Case No. 3:21-cv-01295-X

**THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**

In re: HIGHLAND CAPITAL MANAGEMENT, L.P.,

Reorganized Debtor.

THE DUGABOY INVESTMENT TRUST AND GET GOOD NONEXEMPT TRUST

Appellants,

v.

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Appellee.

On Appeal from the United States Bankruptcy Court
for the Northern District of Texas, Dallas Division, Case No. 19-34054-sgj11
Hon. Stacey G. C. Jernigan

# APPELLEE'S BRIEF

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## CORPORATE DISCLOSURE STATEMENT

Under Rules 8012(a) and 8014(b) of the Federal Rules of Bankruptcy Procedure, no publicly-held corporation owns 10% or more of Appellee Highland Capital Management, L.P., which is not a corporation and which does not have a parent corporation.

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## I. STATEMENT OF ISSUES AND STANDARD OF APPELLATE REVIEW[1]

1. Appellee agrees with Appellants' statement of the first issue and the applicable standard of appellate review.

2. Appellants' second issue departs materially from what was litigated in the Bankruptcy Court. Appellee's motion to the Bankruptcy Court[2] did *not* seek the Bankruptcy Court's approval of the Multi-Strat portion of the March 2021 Settlement under Bankruptcy Rule 9019.[3] Instead, Appellee sought the Bankruptcy Court's approval of *Appellee's* use of bankruptcy estate property—that is, Appellee's contractual right to direct Multi-Strat (a non-debtor not subject to Bankruptcy Rule 9019) to enter into the March 2021 Settlement—under Bankruptcy Code § 363(b) out of an abundance of caution, as causing Multi-Strat to settle UBS's litigation claims could be construed as outside the "ordinary course of business." Appellee's motion sought, and the Bankruptcy Court granted, Appellee's authority to cause Multi-Strat to enter into the settlement agreement under Bankruptcy Code § 363(b), and, in doing so, determined Appellee's exercise of its contractual rights was a sound exercise of Appellee's judgment. **Appellants have not appealed the Bankruptcy Court's granting of Appellee's authority under Bankruptcy Code § 363(b) or its determination that causing Multi-Strat to enter into the Settlement Agreement was a sound exercise of Appellee's business judgment.**

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[1] For the Court's convenience, capitalized but undefined terms used in this brief have the meanings given to them in Appellants' brief.

[2] ROA 641.

[3] "Bankruptcy Rule" means the enumerated rule from the Federal Rules of Bankruptcy Procedure.

[Aplt. Br. 2][4] Instead, Appellants' second statement purports to appeal relief, approval of the Multi-Strat settlement under Bankruptcy Rule 9019, that Appellee did not seek and the **Bankruptcy Court did not grant. Accordingly, this Court should summarily dispose of Appellants' appeal with respect to this issue.**

Appellants' second statement also impermissibly contains argument and assertions of fact already rejected by the Bankruptcy Court below following an evidentiary hearing. Appellants' second statement also contains ambiguous and ungrammatical syntax and punctuation. Nonetheless, this Court's review of the Bankruptcy Court's approval of the 9019 Motion[5] is based on the "clear error" standard appropriate for review of the Bankruptcy Court's findings of fact.[6]

3. Appellants cite *Linn Energy* for the proposition that whether the settlement constitutes a plan modification is a legal issue subject to this Court's *de novo* review. That case says nothing of the sort. Whether a settlement constitutes a plan modification is a "mixed question of law and fact that is subject to *de novo* review."[7]

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[4] "Aplt. Br." Refers to Appellants' Brief, Doc. 26.

[5] As indicated, Appellee's motion to the Bankruptcy Court did *not* seek approval under Bankruptcy Rule 9019 as it relates to Multi-Strat's participation in the settlement agreement but rather approval under Bankruptcy Code § 363(b). As described below, the distinction is both highly significant and fatal to Appellants' position on appeal.

[6] *Matter of Linn Energy, L.L.C.*, 936 F.3d 334, 340 (5th Cir. 2019).

[7] *U.S. Brass Corp. v. Travelers Ins. Group, Inc. (In re U.S. Brass Corp.)*, 301 F.3d 296 (5th Cir. 2002).

## II. STATEMENT OF THE CASE

With important exceptions noted below, Appellee generally agrees with the central facts relevant to the issues submitted for review—those facts required to be identified in Bankruptcy Rule 8014(a)(6). Appellee does not concede or agree with those statements that Appellants present as fact but are obviously argument.[8] For example, Appellants assert it is "undisputed" that "[a]ll entities involved are … entitled to separate independent counsel to represent the interests of the company." [Aplt. Br. 4] Leaving aside the mystery of what Appellants intend "the company" to mean in that sentence, Appellee has disputed and continues to dispute that "all entities" involved are "entitled to separate independent counsel," and there is no requirement in the settlement agreement, applicable law, or otherwise requiring Multi-Strat to be represented by separate counsel. Appellee did not concede that to be true to the Bankruptcy Court and the Bankruptcy Court did not find that to be true.

Additionally, Appellants partially base their "unfairness" argument (discussed below) on the supposed distinction between Multi-Strat LTD and Multi-Strat LP, the on-shore and off-shore components of the Multi-Strat investment fund. No meaningful or legally significant distinction exists.

[8] Appellee will not address its many quarrels with those arguments in this section.

