and its members, Strand, the Chapter 11 Directors, employees of the Debtor, officers and directors of the Debtor, and professionals retained by the Debtor (among others).[5] The injunction provision permanently enjoins a host of persons and entities—including any that have appeared in or filed any motion, objection or other pleading in the Chapter 11 case—from pursuing any claim against a "Protected Party"—which includes the Debtor, the Debtor's employees, the Chapter 11 Directors, the CEO/CRO, the Committee and its members and professionals retains by the Debtor and the Committee in the

[4] Funds Op. Br. at 17.

[5] Plan at IV.C, ROA.157 and Plan at I.B., ROA.119.

Chapter 11 case—unless the Bankruptcy Court first determines that the claim is "colorable."[6]

As the Funds explained, in *Pacific Lumber* and other cases, this Court held that the Bankruptcy Code forecloses non-consensual, non-debtor releases. *See, e.g., Pac. Lumber*, 584 F.3d at 252; *In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1069 (5th Cir. 2012). Thus, a bankruptcy court may not approve, over objection, protections of third parties other than those the Bankruptcy Code provides to committees, members of committees and professionals engaged by committees. *See In re Pilgrim's Pride Corp.*, No. 08-45664, 2010 WL 200000 at *5 (Bankr. N.D. Tex. Jan. 14, 2010). Moreover, while this Court has allowed a *temporary* stay of a creditor's suit against a non-debtor during the pendency of the bankruptcy proceeding in order to facilitate the reorganization process, "the stay may not be extended post-confirmation in the form of a permanent injunction that effectively relieves the nondebtor from its own liability to the creditor." *See Feld v. Zale Corp. (In re Zale Corp.*), 62 F.3d 746, 760 (5th Cir. 1995).

The question, then, is whether this part of the Funds' appeal is equitably moot. It is not.

---

[6] Plan at IX.F, ROA.161 and Plan at I.B., ROA123.

As a threshold matter, this Court has held that "equity strongly supports appellate review of issues consequential to the integrity and transparency of the Chapter 11 process." *Hilal*, 534 F.3d at 500. The Court quoted this principle in its discussion in *Pacific Lumber* of whether the challenge to the exculpation clause in that case was equitably moot. 584 F.3d at 251. The Court went on to explain that

> the goal of finality sought in equitable mootness analysis does not outweigh a court's duty to protect the integrity of the process. We see little equitable about protecting the released non-debtors from negligence suits arising out of the reorganization.

584 F.3d at 252.

Turning to the test the Court set out in *Manges*, the most significant flaw in the Debtor's analysis is with respect to the third element—whether, if the Funds were successful in their challenge to the plan's exculpation and injunction provisions, it would affect the rights of parties not before the court or the success of the plan. Notably, the Court has treated challenges to exculpation provisions and releases as often peripheral to plan confirmation such that those challenges are less likely to be equitably moot. *See Hilal*, 534 F.3d at 501.

The Debtor begins its argument by pointing to the overall relief the Funds (and other appellants) seek. The Funds have asked the Court to vacate

the plan, or alternatively, to vacate only those parts the Funds have challenged. The Debtor argues that the Court is without authority to excise just a part of the plan, but that misses the mark. The Court has held that a court "may fashion whatever relief is practicable," including only partial relief that does not unwind a plan. *In re Texas Grand Prairie Hotel Realty, L.L.C.*, 710 F.3d 324, 328 (5th Cir. 2013).

The Debtor then turns to the Bankruptcy Court's suggestion that the exculpation and injunction provisions are necessary to the plan's success. Here again, though, the Bankruptcy Court—without proper support—treated the Funds (and other appellants) as essentially the same as Mr. Dondero when there is no evidence that the Funds have been litigious or harassing and, as the Funds explain in their opening brief, there is no proper factual support for any suggestion that they are controlled by Mr. Dondero.[7]

There is another flaw in the Debtor's argument. It points to the Bankruptcy Court's statement that certain of the exculpated parties "expected" to be exculpated and would likely not have served had they known they would

[7] The Debtor's motion rests in large part on an assertion by the Bankruptcy Court that the Funds contest in their merits brief in this appeal, namely that they are controlled by Mr. Dondero. A case ought not be dismissed on a preliminary motion because of a factual finding that is itself challenged on the merits.

not be.[8] But, as the Funds and the other appellants have demonstrated, this Court's precedent precludes contested non-debtor exculpations, and so none of those improperly exculpated parties could *reasonably* have expected to be exculpated. The Debtor's argument amounts to the illogical contention that parties should be rewarded with unlawful exculpations because, existing authority notwithstanding, they took on roles because they thought they might receive that improper benefit and that, because of that unreasonable assumption, the unlawful exculpations should be shielded from appellate review.

