

Case No. 22-10189

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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

Debtor.

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

Appellants,

v.

Highland Capital Management, L.P.,

Appellee.

**RECORD EXCERPTS OF APPELLANTS NEXPOINT ADVISORS, L.P.
AND HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.**

Direct Appeal from the United States District Court for
the Northern District of Texas, the Honorable Sidney A. Fitzwater

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RESPECTFULLY SUBMITTED this 9th day of May, 2022.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Davor Rukavina

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The undersigned hereby certifies that, on this the 9th day of May, 2022, a true and a correct copy of the foregoing document was served on the counsel of record listed below via electronic service.

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Tab 1

APPEAL,BKAPP,CLOSED,TOLIVER

**U.S. District Court
Northern District of Texas (Dallas)
CIVIL DOCKET FOR CASE #: 3:21-cv-01895-D**

Highland Capital Management Fund Advisors LP et al v. Highland
Capital Management LP
Assigned to: Senior Judge Sidney A Fitzwater
Case in other court: USCA5, 22-10189
Cause: 28:0158 Notice of Appeal re Bankruptcy Matter (BA

Date Filed: 08/13/2021
Date Terminated: 01/28/2022
Jury Demand: None
Nature of Suit: 422 Bankruptcy: Appeal 28
USC 158
Jurisdiction: Federal Question

Debtor

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Appellant

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Notice Only

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Date Filed	#	Docket Text
08/13/2021	<u>1 (p.11)</u>	Pursuant to Fed. R. Bankr. P. 8003(d), the bankruptcy clerk has transmitted the notice of appeal filed in <u>bankruptcy case</u> number 19-34054 and the notice of appeal has now been docketed in the district court in case 3:21-cv-1895. (The filing fee has been paid in the Bankruptcy Court.) Pursuant to <u>Fed. R. Bankr. P. 8009</u> , before the record on appeal can be assembled and filed in the district court, designations of items to be included in the record on appeal and statements of issues must be filed in the bankruptcy case. If a sealed document is designated, the designating party must file a motion in the district court case for the document to be accepted under seal. See also <u>District Court Local Bankruptcy Rule 8012.1</u> . Unless exempted, attorneys who are not admitted to practice in the Northern District of Texas must seek admission promptly. Forms and Instructions found at www.txnd.uscourts.gov , or by clicking here: <u>Attorney Information - Bar Membership</u> . If admission requirements are not satisfied within 21 days, the clerk will notify the presiding judge. (Attachments: # <u>1 (p.11)</u> Notice of appeal and supporting documents) (Whitaker - TXNB, Sheniqua) (Entered: 08/13/2021)
08/13/2021		New Case Notes: A filing fee has been paid. (ykp) (Entered: 08/16/2021)
09/14/2021	<u>2 (p.46)</u>	ORDER: The court is advised by the clerk of court that Douglas Draper, Esquire and Jeffery N. Pomerantz, Esquire, whose names appear on the docket in this appeal, are not members of the Bar of the Northern District of Texas. Accordingly, within 14 days of the date of this order, Messrs. Draper and Pomerantz must either (1) provide to the court, and to the clerk of court, satisfactory documentation of membership in the Bar of this court or (2) apply for membership in the Bar or for admission pro hac vice for this bankruptcy appeal. (Ordered by Senior Judge Sidney A Fitzwater on 9/14/2021) (ctf) (Entered: 09/14/2021)
09/17/2021	<u>3 (p.48)</u>	Notice Transmitting COMPLETE BK Record on Appeal re <u>1 (p.11)</u> Notice Transmitting BK Appeal or Withdrawal of Reference. (Attachments: # <u>1 (p.11)</u> Mini Record Vol. 1, # <u>2 (p.46)</u> Appellant Record Vol. 2, # <u>3 (p.48)</u> Appellant Record Vol. 3, # <u>4 (p.3841)</u> Appellant Record Vol. 4, # <u>5</u> Appellant Record Vol. 5, # <u>6 (p.3847)</u> Appellant Record Vol. 6, # <u>7</u> Appellant Record Vol. 7, # <u>8 (p.3853)</u> Appellant Record Vol. 8, # <u>9</u> Appellant Record Vol. 9, # <u>10 (p.3857)</u> Appellant Record Vol. 10, # <u>11 (p.3859)</u> Appellant Record Vol. 11, # <u>12 (p.3861)</u> Appellant Record Vol. 12, # <u>13</u> Appellant Record Vol. 13, # <u>14 (p.3867)</u> Appellant Record Vol. 14) (Blanco - TXNB, Juan) (Entered: 09/17/2021)
09/23/2021	<u>4 (p.3841)</u>	Application for Admission Pro Hac Vice with Certificate of Good Standing (Filing fee \$100; Receipt number 0539-12246303) filed by Highland Capital Management LP (Attachments: # <u>1 (p.11)</u> Certificate of Good Standing) (Pomerantz, Jeffrey) (Entered: 09/23/2021)
09/23/2021	5	ELECTRONIC ORDER granting <u>4 (p.3841)</u> Application for Admission Pro Hac Vice of Jeffery N. Pomerantz. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f) and LCvR 49.2(g). (Ordered by Senior Judge Sidney A Fitzwater on 9/23/2021) (Senior Judge Sidney A Fitzwater) (Entered: 09/23/2021)
09/24/2021	<u>6 (p.3847)</u>	Application for Admission Pro Hac Vice with Certificate of Good Standing (Filing fee \$100; Receipt number 0539-12250401) filed by Highland Capital Management LP (Attachments: # <u>1 (p.11)</u> Certificate of Good Standing) Attorney Gregory V