Appellants fail to include in their statement of facts an important facet of the March 2021 Settlement's history. The Debtor and UBS had reached a settlement in principle in January 2021, which settled UBS's claims against the Debtor, including its claim that Mr. Dondero (when he controlled the Debtor) had caused the Debtor to breach its implied covenant of good faith by moving assets in ways intended to frustrate UBS's ability to be made whole on hundreds of millions of dollars of contractual obligations. After that settlement had been reached, and as Mr. Seery testified without challenge in the proceedings below, the Debtor uncovered evidence of a brazen conspiracy among Mr. Dondero and his close associates to cause the investment funds named in UBS's New York State Action (and against whom UBS had obtained a billion-dollar judgment), among others, to fraudulently transfer more than $300 million in face amount of securities and cash from those funds to a Cayman-based reinsurance company called Sentinel Reinsurance, Ltd., 70% of which is beneficially owned by Mr. Dondero (with the remaining 30% owned by Highland's former in-house general counsel, Scott Ellington). Highland immediately disclosed its discovery to UBS,[9] and these revelations caused the parties to revisit the earlier settlement, ultimately resulting in the March 2021 Settlement, which significantly increased the settlement amount attributable to the Debtor *but did not increase the settlement amount attributable to Multi-Strat.*

This is particularly important because Appellants do not challenge the amount of the claims against the bankruptcy estate granted to UBS under the March 2021

[9] The transfers to Sentinel were actively concealed from UBS, the Debtor, its management, and its advisors during the pendency of the Bankruptcy Case.

Settlement but focus solely on the one provision of the March 2021 Settlement under which Multi-Strat made a payment of $18.5 million to UBS to settle UBS's fraudulent transfer claim against Multi-Strat, which the Bankruptcy Court, under Bankruptcy Rule 3018, previously estimated at $23.2 million. Despite this, Appellants claim the settlement was "unfair" to Multi-Strat because it "received nothing" in exchange for the $18.5 million settlement payment it was required to make, ignoring that Multi-Strat received a release for a much larger liability.

## III. SUMMARY OF ARGUMENT

First, no one asked the Bankruptcy Court to rule that UBS's settlement with Multi-Strat was "fair" under Bankruptcy Rule 9019. Instead, Appellee asked the Bankruptcy Court for (1) authority to use property of the bankruptcy estate (Appellee's management rights under the management agreement) outside of the ordinary course of business under Bankruptcy Code § 363(b), and (2) a determination that causing Multi-Strat to enter into the settlement agreement was a sound exercise of its business judgment. The Bankruptcy Court did not err when it found that it had jurisdiction to enter an order authorizing the Debtor use property of the bankruptcy estate. It is beyond peradventure that the Bankruptcy Court has jurisdiction over a Chapter 11 debtor's request to use property of the estate outside the ordinary course of business under Bankruptcy Code § 363(b).

Second, even if the Debtor had sought a ruling under Bankruptcy Rule 9019 on the Multi-Strat portions of the March 2021 Settlement, the provisions settling claims between UBS and Multi-Strat were economically and legally connected with the provisions that settled claims between UBS and the Debtor. Settlements between all parties were part of an integrated, multi-faceted agreement to which the Debtor was an essential and indispensable party. The Bankruptcy Court certainly had jurisdiction over the settlement between UBS and the Debtor—Appellants concede that—and, therefore, had jurisdiction over the entire integrated agreement.

Despite that the Bankruptcy Court was not asked to approve, and did not approve, the Multi-Strat components of the March 2021 Settlement under the "fairness" standard of Bankruptcy Rule 9019, Appellants persist in their appeal to this Court that the settlement was "unfair" to Appellants. They base their argument on the fallacious notion that Multi-Strat, an entity controlled by the Debtor, was somehow "entitled" to separate counsel under a tortured reading of the settlement agreement addressed below and fail to cite any applicable law requiring that all signatories must have engaged different counsel. Insofar as that notion is itself based on a purported conflict of interest between the Debtor as Multi-Strat LP's general partner and certain of Multi-Strat's investors, Appellants expressly waived any conflict of interest when they invested in Multi-Strat. Whatever conflict of interest may have theoretically existed in connection with Multi-Strat's settling claims with

UBS was irrelevant to the Bankruptcy Court's approval of the March 2021 Settlement and irrelevant to this Court's review of that approval.

Lastly, the March 2021 Settlement did not modify the Plan. Appellants base their argument on a mistaken reading of a single sub-provision contained within the March 2021 Settlement that neither conflicts with nor modifies the Plan.

## IV. BACKGROUND ON MULTI-STRAT

Multi-Strat is a pooled investment fund[10] consisting of an offshore feeder fund and onshore master fund. Generally, foreign investors and tax-exempt entities invest in the foreign feeder for tax reasons, and the foreign feeder fund in turn invests substantially all its assets in the onshore master fund. The master fund is the dominant entity structure and holds and invests all the assets, including those of the feeder fund.

Here, Multi-Strat's "master fund" is Highland Multi Strategy Credit Fund, L.P., referred to as "Multi-Strat LP," and its offshore feeder fund is Highland Multi Strategy Credit Fund, Ltd., referred to as "Multi-Strat LTD." Multi-Strat LP, Multi-Strat LTD, their direct and indirect subsidiaries, and their respective general partners are referred to in the March 2021 Settlement, collectively, as "Multi-Strat."

[10] Additional background on Multi-Strat is included in the *Confidential Private Placement Memorandum of Highland Multi Strategy Credit Fund, L.P.*, dated November 2014 (the "Master PPM") and the *Confidential Private Offering Memorandum of Highland Multi Strategy Credit Fund, Ltd.*, dated November 2014 (the "Feeder PPM" and together with the Master PPM, the "PPMs").

*All* Multi-Strat's investment activity is conducted through Multi-Strat LP, and all its investable assets are held by Multi-Strat LP (either directly or indirectly). Investors in Multi-Strat LP and Multi-Strat LTD generally have the same rights and liquidity,[11] and each look to the investment activity conducted at Multi-Strat LP for their investment returns.

## V. ARGUMENT

### A. The Bankruptcy Court Had Jurisdiction to Approve the March 2021 Settlement

Appellants argued unpersuasively in the Bankruptcy Court that the Bankruptcy Court lacked jurisdiction to consider and approve the settlement between UBS and Multi-Strat "on the ground that the Bankruptcy Court lacks jurisdiction to approve a settlement between non-debtors."[12] But, Appellee did not request that the Bankruptcy Court approve the settlement between Multi-Strat and UBS under Bankruptcy Rule 9019. Still, Appellants persist in their argument and continue to ignore the uncontroverted fact that the Debtor did not seek approval of the Multi-Strat/UBS component of the settlement agreement but, rather, sought

[11] *See* ROA 915-962, Feeder PPM at 5 ("Aside from the differences described in this Memorandum, an investment in the [Feeder] Fund will have substantially similar terms and risks to an investment in the [Master Fund], as described in the [Master PPM].")