The Debtor argues that granting appellate relief "would jeopardize numerous third parties' reasonable reliance on the Plan."[9] The Funds explain above why none of the exculpated parties could have *reasonably* relief on those plan protections, and the Debtor makes no effort to explain why any other party could have relied on those provisions.

Moreover, as the Funds discuss in their opening merits brief, the exculpation provision is particularly and unduly broad:

> The exculpation provision does not simply exculpate the Debtor for pre-petition and pre-confirmation acts and the Committee and its members for acts taken within the scope of the Committee's duties, as this Court has deemed an appropriate limit under

[8] Motion at 15.

[9] Motion at 2.

> relevant provisions of the Bankruptcy Code. The Plan also exculpates the Debtor's employees, officers and direc-tors, and professionals. Additionally, with respect to all Exculpated Parties except for the Debtor's employees and Strand, the exculpation provision has no end date. Thus, the provision exculpates non-debtor third parties from negligent and otherwise improper conduct into eternity, so long as it relates to the implementation of the Plan, the consummation of related agreements (such as contracts assumed under the plan), and any other related negotiations, transactions and documentation. In effect, it allows the Exculpated Parties to escape future contractual obligations and resulting liability relating to agreements assumed under the Plan.[10]

The Debtor makes no meaningful effort in its motion to demonstrate that the breadth of the exculpation provision—with respect to both the number of parties and the temporal scope—is necessary to the success of the plan. As the other appellants note in their response to the Debtor's motion, the "reorganization" at issue is more like a liquidation that will be wound up in two or three years and, so, it is all the less likely that eternal exculpation is necessary to the success of the plan.

Two other points bear brief attention.

First, the Debtor notes that the various appellants noted in their stay motions that there was a danger of equitable mootness if a stay were not granted. There is nothing inconsistent between that position and the Funds' current position. They noted that, in the absence of a stay, they would face

---

[10] Funds' Opening Br. at 16.

an argument that their appeal was equitably moot, and so they have. Now they are demonstrating that, given the narrowness of their appellate issues, their appeal is not in fact equitably moot.

Second, the Debtor rather dramatically asserts that "Appellants evidently *want* to bring about the turmoil that would follow the upending of the consummated Plan. Perhaps they have designs on somehow managing to rise from those ashes with Dondero back in control of the estate's assets and its causes of action ..." Motion at 19. Breathless speculation is no substitute for evidence or logic. There is no evidence that the Funds seek the ultimate unraveling of the plan or to give Mr. Dondero any control of anything, and the Funds' narrow challenge on appeal would, if successful, bring about neither result.

***

It is noteworthy that the Debtor can point to no case in which a court has held that a challenge to release and exculpation provisions is equitably moot. That is perhaps because, as the Court held in *Pacific Lumber*, the breadth of exculpation and release provisions relates to the integrity of the bankruptcy process, and such issues should not escape appellate review. Moreover, the Bankruptcy Court extended the releases and exculpations in ways not approved in any other case in this circuit. This Court should have

the opportunity to determine if the Bankruptcy Court went further than circuit precedent and the Bankruptcy Code permit—which the Funds believe will be the Court's merits conclusion.

The Funds ask the Court to deny the motion to dismiss as it relates to their challenge to the exculpation and injunction provisions.