		Demo added to party Highland Capital Management LP(pty:dbpos) (Demo, Gregory) (Entered: 09/24/2021)
09/27/2021	<u>7</u>	ELECTRONIC ORDER granting <u>6 (p.3847)</u> Application for Admission Pro Hac Vice of Gregory V. Demo. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f) and LCrR 49.2(g). (Ordered by Senior Judge Sidney A Fitzwater on 9/27/2021) (Senior Judge Sidney A Fitzwater) (Entered: 09/27/2021)
09/28/2021	<u>8 (p.3853)</u>	Application for Admission Pro Hac Vice with Certificate of Good Standing (Filing fee \$100; Receipt number 0539-12257972) filed by The Dugaboy Investment Trust (Attachments: # <u>1 (p.11)</u> Certificate of Good Standing) (Draper, Douglas) (Entered: 09/28/2021)
09/29/2021	<u>9</u>	ELECTRONIC ORDER granting <u>8 (p.3853)</u> Application for Admission Pro Hac Vice of Douglas S. Draper. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f) and LCrR 49.2(g). (Ordered by Senior Judge Sidney A Fitzwater on 9/29/2021) (Senior Judge Sidney A Fitzwater) (Entered: 09/29/2021)
10/14/2021	<u>10 (p.3857)</u>	NOTICE of Attorney Appearance by Zachery Z. Annable on behalf of Highland Capital Management LP. (Filer confirms contact info in ECF is current.) (Annable, Zachery) (Entered: 10/14/2021)
10/14/2021	<u>11 (p.3859)</u>	NOTICE of Attorney Appearance by Melissa S Hayward on behalf of Highland Capital Management LP. (Filer confirms contact info in ECF is current.) (Hayward, Melissa) (Entered: 10/14/2021)
10/14/2021	<u>12 (p.3861)</u>	Application for Admission Pro Hac Vice with Certificate of Good Standing (Filing fee \$100; Receipt number 0539-12301517) filed by Highland Capital Management LP (Attachments: # <u>1 (p.11)</u> Certificate of Good Standing) Attorney John A Morris added to party Highland Capital Management LP(pty:dbpos) (Morris, John) (Entered: 10/14/2021)
10/14/2021	<u>13</u>	ELECTRONIC ORDER granting <u>12 (p.3861)</u> Application for Admission Pro Hac Vice of John A. Morris. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f) and LCrR 49.2(g). (Ordered by Senior Judge Sidney A Fitzwater on 10/14/2021) (Senior Judge Sidney A Fitzwater) (Entered: 10/14/2021)
10/15/2021	<u>14 (p.3867)</u>	MOTION to Dismiss <i>Appeal as Equitably Moot</i> filed by Highland Capital Management LP. (Annable, Zachery) (Entered: 10/15/2021)
10/15/2021	<u>15 (p.3892)</u>	Appendix in Support filed by Highland Capital Management LP re <u>14 (p.3867)</u> MOTION to Dismiss <i>Appeal as Equitably Moot</i> . (Annable, Zachery) (Entered: 10/15/2021)
10/18/2021	<u>16 (p.4183)</u>	Appellant's BRIEF by Highland Capital Management Fund Advisors LP, NexPoint Advisors LP, The Dugaboy Investment Trust. (Rukavina, Davor) (Entered: 10/18/2021)
10/18/2021	<u>17 (p.4213)</u>	Appendix in Support by Highland Capital Management Fund Advisors LP, NexPoint Advisors LP, The Dugaboy Investment Trust re: <u>16 (p.4183)</u> Appellant's