[12] ROA 768, *Supplemental Opposition To Debtor's Motion For Entry Of An Order Approving Settlement With UBS Securities LLC And UBS AG London Branch And Authorizing Actions Consistent Therewith*, ¶12.

authority under Bankruptcy Code § 363(b) to exercise its contractual management rights to cause Multi-Strat to enter into the settlement agreement.

With respect to the actual relief the Debtor requested on Multi-Strat, the Bankruptcy Court unquestionably had jurisdiction to enter an order under Bankruptcy Code § 363(b) as such actions "arise in" and/or "arise under" the Bankruptcy Code and are core proceedings.[13]

Even had the Debtor sought approval of the Multi-Strat/UBS component of the settlement under Bankruptcy Rule 9019, the Bankruptcy Court still had jurisdiction, since the matter "related to" Appellee's Chapter 11 case. Under 28 U.S.C. § 1334(b), Congress granted bankruptcy courts' jurisdiction over, among other things, "all civil proceedings … related to cases under" the Bankruptcy Code. Because Multi-Strat's settlement with UBS affects the Debtor's bankruptcy estate, "related to" jurisdiction, at very least, exists. As the Fifth Circuit reminds us, a proceeding "relates to" a case under the Bankruptcy Code if "the outcome of [the non-bankruptcy] proceeding could conceivably have any effect on the estate being administered in bankruptcy."[14]

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[13] *See, e.g., Rivet v. Regions Bank,* 108 F.3d 576 (5th Cir. 1997) (proceedings under Bankruptcy Code § 363(b) are core proceedings under 28 U.S.C. § 157(b) over which the bankruptcy court has exclusive "arising in" jurisdiction under 28 U.S.C. § 1334).

[14] *See, e.g., Burch v. Freedom Mortg. Corp. (In re Burch),* 835 Fed. Appx. 741, 748 (5th Cir. 2021).

Here, Appellants do not and cannot quarrel with any of the following facts demonstrating how the Multi-Strat settlement directly affects the Debtor's bankruptcy estate:

- The Multi-Strat settlement provisions are part of a multi-party settlement agreement under which UBS and the Debtor are receiving various types of consideration, including that UBS's claims against Multi-Strat are being compromised, the removal of any one type of which would radically alter the nature, value, mutuality, and give-and-take of the bargain being struck and documented in the March 2021 Settlement. The Debtor's own interests in the March 2021 Settlement are inextricably bound up with the Multi-Strat-related portions of that agreement;

- Multi-Strat is an investment vehicle consisting of Multi-Strat LP and Multi-Strat LTD. Multi-Strat can only act through its general partner, MSCF GP, and its investment manager—that is, a wholly-controlled subsidiary of the Debtor and the Debtor, respectively. A settlement of UBS's claims against Multi-Strat require the general partner and the investment manager to exercise their respective authority and rights under Multi-Strat's limited partnership and investment management agreements, management and control rights that themselves constitute

property of the Debtor's bankruptcy estate under Bankruptcy Code § 541(a).[15] The Debtor could not exercise its management and control rights over Multi-Strat without exercising control over property of its bankruptcy estate—an act that directly implicates Bankruptcy Code § 363(b), which controls the requirements and circumstances under which the Debtor "may use … property of the estate";

- Appellants spend considerable time arguing that the Debtor somehow breached its fiduciary duties to Multi-Strat's investors (there are no such duties) by agreeing to Multi-Strat's settlement with UBS without allegedly ensuring all parties had separate counsel. If Appellants are correct that the Debtor's entering into the Multi-Strat settlement violated the Debtor's fiduciary duties, giving rise to a claim against the Debtor's bankruptcy estate for that breach, then how could this settlement not affect—directly, materially—the administration of the Debtor's bankruptcy estate?

A settlement's direct implication of property of the estate and direct effect on administration of the bankruptcy estate are precisely why the *Zale* case Appellants cite so extensively does not support Appellants' argument. And Appellants tell us exactly why. They quote *Zale* thus: "For the bankruptcy court to have subject matter

[15] *See In re Thomas*, 2020 Bankr. LEXIS 1364 at *31 (Bankr. W.D. Tenn. 2020) (a debtor's membership interest in an LLC, including its governance rights, became property of the estate on the petition date); *In re Cardinal Indus.*, 105 B.R. 834, 849 (Bankr. S.D. Ohio 1989).

jurisdiction, therefore, *some nexus* must exist between the related civil proceeding and the Title 11 case."[16]

The facts appearing in the record and summarized above amply establish the "nexus" between the Multi-Strat settlement and the bankruptcy estate that was notably absent in *Zale.* Appellants themselves have established this "nexus." Whether they intended to, Appellants have conceded in their own briefing and in their own arguments in the Bankruptcy Court below that, in accordance with applicable Fifth Circuit law on "related to" bankruptcy court jurisdiction, the Multi-Strat settlement clearly implicates property of the Debtor's bankruptcy estate (creating *in rem* jurisdiction)[17] and clearly affects the administration of the Debtor's bankruptcy estate (creating "related to" jurisdiction at least). In light of all this, the Bankruptcy Court ruled that it had jurisdiction to consider the Multi-Strat-related components of the March 2021 Settlement. The Bankruptcy Court was right.

[16] *Matter of Zale Corp.*, 62 F.3d 746, 752 (5th Cir. 2995) (emphasis added).

[17] 28 U.S.C. § 1334(e): "The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction—(1) of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate …"; *see, e.g., Universal Oil Ltd. v. Allfirst Bank (In re Millenium Seacarriers, Inc.),* 419 F.3d 83, 96 (2d Cir. 2005) (bankruptcy court has *in rem* jurisdiction over all property of the bankruptcy estate, wherever located).