III. The Court should not find the Funds' challenge to the Plan's gatekeeper provision equitably moot.

The Bankruptcy Court approved a remarkably broad gatekeeper provision. As the Funds explained in their opening merits brief,

> [t]he gatekeeper provision requires that the Enjoined Parties seek approval from the Bankruptcy Court before they may commence an action against Protected Parties. In effect, the gatekeeper provision also prevents the Enjoined Parties from exercising post-confirmation legal and contractual rights without Bankruptcy Court approval. Only if the Bankruptcy Court finds that a claim is colorable may the action proceed (in the Bankruptcy Court or another court of competent jurisdiction).[11]

The gatekeeper provision extends to claims that arise post-confirmation, under assumed contracts, and that are wholly unrelated to the bankruptcy case. The Bankruptcy Court lacks subject-matter jurisdiction over such claims. *See In re CJ Holding Co.*, 597 B.R. 597, 604 (S.D. Tex. 2019) ("After confirmation, 'the debtor's estate, and thus bankruptcy jurisdiction, ceases to exist,

[11] Funds' Opening Br. at 29.

other than for matters pertaining to the implementation or execution of the plan.' ") (quoting *In re Galaz*, 841 F.3d 316, 322 (5th Cir. 2016)).

The arguments the Funds offer in the previous section of this response apply with equal strength to the Debtor's argument that the challenge to the gatekeeper provision is equitably moot, but there is more. As noted, that provision extends by its terms to potential litigation wholly unrelated to the bankruptcy case. By definition, such potential lawsuits could not interfere with the plan's success. Notably, the Debtor makes no effort to argue otherwise as it focuses the arguments in its motion on the appellants' other challenges.

The Funds ask the Court to deny the motion to dismiss as it relates to their challenge to the gatekeeper provision.

IV. The Court should not find the Funds' challenge to discrete factual findings equitably moot.

Finally, the Funds challenge certain of the Bankruptcy Court's factual findings, including that that the Funds are entities owned or controlled by Mr. Dondero and that the Funds are not independent of Mr. Dondero.[12] Correcting those clearly erroneous findings is important not only because they feed into the incorrect arguments addressed above but because those findings

[12] Funds' Opening Br. at 31.

affect the Funds' reputations and could negatively affect their value over time.[13]

The Debtor simply ignores this issue in its motion and for good reason. It could not make even a colorable argument that appellate review and correction of those factual findings would affect the rights of any third parties or imperil the plan's success.

The Funds ask the Court to deny the motion to dismiss as it relates to their challenges to certain factual findings.[14]

CONCLUSION

The Funds have challenged discrete plan provisions that are at odds with this Court's precedent, and the Debtor asks the Court to find those challenges equitably moot even though no court has ever found such challenges to be equitably moot. The Funds ask the Court to deny the Debtor's inequitable request so that it may address the merits of those issues and confirm the important principle that the Bankruptcy Code does not permit non-consensual, non-debtor releases and exculpations. As the Court said in *Pacific Lumber*, there is nothing equitable in allowing those non-debtor parties to have those unlawful protections.

[13] *Id.* at 34.

[14] The fact that the Debtor has ignored this issue could be read to mean that it does not seek dismissal of the Funds' appeal on that issue, but the Debtor has cast its motion as one to dismiss all of the appeals.

The Funds have also challenged discrete factual findings, and the Debtor has made no argument that that challenge is equitably moot and, so, there is no basis to dismiss that challenge.

The Funds respectfully request that the Court deny the Debtor's motion to dismiss as equitably moot the issues the Funds have presented in their appeal. The Court can and should proceed to the merits of the Funds' appeal.

October 27, 2021

Respectfully submitted,

/s/ David R. Fine
David R. Fine
K&L GATES LLP
Market Square Plaza
17 North Second Street
18th Floor
Harrisburg, PA 17101
(717) 231-4500
(717) 231-4501 (facimile)
david.fine@klgates.com

A. Lee Hogewood, III
Emily Mather
K&L GATES LLP
4350 Lassiter at North Hills Ave.
Suite 300
Raleigh, N.C. 27609
(919) 743-7306
lee.hogewood@klgates.com
emily.mather@klgates.com

Counsel for Appellants Highland Income Fund, NexPoint Strategic Opportunities Fund, Highland Global Allocation Fund and NexPoint Capital, Inc.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel certifies that this brief:

(i) complies with the type-volume limitation of Rule 27(d)(2) because it contains 3,426 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2010 and is set in Equity font in a size equivalent to 14 points or larger.

October 27, 2021 /s/ David R. Fine

CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2021, I electronically filed the attached brief using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

October 27, 2021 /s/ David R. Fine