		Brief. (Attachments: # <u>1</u> (p.11) Exhibit(s) 1, # <u>2</u> (p.46) Exhibit(s) 2, # <u>3</u> (p.48) Exhibit(s) 3, # <u>4</u> (p.3841) Exhibit(s) 4, # <u>5</u> Exhibit(s) 5, # <u>6</u> (p.3847) Exhibit(s) 6) (Rukavina, Davor) Modified title on 10/19/2021 (ygl). (Entered: 10/18/2021)
10/20/2021	<u>18</u> (p.4329)	CERTIFICATE OF SERVICE by Highland Capital Management LP re <u>15</u> (p.3892) Appendix in Support, <u>14</u> (p.3867) MOTION to Dismiss <i>Appeal as Equitably Moot</i> (Annable, Zachery) (Entered: 10/20/2021)
10/26/2021	<u>19</u> (p.4334)	<i>Appellee's Request for Ruling</i> filed by Highland Capital Management LP. (Annable, Zachery) Modified on 10/27/2021 (ygl). (Entered: 10/26/2021)
10/26/2021	<u>20</u> (p.4338)	RESPONSE AND OBJECTION filed by Highland Capital Management Fund Advisors LP, NexPoint Advisors LP, The Dugaboy Investment Trust re: <u>19</u> (p.4334) <i>Appellee's Request for Ruling</i> (Rukavina, Davor) Modified text on 10/27/2021 (ygl). (Entered: 10/26/2021)
10/29/2021	<u>21</u> (p.4378)	RESPONSE AND OBJECTION filed by Highland Capital Management Fund Advisors LP, NexPoint Advisors LP, The Dugaboy Investment Trust re: <u>14</u> (p.3867) MOTION to Dismiss <i>Appeal as Equitably Moot</i> (Vasek, Julian) (Entered: 10/29/2021)
11/02/2021	<u>22</u> (p.4402)	CERTIFICATE OF SERVICE by Highland Capital Management LP re <u>19</u> (p.4334) <i>Appellee's Request for Ruling</i> (Annable, Zachery) Modified docket text on 11/3/2021 (oyh). (Entered: 11/02/2021)
11/03/2021	<u>23</u> (p.4407)	Application for Admission Pro Hac Vice with Certificate of Good Standing for Attorney Jordan A. Kroop (Filing fee \$100; Receipt number 0539-12354388) filed by Highland Capital Management LP (Attachments: # <u>1</u> (p.11) Certificate of Good Standing) (Hayward, Melissa) (Entered: 11/03/2021)
11/03/2021	24	ELECTRONIC ORDER granting <u>23</u> (p.4407) Application for Admission Pro Hac Vice of Jordan A. Kroop. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f) and LCrR 49.2(g). (Ordered by Senior Judge Sidney A Fitzwater on 11/3/2021) (Senior Judge Sidney A Fitzwater) (Entered: 11/03/2021)
11/05/2021	<u>25</u> (p.4413)	REPLY filed by Highland Capital Management LP re: <u>14</u> (p.3867) MOTION to Dismiss <i>Appeal as Equitably Moot</i> . (Annable, Zachery) (Entered: 11/05/2021)
11/12/2021	<u>26</u> (p.4427)	CERTIFICATE OF SERVICE by Highland Capital Management LP re <u>25</u> (p.4413) Reply (Annable, Zachery) (Entered: 11/12/2021)
11/17/2021	<u>27</u> (p.4436)	<i>Appellee's BRIEF</i> by Highland Capital Management LP. (Annable, Zachery) (Entered: 11/17/2021)
11/18/2021	<u>28</u> (p.4463)	ORDER carrying with the appeal <u>14</u> (p.3867) <i>Appellee's</i> October 15, 2021 motion to dismiss appeal as equitably moot. The court intends to hold oral argument in this appeal. Counsel are requested to confer regarding their availability, and preference, for argument on any the dates specified in this order. (Ordered by Senior Judge Sidney A Fitzwater on 11/18/2021) (Senior Judge Sidney A Fitzwater) (Entered: 11/18/2021)
11/19/2021	<u>29</u> (p.4465)	CERTIFICATE OF SERVICE by Highland Capital Management LP re <u>27</u> (p.4436) <i>Appellee's Brief</i> (Annable, Zachery) (Entered: 11/19/2021)
11/23/2021		

	<u>30</u> (p.4474)	BANKRUPTCY APPEAL ORAL ARGUMENT CALENDAR. Oral argument set for 1/25/2022 10:00 AM in US Courthouse, Courtroom 1351, 1100 Commerce St., Dallas, TX 75242-1310 before Senior Judge Sidney A Fitzwater. (Ordered by Senior Judge Sidney A Fitzwater on 11/23/2021) (Senior Judge Sidney A Fitzwater) (Entered: 11/23/2021)
11/30/2021	<u>31</u> (p.4475)	CERTIFICATE OF SERVICE by Highland Capital Management LP re <u>30</u> (p.4474) Order Setting Deadline/Hearing. (Annable, Zachery) (Entered: 11/30/2021)
12/01/2021	<u>32</u> (p.4480)	Appellant's REPLY BRIEF by Highland Capital Management Fund Advisors LP, NexPoint Advisors LP, The Dugaboy Investment Trust. (Rukavina, Davor) (Entered: 12/01/2021)
01/10/2022	<u>33</u> (p.4499)	MOTION to Dismiss <i>Appeal as Constitutionally Moot</i> filed by Highland Capital Management LP. (Annable, Zachery) Modified title on 1/11/2022 (ygl). (Entered: 01/10/2022)
01/12/2022	<u>34</u> (p.4520)	CERTIFICATE OF SERVICE by Highland Capital Management LP re <u>33</u> (p.4499) MOTION to Dismiss for Lack of Jurisdiction (<i>Appellee's Motion to Dismiss Appeal as Constitutionally Moot</i>) (Annable, Zachery) (Entered: 01/12/2022)
01/13/2022	<u>35</u> (p.4525)	Supplemental Document by Highland Capital Management LP as to <u>33</u> (p.4499) MOTION to Dismiss for Lack of Jurisdiction (<i>Appellee's Motion to Dismiss Appeal as Constitutionally Moot</i>) . (Annable, Zachery) (Entered: 01/13/2022)
01/18/2022	<u>36</u> (p.4530)	RESPONSE AND OBJECTION filed by Highland Capital Management Fund Advisors LP, NexPoint Advisors LP re: <u>33</u> (p.4499) MOTION to Dismiss for Lack of Jurisdiction (<i>Appellee's Motion to Dismiss Appeal as Constitutionally Moot</i>) (Vasek, Julian) (Entered: 01/18/2022)
01/18/2022	<u>37</u> (p.4556)	Appendix in Support filed by Highland Capital Management Fund Advisors LP, NexPoint Advisors LP re <u>36</u> (p.4530) Response/Objection, (Vasek, Julian) (Entered: 01/18/2022)
01/19/2022	38	ELECTRONIC ORDER RE VIDEO HEARING. In view of the increase in COVID-19 cases in Dallas and the steps being taken at the United States Courthouse to minimize exposure to the virus, the court has decided to conduct the hearing on this bankruptcy appeal by video. The courtroom deputy will provide counsel the information they need to participate in the hearing. The date and time for the hearing remain the same. (Ordered by Senior Judge Sidney A Fitzwater on 1/19/2022) (Senior Judge Sidney A Fitzwater) (Entered: 01/19/2022)
01/19/2022	<u>39</u> (p.4589)	CERTIFICATE OF SERVICE by Highland Capital Management LP re <u>35</u> (p.4525) Supplemental Document (Annable, Zachery) (Entered: 01/19/2022)
01/21/2022		The oral argument scheduled for 1/25/2022 at 10:00 a.m. will be conducted by video teleconferencing only and will not be accessible to the public at the courthouse. To watch or listen to the proceeding live, click here: Link to Hearing . (Do not use Windows Explorer for your browser) and enter your name. It is impermissible under Judicial Conference Policy to record or rebroadcast this proceeding. Violators will be subject to sanctions. (rekc) (Entered: 01/21/2022)
01/21/2022	<u>40</u> (p.4594)	REPLY filed by Highland Capital Management LP re: <u>33</u> (p.4499) MOTION to Dismiss for Lack of Jurisdiction (<i>Appellee's Motion to Dismiss Appeal as Constitutionally Moot</i>) (Annable, Zachery) (Entered: 01/21/2022)