### B. The Bankruptcy Court Could Authorize the Debtor to Cause Multi-Strat to Settle UBS's Claims and the Settlement Was a Sound Exercise of the Debtor's Business Judgment

As described above, Appellants have appealed relief the Bankruptcy Court did not grant. All the Bankruptcy Court was asked to rule on was whether the Debtor had *authority* under Bankruptcy Code § 363(b) to cause Multi-Strat to settle with UBS and that was the *only* issue that the Bankruptcy Court ruled on with respect to Multi-Strat in its order approving the settlement with UBS:

> The Court finds that the Debtor, in its capacity as investment manager of Multi-Strat, exercised sound business judgment in causing Multi-Strat to enter into the Settlement Agreement.[18]

As such, the concept of "fairness" is irrelevant; it only applies under a Bankruptcy Rule 9019 motion to approve a settlement as reasonable. As to Multi-Strat, none of that happened in the Bankruptcy Court and there is nothing to appeal in that regard, particularly because Appellants do *not* list the Bankruptcy Court's determination that the Debtor *did* have authority over Multi-Strat as one of the issues Appellants are appealing here. Nonetheless, to ensure that this Court hears from Appellee on Appellants' misplaced arguments on this issue, Appellee will address the merits (or lack of them) of Appellants' fairness arguments.

Appellants base their dissatisfaction with the Multi-Strat portion of the March 2021 Settlement on three principal concerns: (1) the Debtor, as Multi-Strat's

[18] ROA 4.

investment manager and owner of MSCF GP, allegedly had a conflict of interest when it negotiated and entered into the March 2021 Settlement on Multi-Strat's behalf; (2) the terms of the settlement were economically unfair to Multi-Strat; and (3) Multi-Strat should have had separate counsel in connection with the negotiation of that settlement. The uncontroverted evidence presented to and relied on by the Bankruptcy Court belies each of these concerns and includes facts that Appellants conveniently omit from their brief to this Court.

**Appellants Waived Conflicts of Interest, Even if One Existed**

To understand why Appellants cannot now be heard to complain about any would-be conflict of interest, this Court must gain the same appreciation for Multi-Strat's governance structure and operative documents the Bankruptcy Court had.

Multi-Strat is managed by its investment manager — the Debtor — and its general partner — Highland Multi Strategy Credit Fund GP, L.P. (the "MSCF GP"). The MSCF GP is 100% owned, indirectly, by the Debtor, and the sole officer of MSCF GP is James P. Seery, Jr., the Debtor's chief executive officer. The Debtor's rights, duties, and obligations as investment manager are set forth in various contractual agreements.[19] MSCF GP's rights, duties, and obligations are set forth in the LPA, the Master PPM, and general Delaware partnership law.

[19] *See Third Amended and Restated Investment Management Agreement, by and among Highland Multi Strategy Credit Fund, Ltd., Highland Multi Strategy Credit Fund, L.P., and Highland Capital Management, L.P.*, dated November 1, 2013 (the "IMA"), the *Fourth Amended and Restated Limited Partnership Agreement of Highland Multi Strategy Credit Fund, L.P.*, dated

Appellant Dugaboy invested in Multi-Strat by executing a subscription agreement (the "Subscription"),[20] which was signed by James Dondero as Dugaboy's beneficiary. By doing so, Mr. Dondero represented that he had received a copy of the Governing Documents.[21]

The Governing Documents vest in the Debtor (as investment manager) and MSCF GP (as general partner) the exclusive authority and obligation to manage and bind Multi-Strat, including the authority to settle claims against Multi-Strat. Appellants do not dispute this. For example, in the section titled "Risk Factors and Potential Conflicts of Interest," the Master PPM states that "[s]ubstantially all decisions with respect to the management of the Fund are made by the General Partner and the Investment Manager. Limited Partners have no right or power to take part in the management of the Fund."[22] The PPMs also contain dozens of pages of

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November 1, 2014 (the "LPA"), the PPMs, and the *Amended and Restated Memorandum and Articles of Association of Highland Multi Strategy Credit Fund, Ltd.*, as adopted on 1 November 2014 (the "Articles" and together with the IMA, the LPA, and the PPMs, the "Governing Documents"). *See* ROA 839–962.

[20] ROA 966–1074.

[21] ROA 1097, Subscription at 1: "The undersigned (the "***Subscriber***") hereby acknowledges having (i) received, read and understood the current Confidential Private Offering Memorandum, as supplemented and amended from time to time (the "***Private Offering Memorandum***"), of Highland Credit Opportunities Fund, Ltd., a Cayman Islands exempted company (the "***Fund***"), including but not limited to those section dealing with risk facts, conflicts of interest, fees and tax consequences of an investment in the Fund …"

[22] ROA 868, Master PPM at 25; *see also* ROA 915-962, Feeder PPM at 6 ("[T]he [Feeder] Fund's management, as well as investment decisions at the [Master Fund] level, are effectively controlled by the Investment Manager or its affiliates."); *see also* ROA 968, IMA, § 2(c)(i) (granting the Debtor, as investment manager, full discretion and authority to "exercise all rights, powers, privileges and other incidents of ownership or possession" with respect to Multi-Strat's

extensive, highly-detailed risk factors, including several pages regarding the potential for conflicts of interest by the investment manager (that is, the Debtor) and which disclose in excruciating detail that the relationship between the investment manager and the fund may give rise to conflicts of interest.[23] These disclosures were expressly incorporated into the Feeder PPM.

By signing the Subscription Agreement and investing in Multi-Strat, every investor, including Appellant Dugaboy, acknowledged and waived any such conflicts of interest and acknowledged that the Debtor, as Multi-Strat's investment manager "undertakes to resolve conflicts in a fair and equitable basis, *which in some instances may mean a resolution that would not maximize the benefit to the Fund's investors.*" Appellant Dugaboy, therefore, acknowledged and accepted the

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investments and "other property and funds held or owned by the Master Fund" and the authority to "**institute and settle or compromise suits and administrative proceedings and other similar matters**.") (emphasis added); ROA 1005, LPA, § 4.3 (providing that Multi-Strat's limited partners "may not take any part in the management, control or operation of the Partnership's business, and have no right or authority to act for the Partnership or to vote on matters other than the matters set forth in this Agreement or as required by applicable law.")