01/21/2022	<u>41</u> (p.4610)	Appendix in Support filed by Highland Capital Management LP re <u>40</u> (p.4594) Reply (Annable, Zachery) (Entered: 01/21/2022)
01/25/2022	42	ELECTRONIC Minute Entry for proceedings held before Senior Judge Sidney A Fitzwater: Oral argument heard on 1/25/2022 re <u>33</u> (p.4499) Motion to Dismiss/Lack of Jurisdiction filed by Highland Capital Management LP, <u>14</u> (p.3867) Motion to Dismiss filed by Highland Capital Management LP. Taken under advisement. Written order to follow. Attorney Appearances: Appellee - Jeffery Pomerantz; Appellants - Davor Rukavina with Douglas Draper. (Court Reporter: Pamela Wilson) (No exhibits) Time in Court - :45. (chmb) (Entered: 01/25/2022)
01/25/2022	<u>43</u> (p.4639)	CERTIFICATE OF SERVICE by Highland Capital Management LP re <u>40</u> (p.4594) Reply, <u>41</u> (p.4610) Appendix in Support (Annable, Zachery) (Entered: 01/25/2022)
01/28/2022	<u>44</u> (p.4645)	OPINION. This appeal is DISMISSED in part, and the bankruptcy court's July 21, 2021 order approving 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 is AFFIRMED. (Ordered by Senior Judge Sidney A Fitzwater on 1/28/2022) (Senior Judge Sidney A Fitzwater) (Main Document 44 replaced on 1/28/2022) (Fitzwater, Sidney). (Entered: 01/28/2022)
01/28/2022	<u>45</u> (p.4653)	JUDGMENT: This appeal is DISMISSED in part, and the bankruptcy court's 7/21/2021 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 is AFFIRMED. (Ordered by Deputy Clerk on 1/28/2022) (mjr) (Entered: 01/28/2022)
01/31/2022	<u>46</u> (p.4655)	CERTIFICATE OF SERVICE by Highland Capital Management LP re <u>45</u> (p.4653) Judgment, <u>44</u> (p.4645) Memorandum Opinion and Order, (Annable, Zachery) (Entered: 01/31/2022)
02/24/2022	<u>47</u> (p.4661)	NOTICE OF APPEAL as to <u>45</u> (p.4653) Judgment, <u>44</u> (p.4645) Memorandum Opinion and Order, to the Fifth Circuit by Highland Capital Management Fund Advisors LP, NexPoint Advisors LP, The Dugaboy Investment Trust. Filing fee \$505, receipt number 0539-12621832. T.O. form to appellant electronically at <u>Transcript Order Form</u> or US Mail as appropriate. Copy of NOA to be sent US Mail to parties not electronically noticed. IMPORTANT ACTION REQUIRED: Provide an electronic copy of any exhibit you offered during a hearing or trial that was admitted into evidence to the clerk of the district court within 14 days of the date of this notice. Copies must be transmitted as PDF attachments through ECF by all ECF Users or delivered to the clerk on a CD by all non-ECF Users. See detailed instructions <u>here</u> . (Exception: This requirement does not apply to a pro se prisoner litigant.) Please note that if original exhibits are in your possession, you must maintain them through final disposition of the case. (Vasek, Julian) (Entered: 02/24/2022)
02/25/2022		USCA Case Number 22-10189 in USCA5 for <u>47</u> (p.4661) Notice of Appeal filed by The Dugaboy Investment Trust, NexPoint Advisors LP, Highland Capital Management Fund Advisors LP. (ajb) (Entered: 02/25/2022)
03/10/2022	<u>48</u> (p.4666)	Transcript Order Form: transcript requested by Highland Capital Management Fund Advisors LP, NexPoint Advisors LP for Oral Argument in Bankruptcy Appeal, January 25, 2022 (Court Reporter: Pamela Wilson.) Payment method: Other Reminder: If the transcript is ordered for an appeal, Appellant must also file a copy of the order form with the appeals court. (Vasek, Julian) (Entered: 03/10/2022)