[23] *See, e.g.*, ROA 892–896, Master PPM at 49–53: "None of the Investment Manager, its affiliates and their respective officers, directors, shareholders, members, partners, personnel and employees (collectively, the "***Highland Group***") is precluded from engaging in or owning an interest in other business ventures or investment activities of any kind, whether or not such ventures are competitive with the Fund. The Investment Manager is permitted to manage other client accounts, some of which may have objectives similar or identical to those of the Fund, including other collective investment vehicles that may be managed by the Highland Group and in which the Investment Manager or any of its affiliates may have an equity interest. **The Fund will be subject to a number of actual and potential conflicts of interest involving the Highland Group … The Investment Manager undertakes to resolve conflicts in a fair and equitable basis, which in some instances may mean a resolution that would not maximize the benefit to the Fund's investors.**"

disclosures regarding conflicts of interest, and expressly waived those conflicts and the potential result of conflicts in which certain decisions may not maximize the benefit to Multi-Strat's investors.[24]

Appellants' counsel all but abandoned these arguments at the end of the proceedings below. After exerting considerable effort to avoid even addressing the obvious meaning and implications of the conflict of interest disclosures and waivers, Appellants' counsel reiterated that a conflict of interest makes the settlement unfair to Multi-Strat, yet seconds later acknowledged that the settlement is "probably a good deal," adding that "I don't dispute that everybody acted in good faith."[25] If the March 2021 Settlement is a "good deal," how, exactly is that settlement also unfair or somehow infirm because of a purported conflict of interest? If "everybody acted in good faith," how could the March 2021 Settlement have been the result of a prejudicial conflict of interest? How have Appellants not already conceded in the proceeding below that the alleged conflict of interest did not amount to any

[24] Appellant Dugaboy, Mr. Dondero's personal family trust, must be expected to appreciate the full legal and practical implications of those disclosures and those waivers. Mr. Dondero ran the Debtor until his removal by the Bankruptcy Court in January 2020 and was the actual person who controlled Multi-Strat's investment manager and structured Multi-Strat at its formation. Mr. Dondero signed all the Governing Documents in *all* capacities ostensibly not bothered a whit by his own conflicts of interest. Mr. Dondero disclosed the potential for conflicts of interest to all investors, including Dugaboy. Yet it is Mr. Dondero's Appellants who now claim to be the innocent victims of a conflict of interest arising under the precise governance structure Mr. Dondero himself set up.

[25] ROA 5339, Tscript. at 176.

unfairness that bears on the approval of a settlement under Bankruptcy Rule 9019? How have Appellants not already waived the argument?

**There Was No Breach of Fiduciary Duty as No Duty Was Owed to Appellants**

Appellants alternatively couch their conflict of interest argument as a breach of fiduciary duties argument, alleging that the Debtor could not appropriately "serve[] the interests of multiple parties in the March 2021 Settlement"[26] while fulfilling its "fiduciary duties," which ostensibly arise under the Investment Advisors Act of 1940 (the "Advisors Act"). What Appellants don't argue—because they can't—is that *the Debtor never owed fiduciary duties to Multi-Strat's investors.* Under applicable case law, which Appellants do not even try to cite or distinguish, an investment adviser's fiduciary duties run solely to the investment vehicle itself, not to individual investors in that vehicle.[27]

[26] Aplt. Br. at 21.

[27] *See Goldstein v. SEC*, 451 F.3d 873, 879 (D.C. Cir. 2006) ("An investor in a private fund may benefit from the adviser's advice (or he may suffer from it) but he does not receive the advice directly. He invests a portion of his assets in the fund. The fund manager – the adviser – controls the disposition of the pool of capital in the fund. The adviser does not tell the investor how to spend his money; the investor made that decision when he invested in the fund. Having bought into the fund, the investor fades into the background; his role is completely passive. If the person or entity controlling the fund is not an "investment adviser" to each individual investor, then *a fortiori* each investor cannot be a 'client' of that person or entity"); *see also, e.g., SEC v. Northshore Asset Mgmt.*, 2008 U.S. Dist. LEXIS 36160, at *18-20 (S.D.N.Y. May 5, 2008) (dismissing a claim that an investment adviser owed a duty to a fund's investors rather than just the fund); *SEC v. Trabulse*, 526 F.Supp.2d 1008, 1016 (N.D. Cal. 2007) (same).

Consistent with this black-letter law, the PPMs and the Subscription clearly establish that Multi-Strat's investors are charged with understanding that *they are owed no such duties*.[28] So too, does the LPA:

> The General Partner, the Investment Manager, any of their Affiliates, each direct or indirect member, manager, partner, director, officer, shareholder and employee of any of the foregoing and, with the approval of the General Partner, any agent of any of the foregoing (including their respective executors, heirs, assigns, successors or other legal representatives) (each an "Indemnified Person") shall not be liable to the Partnership or to any of the Limited Partners for any loss or damage occasioned by any acts or omissions in the performance of services under this Agreement or the Investment Management Agreement, or otherwise in connection with the Partnership, its Investments or operations, unless such loss or damage has occurred by reason of the willful misconduct, fraud or gross negligence of such Indemnified Person or as otherwise required by law …[29]

The record lacks any allegation, much less any evidence, that the Debtor engaged in "willful misconduct, fraud or gross negligence" in undertaking its duties as investment manager to cause Multi-Strat to enter into the March 2021 Settlement.

Even Appellants' brief, in quoting testimony from Mr. Seery, establishes only that the Debtor's acting as Multi-Strat's investment manager "triggers certain fiduciary duties on the part of the Debtor to Multi-Strat LP."[30] This is true and

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[28] ROA 1100, Subscription, § 3(o) at 4: "The Subscriber has carefully reviewed and understands the various risks of an investment in the Fund, as well as the fees and conflicts of interest to which the Fund is subject, as set forth in the Private Offering Memorandum. **The Subscriber hereby consents and agrees** to the payment of the fees so described to the parties identified as the recipients thereof, and **to such conflicts of interest**" (emphasis added).