03/10/2022	<u>49</u> (p.4668)	DESIGNATION of Record on Appeal by Highland Capital Management Fund Advisors LP, NexPoint Advisors LP re <u>47 (p.4661)</u> Notice of Appeal,,,, (Vasek, Julian) (Entered: 03/10/2022)
03/10/2022	<u>50</u> (p.4673)	NOTICE of <i>Statement of the Issues on Appeal</i> re: <u>47 (p.4661)</u> Notice of Appeal,,,, filed by Highland Capital Management Fund Advisors LP, NexPoint Advisors LP (Vasek, Julian) (Entered: 03/10/2022)
03/15/2022	<u>51</u> (p.4677)	Notice of Filing of Official Electronic Transcript of Oral Argument Proceedings held on 1/25/2022 before Judge Sidney A Fitzwater. Court Reporter/Transcriber Pamela Wilson, Telephone number 214.662.1557. Parties are notified of their <u>duty to review</u> the transcript. A copy may be purchased from the court reporter or viewed at the clerk's office. If the transcript contains personal identifiers that must be redacted under MO 61, Fed.R.Civ.P. 5.2 or Fed.R.Crim.P. 49.1, or if the transcript contains the name of a minor child victim or a minor child witness that must be redacted under 18 U.S.C. § 3509, file a <u>Redaction Request - Transcript</u> within 21 days. If no action is taken, the entire transcript will be made available through PACER without redaction after 90 calendar days. The clerk will mail a copy of this notice to parties not electronically noticed. (49 pages) Redaction Request due 4/5/2022. Redacted Transcript Deadline set for 4/15/2022. Release of Transcript Restriction set for 6/13/2022. (pjw) (Entered: 03/15/2022)

Tab 2

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ATTORNEYS FOR HIGHLAND CAPITAL
MANAGEMENT FUND ADVISORS, L.P. AND
NEXPOINT ADVISORS, L.P.

ATTORNEYS FOR DUGABOY INVESTMENT
TRUST

**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:

1. Appellants:

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

Attorneys:

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The Dugaboy Investment Trust

Attorneys:

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2. Appellee:

Highland Capital Management, L.P.

Attorneys:

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ikharasch@pszjlaw.com
jmorris@pszjlaw.com
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RESPECTFULLY SUBMITTED this 4th day of August, 2021.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ *Julian P. Vasek*

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**ATTORNEYS FOR HIGHLAND CAPITAL
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NEXPOINT ADVISORS, L.P.**

-AND-

HELLER, DRAPER & HORN, L.L.C.

By: /s/ *Douglas S. Draper*

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**ATTORNEYS FOR THE DUGABOY
INVESTMENT TRUST**

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.

Tab 3



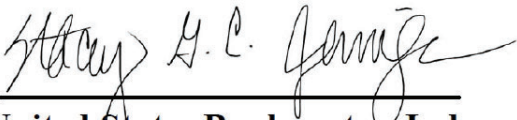
CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

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


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

Tab 4

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

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)	Case No. 19-34054-sgj-11
In Re:)	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.

WEBEX APPEARANCES:

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For the U.S. Trustee:	Lisa L. Lambert OFFICE OF THE UNITED STATES TRUSTEE 1100 Commerce Street, Room 976 Dallas, TX 75242 (214) 767-8967

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9 For Highland Capital Davor Rukavina
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11 Advisors, LP and Dugaboy MUNSCH, HARDT, KOPF & HARR
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14 (214) 855-7587

15 For the Official Committee Matthew A. Clemente
16 of Unsecured Creditors: SIDLEY AUSTIN, LLP
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20 For the Get Good Trust Douglas S. Draper
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25 Recorded by: Michael F. Edmond, Sr.
UNITED STATES BANKRUPTCY COURT
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Dallas, TX 75242
(214) 753-2062

Transcribed by: Kathy Rehling
311 Paradise Cove
Shady Shores, TX 76208
(972) 786-3063

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

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

Seery - Direct

32

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.

Seery - Direct

33

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?

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

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

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

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

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

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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.

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 So, Judge, this is a plan modification and the motion
2 should be denied on that basis because it fails to comply with
3 Section 1125, as required by 1127(c), and we're not having a
4 hearing today on 1129(a) and 1129(b).