[29] ROA 1006, LPA at 26.

[30] Aplt. Br. at 20.

consistent with applicable law. But, as set forth above, nothing in the Advisors Act imposes fiduciary duties on an investment manager that *run to the investors themselves.* Nothing in applicable Delaware law imposes fiduciary duties that run to the limited partners. Appellants offered the Bankruptcy Court literally nothing — no evidence, no testimony, no legal citations — to establish that the Debtor as Multi-Strat's investment manager owed any fiduciary duties to Dugaboy or any other investors. Appellants offer this Court nothing in that regard either.

The Bankruptcy Court's determination that Appellants' allegations of conflict of interest and breach of fiduciary duty were not supported by actual evidence — no testimony, no documentary evidence, nothing but Appellants' counsel's argument — is, to say the very least, not clearly erroneous and should not be disturbed in this appeal.

**The Settlement Terms Were Fair to Multi-Strat and an Exercise of the Debtor's Sound Business Judgment**

Although somewhat obliquely, Appellants assert in the appeal that the Bankruptcy Court somehow erred in approving the March 2021 Settlement because it is economically unfair to Multi-Strat: "the economics of the transaction and the fact Multi-Strat LP is paying $18.5 Million to UBS when it received nothing cannot be justified … Paying $18.5 Million when you received nothing … seems to be a

pretty compelling defense."[31] This assertion, posited in the Bankruptcy Court and now to this Court, was the only substantive assertion regarding the alleged economic unfairness of the March 2021 Settlement to Multi-Strat.

The theme of "Multi-Strat gets nothing" may be rhetorically attractive for Appellants, but the record amply demonstrates that it belies reality. The Bankruptcy Court had before it the actual March 2021 Settlement agreement containing provisions that make it clear that: (a) UBS had asserted a claim for approximately $25,783,000 directly against Multi-Strat;[32] and (b) UBS was compromising and releasing those claims as part of the settlement in exchange for, among other things, Multi-Strat's payment of $18.5 million. Further, UBS had previously filed a motion under Bankruptcy Rule 3018[33] asking the Bankruptcy Court to estimate the value of its claim, including its claim against Multi-Strat, for voting purposes. This relief was vigorously contested by the Debtor. After a contested hearing on UBS's motion, the Bankruptcy Court held that UBS had a 90% chance of recovering on its claim against

[31] Aplt. Br. at 22. On repeated readings, Appellee has not been able to divine what Appellants mean by that last phrase.

[32] Appellants seek to confuse this Court by implying that UBS only had claims against Multi-Strat LP and that it was somehow unfair to use Multi-Strat LTD's resources to satisfy such claims. For the reasons set forth above, that claim has no merit. Under Multi-Strat's corporate structure, all assets were pooled at Multi-Strat LP and all investment activity occurred at Multi-Strat LP, in each case for the benefit of all investors in Multi-Strat, including those invested through Multi-Strat LTD.

[33] *UBS's Motion for Temporary Allowance of Claims for Voting Purposes Pursuant to Federal Rule of Bankruptcy Procedure 3018*, Case No. 19-34054-sgj11, D.I. 1338 (Bankr. N.D. Tex. Nov. 6, 2020).

Multi-Strat, resulting in a claim, for voting purposes, of at least $23.2 million (excluding interest).[34]

Nothing in the record will indicate that any of the foregoing is somehow inaccurate or untrue. The only evidence the Bankruptcy Court had before it was that UBS was settling a claim against Multi-Strat of $25.8 million (estimated by the Bankruptcy Court to be worth $23 million) for a settlement payment of only $18.5 million — hardly unfair.

Thus, even assuming Appellee had asked the Bankruptcy Court to approve Multi-Strat's settlement with UBS under the fairness standard of Bankruptcy Rule 9019—it did not—the uncontroverted evidence demonstrates the settlement is in fact more than fair to Multi-Strat, and well above the lowest point in the range of reasonableness.[35] Appellants argued in the Bankruptcy Court, but did not provide testimony or anything resembling evidence, that Multi-Strat had meritorious defenses to UBS's claims and asserted (as they do in their appellate brief to this Court) that Multi-Strat LP was not a party to the Termination Agreement that gave rise, at least in part, to UBS's claims against the Debtor and Multi-Strat. The only actual evidence the Bankruptcy Court had before it with respect to Multi-Strat was

[34] *Order Granting UBS's Motion for Temporary Allowance of Claims for Voting Purposes Pursuant to Federal Rule of Bankruptcy Procedure 3018*, Case No. 19-34054-sgj11, D.I. 1518 (Bankr. N.D. Tex. Dec. 7, 2020).

[35] *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968)* (same).

Mr. Seery's testimony, which contains several unequivocal statements that UBS had serious claims against both the Debtor and Multi-Strat and that UBS did not believe that its claims against Multi-Strat were anywhere near as limited as Appellants portrays them.[36]

Given this evidence, given the "lowest range of reasonableness" or "basic fairness" standard the Bankruptcy Court would have required to follow if it had been asked to evaluate the Multi-Strat settlement under Bankruptcy Rule 9019,[37] and given that literally no actual creditor of the Debtor objected to the Bankruptcy Court's approval of the March 2021 Settlement,[38] Appellants have offered this Court

[36] *See, e.g.*, Tscript. at 37:14–22: "a number of ancillary claims that UBS had brought, including … that that entity engaged in actual fraud, and that included transfer to Multi-Strat …"; Tscript. at 38:8–11: "The [UBS] allegation is that in 2008 Multi-Strat contributed assets to HFP to prop up the —HFP and its ability to put money into SOHC, and ultimately CDO Fund, to make margin payments"; at 40:1: "Multi-Strat was a defendant in [the UBS] litigation, yes"; Tscript. at 54:12–19: "Recall that the claim that UBS has is for actual fraud. This is not — so their recovery could be from Multi-Strat, but their recovery could also be from Highland. Remember the implied covenant of good faith and fair dealing and the domination and control and moving the assets in and out Highland could be liable for that amount as well. But that would reflect on what the transfers were and what the likelihood of success against Multi-Strat would be, too."