5 If this is not a plan modification, then my argument
6 fails. And I have nothing else to add. Thank you, Your
7 Honor.

8 THE COURT: Thank you. Mr. Clemente, do you have
9 anything to add?

10 MR. CLEMENTE: Yes, Your Honor. Just very briefly.

11 CLOSING ARGUMENT ON BEHALF OF THE UNSECURED CREDITORS'

12 COMMITTEE

13 MR. CLEMENTE: Just for the record, Matt Clemente,
14 Sidley Austin, on behalf of the Committee.

15 Just, again, from a perspective of the Committee and the
16 creditors, the Indemnity Sub-Trust does not change or alter
17 the fundamental rights or the expectation of the creditors.
18 Again, for me, the -- I started and stopped this with the
19 waterfall, because it expressly contemplates a reserve. And
20 despite Mr. Rukavina's argument to the contrary, that really
21 is all the Indemnity Trust is. It's just a mechanism that
22 recognizes the reserve that's being established in order to
23 support the indemnity claims, potential indemnity claims that
24 the creditors -- by the way, the overwhelming amount of
25 creditors, as Your Honor will recall, voted in favor of the

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--

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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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Tab 5

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

IN RE HIGHLAND CAPITAL	§	
MANAGEMENT, L.P.,	§	
	§	
Debtor.	§	
	§	
HIGHLAND CAPITAL	§	
MANAGEMENT FUND ADVISORS,	§	
L.P., et al.,	§	
	§	Civil Action No. 3:21-CV-1895-D
Appellants,	§	(Bank. Ct. No. 19-34054-sgj-11)
	§	
VS.	§	
	§	
HIGHLAND CAPITAL	§	
MANAGEMENT, L.P.,	§	
	§	
Appellee.	§	

APPEAL FROM THE
UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS

FITZWATER, Senior Judge:

Three creditors of a reorganized chapter 11 debtor appeal a bankruptcy court order approving the debtor’s motion for entry of an order authorizing the creation of an indemnity subtrust and entry into an indemnity trust agreement and granting related relief (the “Order”). The appellee-debtor moves to dismiss the appeal as equitably and constitutionally moot and challenges appellants’ standing. Concluding that two of the three appellants lack standing and that the Order is not a plan modification—meaning that the bankruptcy court was not required to comply with 11 U.S.C. § 1127(b) in approving the Order—the court DISMISSES

the appeal in part and AFFIRMS the bankruptcy court's Order.¹

I

The court turns first to the question whether appellants have standing. Appellants are NexPoint Advisors, L.P. (“NexPoint”), Highland Capital Management Fund Advisors, L.P. (“HCMFA”), and The Dugaboy Investment Trust (“Dugaboy”). Although the parties frame this issue as one of constitutional standing and mootness, they cite case law and present arguments about the prudential standing requirement embodied in the “person aggrieved” test. *See In re Coho Energy Inc.*, 395 F.3d 198, 202 (5th Cir. 2004) (“To prevent unreasonable delay, courts have created an *additional* prudential standing requirement in bankruptcy cases: The appellant must be a ‘person aggrieved’ by the bankruptcy court’s order.” (emphasis in original) (quoting *In re P.R.T.C., Inc.*, 177 F.3d 774, 777 (9th Cir. 1999))); *In re Acis Capital Mgmt., L.P.*, 604 B.R. 484, 508 (N.D. Tex. 2019) (Fitzwater, J.) (“[T]he person aggrieved doctrine is itself a creature of prudential standing.”), *dism’d in part*, 850 Fed. Appx. 300 (5th Cir. 2021), and *aff’d in part and disp’d in part*, 850 Fed. Appx. 302 (5th Cir. 2021).²

¹Under § 205(a)(5) of the E-Government Act of 2002 and the definition of “written opinion” adopted by the Judicial Conference of the United States, this is a “written opinion[] issued by the court” because it “sets forth a reasoned explanation for [the] court’s decision.” It has been written, however, primarily for the parties, to decide issues presented in this appeal, and not for publication in an official reporter, and should be understood accordingly.

²The court has an independent obligation to consider constitutional standing before reaching its prudential aspects. *See Harold H. Huggins Realty, Inc. v. FNC, Inc.*, 634 F.3d 787, 795 n.2 (5th Cir. 2011). “[T]he plaintiffs must allege an injury in fact that is fairly traceable to the defendant’s conduct and likely to be redressed by a favorable ruling.” *Id.*

Applying the prudential “person aggrieved” test, the court holds that HCMFA lacks standing. HCMFA only has administrative claims. Appellants concede that these administrative claims will be paid under any circumstances. *See* Appellant Obj. to Mot. to Dis. Appeal 5 (“[U]nder the Plan, administrative claims are paid in full.”).³ Accordingly, HCMFA lacks standing. *See In re Coho Energy Inc.*, 395 F.3d at 203; *In re Technicool Sys., Inc.*, 896 F.3d 382, 386 (5th Cir. 2018).