[37] *See, e.g., In re Moore*, 608 F.3d 253, 263 (5th Cir. 2010) (under Bankruptcy Rule 9019, a proposed settlement must be 'fair and equitable' and in the best interests of the estate"); *Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop. (In re Cajun Elec. Power Coop.)*, 119 F.3d 349, 356 (5th Cir. 1997) (noting that the court's task is to compare "the terms of the compromise with the rewards of litigation"); *In re Victory Medical Center Mid-Cities, LP*,. 601 B.R. 739, 749 (Bankr. N.D. Tex. 2019) ("A proposed compromise settlement need not result in the best possible outcome for the debtor, but must not fall beneath the lowest point in the range of reasonableness").

[38] *Cajun Elec.* 119 F.3d at 356 (5th Cir. 1997) ("paramount interest of creditors with proper deference to their reasonable views" is a factor bearing on the wisdom of a compromise); *see also Conn. Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortgage Corp.)*, 68 F.3d 914 (5th Cir. 1995).

nothing to support the conclusion that, had the Bankruptcy Court been asked to approve the transaction as it related to Multi-Strat under Bankruptcy Rule 9019, the Bankruptcy Court would have committed clear, reversible error in doing so.[39]

The foregoing evidence, however, clearly supports the Bankruptcy Court's actual ruling: "[T]he Debtor, in its capacity as investment manager of Multi-Strat, exercised sound business judgment in causing Multi-Strat to enter into the Settlement Agreement."

**Multi-Strat Was Not Required to Have Separate Counsel**

As a variation on Appellants' theme that the Debtor could not discharge its obligations as Multi-Strat's investment manager because the Debtor also had a separate interest in settling the UBS claims, Appellants argue that there was something prejudicial about the Debtor's decision not to engage separate counsel for Multi-Strat in connection with the negotiation of the March 2021 Settlement. The sum total of what Appellants present in their brief to this Court to support that argument is (1) a boilerplate representation in the settlement agreement from each party that it had "been adequately represented by independent legal counsel of its

[39] In fact, Appellants recognized that the March 2021 Settlement was not a bad settlement: "And so it's not the settlement is a bad settlement. It's that some of the obligations that the Debtor is required to make or do under this settlement may have an adverse effect on the estate and violate the plan that this Court spent a-hundred-and-some-odd pages confirming." Tscript. at 178:7–11. If the settlement is not a bad settlement, if it is not basically unfair to Multi-Strat, and if Appellants have no basis to complain about some alleged conflict of interest or breach of fiduciary duties they were not owed, what is the basis of this appeal?

own choice, throughout all the negotiations that preceded the execution of" the settlement agreement[40] and (2) snippets of testimony from Mr. Seery in the proceedings below simply acknowledging the fact that Multi-Strat did not have separate counsel.

First, the representation in the settlement agreement does not include a requirement that "independent counsel" be "separate" counsel (as alleged by Appellants), and it was entirely appropriate for Multi-Strat to rely on the Debtor in negotiating and drafting the settlement agreement.

Second, Appellants again cited no law to the Bankruptcy Court and no contractual provision that would have required the Debtor to engage *separate* counsel for Multi-Strat, no law that would impose some sort of liability on the Debtor for failing to do that, and no factual evidence that Multi-Strat was harmed in any way by not having separate counsel. The record of this appeal is devoid of any evidence that the admittedly true fact that Multi-Strat did not have separate counsel injured Multi-Strat or its individual investors in any legally-cognizable way.

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[40] March 2021 Settlement at 12, ROA 20. The full provision is as follows:

> **Advice of Counsel.** Each of the Parties represents that such Party has: (a) been adequately represented by independent legal counsel of its own choice, throughout all of the negotiations that preceded the execution of this Agreement; (b) executed this Agreement upon the advice of such counsel; (c) read this Agreement, and understands and assents to all the terms and conditions contained herein without any reservations; and (d) had the opportunity to have this Agreement and all the terms and conditions contained herein explained by independent counsel, who has answered any and all questions asked of such counsel, or which could have been asked of such counsel, including, but not limited to, with regard to the meaning and effect of any of the provisions of this Agreement.

Appellants brief fails to cite a single case authority or statute that would require the Debtor to provide separate counsel for Multi-Strat (that it had sole authority to run in all respects) when settling claims of one entity — UBS — against both the Debtor and Multi-Strat. All Appellants could do in the Bankruptcy Court, all they can do in their brief to this Court, is to assert that a representation made in the settlement agreement regarding each party having had independent (but not separate) counsel was untrue, at least with respect to Multi-Strat.

The Bankruptcy Court, perhaps recognizing that an investor in Multi-Strat lacked standing to complain about the accuracy of a representation made by Multi-Strat, in an agreement to which the investor is not a party, is utterly irrelevant to whether the proposed settlement should be approved under Bankruptcy Rule 9019 (or whether the Debtor validly exercised its property rights under Bankruptcy Code § 363(b)). With no evidence of any cognizable harm to Appellants, and no judicial or statutory law and no contractual provision requiring Multi-Strat to have had separate counsel, the Bankruptcy Court could not have clearly erred in finding the March 2021 Settlement fair and worthy of approval under Bankruptcy Rule 9019 (and an exercise of the Debtor's sound business judgment under 11 U.S.C. § 363(b)) despite a lack of separate counsel and despite Appellants' nebulous imaginings of impropriety.