NexPoint has standing because of the “Covitz claim.”⁴ Although this claim was disallowed by a recent bankruptcy order, *see* Appellee Reply App. in Support of Mot. to Dis. Appeal 3 (“The [Covitz] Claim is DISALLOWED with prejudice and expunged in its entirety.” (bold font omitted)), the order is not final, *see In re Linn Energy, L.L.C.*, 927 F.3d 862, 866 (5th Cir. 2019) (describing final bankruptcy orders as “orders that are affirmed upon direct review, or, as in this case, not appealed or contested.”). Accordingly, NexPoint’s

(citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Dugaboy and HCMFA lack constitutional standing because they have not identified any injury fairly traceable to the Order: the injuries identified are speculative at best and nonexistent at worst. *See Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 401 (2013) (holding that despite “reasonable likelihood” of injury, “respondents’ theory of future injury is too speculative to satisfy the well-established requirement that threatened injury must be ‘certainly impending.’”). Alternatively, for the reasons discussed above, they lack prudential standing. NexPoint has constitutional standing, however, based on the Covitz claim.

³The estimated amount for distributions is \$181,879,000. *See* R. 1244. And the administrative expenses total only \$1,078,000. *Id.* Accordingly, even if \$25 million is removed from the Claimant Trust, there will still be sufficient funds to pay NexPoint’s and HCMFA’s administrative claims.

⁴The parties dispute whether NexPoint owns this claim. Appellants have proved that NexPoint owned this claim beginning on March 24, 2021. Appellant Obj. App. in Support of Obj. to Mot. to Dis. Appeal 13-17.

Covitz claim has not been extinguished by final order, *see United States v. Stone*, 435 Fed. Appx. 320, 321-22 (5th Cir. 2011) (per curiam) (holding that interest in property became extinguished when order became final), and the claim remains as a basis to confer standing on NexPoint to press this appeal, *see In re JFK Capital Holdings, L.L.C.*, 880 F.3d 747, 751 (5th Cir. 2018).⁵

Dugaboy lacks standing. It has a contingent interest that will only be paid if all other creditors are paid in full. R. 434, 520, 1244 (providing that limited partnership interests, which are included in Class 10 and 11 of classified claims and equity interests, expect “no distribution.”). Dugaboy’s expected return is therefore \$0 both before and after entry of the Order.⁶ Accordingly, it lacks standing. *See In re Coho Energy Inc.*, 395 F.3d at 203; *In re*

⁵Assuming *arguendo* that NexPoint lacks prudential standing, the outcome of this appeal is effectively the same: the bankruptcy court’s Order remains undisturbed either because no appellant has standing or because, despite NexPoint’s standing, the Order is affirmed on the merits.

⁶Appellants cannot rely on the possibility that the Litigation Sub-Trust *might* secure sufficient funds to pay contingent interests. This is speculative at best; Dugaboy will suffer an injury if and only if the Litigation Sub-Trust obtains a future windfall. *See* R. 2279-80 (“Theoretically, there’s a circumstance, and that is if every other creditor in the case were to be paid in full . . . theoretically the junior interest holders could receive distributions. However, based upon our projections, that would be wholly dependent on a significant recovery in the Litigation -- by the Litigation Trustee.”); *Rohm & Hass Tex., Inc. v. Ortiz Bros. Insulation, Inc.*, 32 F.3d 205, 211 (5th Cir. 1994) (addressing constitutional standing and holding that “Ortiz has failed utterly to demonstrate that any action by the IRS against company officers is a real or immediate likelihood or how such an action would adversely affect the company in the least”); *In re Acis Capital Mgmt.*, 604 B.R. at 510 (addressing prudential standing and holding that “although the orders for relief created the possibility that Neutra might suffer harm in the future, Neutra was not aggrieved by them for standing purposes because ‘[the] speculative prospect of harm is far from a direct, adverse, pecuniary hit’” (quoting *In re Technicool Sys.*, 896 F.3d at 386)).

Technicool Sys., 896 F.3d at 386.⁷

Because HCMFA and Dugaboy lack standing, their appeals are dismissed.

II

Turning to the merits, the parties agree that this appeal turns on whether the Order is a plan modification. If it is, the bankruptcy court erred by failing to comply with 11 U.S.C. § 1127(b). But if it is not, the bankruptcy court did not err because it complied with 11 U.S.C. § 363(b). This court applies a *de novo* standard of review when deciding whether the bankruptcy court's order is a plan modification. *See In re ASARCO, L.L.C.*, 650 F.3d 593, 601 (5th Cir. 2011).

A plan modification occurs when a proposed action “alter[s] the parties’ rights, obligations, and expectations under the plan.” *In re U.S. Brass Corp.*, 301 F.3d 296, 309 (5th Cir. 2002). In *U.S. Brass Corp.* the bankruptcy court denied a motion that would have replaced a term of the plan (requiring litigation) with another term (requiring arbitration), because it constituted a plan modification. *Id.* at 302. The Fifth Circuit affirmed, holding that “[t]o substitute arbitration for litigation at this point would alter the bargain the Insurers secured in exchange for their approval of the plan—in violation of § 1127(b).” *Id.* at 308.

The instant Order, however, does not alter the parties’ “rights, obligations, and expectations under the plan.” The first change appellants point to is that the plan created and

⁷Appellants’ alternate theories of standing—including creating a counter-factual causal chain linking the Order to the confirmation plan—are too speculative to support standing.

contemplated two trusts, while the Order authorizes the creation of a third. But this is a complaint of form over substance. The plan authorizes the creation of reserves from which to satisfy indemnity claims. As such, the Indemnify Sub-Trust, which as an economic mechanism functions as a reserve for payment of indemnity claims, is likely at least “specifically contemplated” by the plan. *See id.* at 308.

Next, appellants complain that, because the plan contemplates D&O insurance (as a waivable condition) for payment of indemnification claims, the Order (creating an Indemnity Sub-Trust to pay indemnification claims) violates the spirit of the plan. But the insurance condition is waivable, and the payment of indemnification via a reserve is “specifically contemplated” by the plan. *See id.*

Appellants also challenge the movement of funds from the Claimant Trust to the Indemnity Sub-Trust. The plan provides, however, that the Claimant Trust may take money otherwise earmarked for creditors and set up a reserve. This movement of funds under the Order therefore does not violate the creditors’ expectations of what will occur under the plan—indeed, it is specifically contemplated by the Plan. *See id.*

Finally, appellants contend that the Order alters the terms of the confirmed plan because it obligates the Claimant Trust to indemnify more parties; under the Order, the Claimant Trust transfers its assets to the Indemnity Sub-Trust, which are then used to pay indemnity claims for the Litigation Sub-Trust and reorganized debtor’s indemnified parties.⁸

⁸Appellants’ argument is not that more parties are being indemnified—they appear to concede this point in their reply brief. Appellants Reply Br. 7 (“It is true, however, that the

It should be noted at the outset that the Indemnity Sub-Trust is only a fallback source of funding if the Claimant Trust, Litigation Sub-Trust, and reorganized debtor cannot meet their indemnification obligations. Further, if funding is needed from the Indemnity Sub-Trust, the deposits in the Sub-Trust are intended “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 note for the deposits. Appellee App. in Support of Mot. to Dis. Appeal 254. Indeed, the terms state that “such deposits are intended to ensure proper allocation of the respective assets of the Claimant Trust, the Litigation Sub-Trust and the Reorganized Debtor.” *Id.* In other words, although the Claimant Trust is depositing the money, the Litigation Sub-Trust and the reorganized debtor remain legally obligated for their portions of indemnified parties: nothing has changed.⁹

* * *

Because two of the three appellants lack standing, the appeal is DISMISSED in part. Because the Order is not a plan modification and the bankruptcy court complied with 11 U.S.C. § 363(b), the bankruptcy court’s July 21, 2021 order approving the debtor’s motion for entry of an order (I) authorizing the (A) creation of an indemnity subtrust and (B) entry

foregoing persons were entitled to indemnification under the Plan Implementation Documents . . .”). Their argument is that the Claimant Trust is obligating itself to indemnify more parties.

⁹Because the court concludes that the Order did not modify the confirmed plan, it does not reach appellee’s argument that this appeal is equitably moot. *See In re Blast Energy Servs., Inc.*, 593 F.3d 418, 424 (5th Cir. 2010) (“Unlike Article III mootness, equitable mootness is prudential, not jurisdictional.”).

into an indemnity trust agreement and (II) granting related relief is AFFIRMED.

AFFIRMED in part; DISMISSED in part.

January 28, 2022.



SIDNEY A. FITZWATER
SENIOR JUDGE

Tab 6

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

IN RE HIGHLAND CAPITAL	§	
MANAGEMENT, L.P.,	§	
	§	
Debtor.	§	
	§	
HIGHLAND CAPITAL MANAGEMENT	§	
FUND ADVISORS, L.P., et al.,	§	
	§	Civil Action No. 3:21-CV-1895-D
Appellants,	§	(Bank. Ct. No. 19-34054-sgj-11)
	§	
VS.	§	
	§	
HIGHLAND CAPITAL MANAGEMENT,	§	
L.P.,	§	
	§	
Appellee.	§	

APPEAL FROM THE
UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS

JUDGMENT

This appeal came on for consideration on the briefs, with oral argument. For the reasons stated in the court's opinion filed today, this appeal is DISMISSED in part, and the bankruptcy court's July 21, 2021 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 is AFFIRMED.

All pending motions filed in this appeal are terminated.

Costs of this appeal are taxed against appellants pursuant to Fed. R. Bankr. P. 8021(a)(1) or (a)(2).

Entered: January 28, 2022.

KAREN MITCHELL
Clerk of Court

By: P. Esquivel

Tab 7

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

In re:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Case No. 19-34054-sgj11
	§	Chapter 11
	§	
Debtor.	§	
<hr/>		
	§	
HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., et al.	§	
	§	
Appellants,	§	Civ. Act. No. 3:21-cv-01895-D
	§	
v.	§	<i>Appeal from the United States Bankruptcy Court for the Northern District of Texas</i>
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
	§	
Appellee.	§	

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 and appellants in the above-captioned bankruptcy appeal, and, pursuant to 28 U.S.C. § 158(d), hereby appeal to the United States Court of Appeals for the Fifth Circuit that certain *Judgment* (the “Judgment”) entered by the District Court on January 28, 2022 at ECF Docket No. 45 (including, to the extent necessary, the memorandum opinion entered the same date at ECF Docket No. 44).

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

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RESPECTFULLY SUBMITTED this 24th day of February, 2022.

MUNSCH HARDT KOPF & HARR, P.C.

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**ATTORNEYS FOR THE DUGABOY
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this the 24th day of February, 2022, 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.