### C. The Settlement is Not a Plan Modification

Appellants argue in their brief to this Court that the March 2021 Settlement constituted some sort of "impermissible plan modification." Their entire argument is based on one sub-provision of a 15-page multi-party agreement, Section 1(c)(iii), which provides, in pertinent part:

> (c) Subject to applicable law, HCMLP will use reasonable efforts to … (iii) cooperate with UBS and participate (as applicable) in the investigation or prosecution of claims or requests for injunctive relief against the Funds, Multi-Strat, Sentinel, James Dondero, …[41]

Appellants attempted to persuade the Bankruptcy Court of what can only be charitably described as a tortured reading of this sub-provision, arguing that this provision contains two obligations that effectively modify the Plan: (1) that the Debtor is required to cooperate with UBS in the prosecution of UBS's claims against Multi-Strat and others; and (2) that "instead of distributing the proceeds for the benefit of the Claimant Trust Beneficiaries, [the Debtor] would then be obligated to turn over the proceeds to UBS."

The first obligation has nothing to do with anything the Debtor is required to do or is prohibited from doing under the Plan. Cooperating with UBS in the prosecution of *UBS's claim* does not conflict with the Debtor's prosecution of its own claims. They are completely separate. Appellants offer this Court, just as they

[41] March 2021 Settlement at 5, ROA 9, 13.

offered the Bankruptcy Court, nothing in the way of legal argument or contract interpretation to call into question the Debtor's ability to deliver this performance to UBS under the settlement agreement without somehow altering or violating the Plan's terms. In short, Appellants don't tell this Court *why* cooperating with UBS is a plan modification.[42] Appellants haven't sufficiently raised this issue in their brief and have not, therefore, adequately established a basis for appellate relief.

As for Appellants' second concern—that proceeds of litigation otherwise owing to the Claimant Trust will be diverted to UBS in violation of the Plan—only an illiterate reading of this sub-provision could cause Appellants to believe that the March 2021 Settlement requires proceeds of estate-owned causes of action to be paid over to UBS. The obvious, sensible reading of this passage expresses the unremarkable concept that proceeds of *UBS's claims against other non-settling defendants* are to be turned over to UBS if the Debtor is the party who obtains those proceeds through its cooperation or pursuit of *UBS's* claims. Nothing in this

[42] Appellants have barely even preserved this issue for appeal. Their initial opposition to the Debtor's motion to approve the March 2021 Settlement in the Bankruptcy Court all but omits any argument associated with some would-be plan modification. Scant mention of this argument was included in Appellants' counsel's comments to the Bankruptcy Court at the hearing below, but counsel made no mention of—and certainly presented no factual or legal support for—the notion that the Debtor's cooperation with UBS somehow departs from the Plan or modifies any Plan provision. And the Debtor's cooperation in this context is more than reasonable. It is the Debtor, rather than UBS, who has access to the voluminous information and historical records critical for UBS's pursuit of entities formerly affiliated with the Debtor. This Court undoubtedly appreciates that it is hardly unusual for a settling defendant to agree to cooperate and provide information to a plaintiff to use in pursuit of other co-defendants.

provision or anywhere else in settlement agreement provides that proceeds of the Debtor's claims against anyone, including the parties listed in the settlement agreement, will be diverted or otherwise remitted to UBS. This provision does not speak at all about property of the Debtor's estate or about claims and causes of action now owned by the trusts created under the Plan.

An agreement or transaction constitutes a plan modification only if, as determined on a case-by-case basis after a review of the express terms of the plan,[43] the agreement or transaction 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.[44]

Nothing of the sort is contemplated here. The Debtor's cooperation with UBS in pursuing UBS's claims against others does not affect the Debtor's creditors, alter any creditor's right to payment, or implicate the legal relationship between the Debtor and its creditors. Delivering proceeds of UBS's claims to UBS does not affect the Debtor's creditors, alter any creditor's right to payment, or implicate the legal relationship between the Debtor and its creditors. Neither this sub-provision nor anything else in the March 2021 Settlement can even conceivably be considered a

[43] *In re Johns-Manville Corp.*, 920 F.2d 121, 128 (2d Cir. 1990).

[44] *See Doral Ctr. v. Ionosphere Clubs (In re 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).

plan modification. To the extent that Appellants have even sufficiently articulated this appellate argument, this Court should affirm the Bankruptcy Court's overruling of this aspect of Appellants' objections below.

## VI. CONCLUSION

This Court should reject this appeal to the extent it raises issues that were neither raised in the Bankruptcy Court nor ruled on by the Bankruptcy Court.

Even if this Court considers Appellants' arguments, it should still reject them. This Court's *de novo* review of the Bankruptcy Court's ruling that it had at least "related to" jurisdiction to approve the March 2021 Settlement should cause this Court to affirm that ruling. Even were this Court to disagree that the Bankruptcy Court had jurisdiction, the Bankruptcy Court's error must be considered harmless for the reasons stated above. If this Court were not to disregard the "fairness" issue as inappropriately appealed at the inception, the March 2021 Settlement is fair to Multi-Strat and fair to its investors because any conflicts of interest were waived, no fiduciary duties to Multi-Strat's investors existed, and the economics of the settlement are, in light of UBS's claims against Multi-Strat, obviously well above the lowest point on the range of reasonableness. The Bankruptcy Court's findings of fact providing the bases for its approval of the March 2021 Settlement were not clearly erroneous and should be affirmed. Finally, nothing about the March 2021 Settlement could conceivably be considered a plan modification under any

applicable law. Accordingly, this Court should affirm the Bankruptcy Court's overruling of Appellants' objections to the March 2021 Settlement in that regard, as well.

Dated: November 15, 2021.

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**CERTIFICATE OF COMPLIANCE WITH RULE 8013**

Under Bankruptcy Rule 8014(b) and 8015, I certify that this brief complies with the type-volume limitation contained in Bankruptcy Rule 8015(a)(7)(B)(i) because it contains 8,061 words, not including the parts of the brief excluded under Bankruptcy Rule 8015(g).

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**CERTIFICATE OF SERVICE**

I hereby certify that, on November 15, 2021, a true and correct copy of the foregoing brief was served electronically upon all parties registered to receive electronic notice in this case via the Court's CM/ECF system.

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