

Required Documents



193405422051000000000009

1.

Docket Sheet from the District Court

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

Highland Capital Management LP

represented by **Zachery Z. Annable**
Hayward PLLC
10501 N. Central Expressway
Suite 106
Dallas, TX 75231
972-755-7108
Fax: 972-755-7110
Email: zannable@haywardfirm.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Bar Status: Admitted/In Good Standing

Gregory V Demo
Pachulski Stang Ziehl & Jones LLP
780 Third Ave
34th Floor
New York, NY 10017
212-561-7700
Fax: 212-561-7777
Email: gdemo@pszjlaw.com
PRO HAC VICE
ATTORNEY TO BE NOTICED
Bar Status: Not Admitted

Jeffrey N Pomerantz
Pachulski Stang Ziehl & Jones LLP
10100 Santa Monica Blvd
13th Floor
Los Angeles, CA 90067
310-227-6910
Fax: 310-201-0760
Email: jpomerantz@pszjlaw.com
PRO HAC VICE
ATTORNEY TO BE NOTICED
Bar Status: Not Admitted

John A Morris
Pachulski Stang Ziehl & Jones LLP

780 Third Avenue, 34th Floor
New York, NY 10017-2024
212-561-7700
Fax: 212-561-7777
Email: jmorris@pszjlaw.com
PRO HAC VICE
ATTORNEY TO BE NOTICED
Bar Status: Not Admitted

Jordan A Kroop
Pachulski Stang Ziehl & Jones LLP
780 Third Avenue
34th Floor
New York, NY 10017
212-561-7734
Fax: 212-561-7777
Email: Jkroop@pszjlaw.com
PRO HAC VICE
ATTORNEY TO BE NOTICED
Bar Status: Not Admitted

Melissa S Hayward
Hayward PLLC
10501 N Central Expwy
Suite 106
Dallas, TX 75231
972-755-7100
Fax: 972-755-7104
Email: mhayward@haywardfirm.com
ATTORNEY TO BE NOTICED
Bar Status: Admitted/In Good Standing

Appellant

**Highland Capital Management Fund
Advisors LP**

represented by **Julian Preston Vasek**
Munsch Hardt Kopf & Harr PC
500 N. Akard St
3800 Ross Tower
Dallas, TX 75201
214-855-7587
Fax: 214-855-7584
Email: jvasek@munsch.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Bar Status: Admitted/In Good Standing

Davor Rukavina
Munsch Hardt Kopf & Harr PC
500 N Akard St
Ste 3800
Dallas, TX 75201
214-855-7587
Email: drukavina@munsch.com
ATTORNEY TO BE NOTICED

Bar Status: Admitted/In Good Standing

Appellant

NexPoint Advisors LP

represented by **Julian Preston Vasek**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Bar Status: Admitted/In Good Standing

Davor Rukavina
(See above for address)
ATTORNEY TO BE NOTICED
Bar Status: Admitted/In Good Standing

Appellant

The Dugaboy Investment Trust

represented by **Douglas Draper**
Heller, Draper & Horn, L.L.C.
650 Poydras Street
Suite 2500
New Orleans, LA 70130
504-299-3300
Fax: 504-299-3399
Email: ddraper@hellerdraper.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED
Bar Status: Not Admitted

Greta M Brouphy
Heller Draper & Horn LLC
650 Poydras St
Suite 2500
New Orleans, TX 70130
504-299-3300
Bar Status: Not Admitted

Leslie A Collins
Heller Draper & Horn LLC
650 Poydras St
Suite 2500
New Orleans, LA 70130
504-299-3300
Fax: 504-299-3399
Email: lcollins@hellerdraper.com
ATTORNEY TO BE NOTICED
Bar Status: Not Admitted

V.

Appellee

Highland Capital Management LP

represented by

Zachery Z. Annable

(See above for address)

*LEAD ATTORNEY**ATTORNEY TO BE NOTICED**Bar Status: Admitted/In Good Standing***Gregory V Demo**

(See above for address)

*PRO HAC VICE**ATTORNEY TO BE NOTICED**Bar Status: Not Admitted***Jeffrey N Pomerantz**

(See above for address)

*PRO HAC VICE**ATTORNEY TO BE NOTICED**Bar Status: Not Admitted***John A Morris**

(See above for address)

*PRO HAC VICE**ATTORNEY TO BE NOTICED**Bar Status: Not Admitted***Jordan A Kroop**

(See above for address)

*PRO HAC VICE**ATTORNEY TO BE NOTICED**Bar Status: Not Admitted***Melissa S Hayward**

(See above for address)

*ATTORNEY TO BE NOTICED**Bar Status: Admitted/In Good Standing***Bankruptcy Judge****Stacey G Jernigan**represented by **Stacey G Jernigan**

US Bankruptcy Court

Chambers of Judge Stacey G C Jernigan

1100 Commerce St

Room 1254

Dallas, TX 75242-1496

214-753-2040

Email: sgj_settings@txnb.uscourts.gov

PRO SE

V.

Notice Only**Case Admin Sup**represented by **Case Admin Sup**Email: txnb_appeals@txnb.uscourts.gov

PRO SE

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 LCrR 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 Transcript Order Form 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 here . (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)

2.

Notice of Appeal

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

1. Appellants:

Highland Capital Management Fund Advisors, L.P.

NexPoint Advisors, L.P.

Attorneys:

Davor Rukavina
Julian P. Vasek
MUNSCH HARDT KOPF & HARR, P.C.
3800 Ross Tower
500 N. Akard Street
Dallas, Texas 75201-6659
Telephone: (214) 855-7587
Facsimile: (214) 855-7584
Email: drukavina@munsch.com
Email: jvasek@munsch.com

The Dugaboy Investment Trust

Attorneys:

Douglas S. Draper
ddraper@hellerdraper.com
Leslie A. Collins
lcollins@hellerdraper.com
Greta M. Brouphy
gbrouphy@hellerdraper.com
HELLER, DRAPER & HORN, L.L.C.
650 Poydras Street, Suite 2500
New Orleans, LA 70130
Telephone: (504) 299-3300
Fax: (504) 299-3399

2. Appellee:

Highland Capital Management, L.P.

Attorneys:

Jeffrey N. Pomerantz
Ira D. Kharasch
John A. Morris
Gregory V. Demo
Hayley R. Winograd
PACHULSKI STANG ZIEHL & JONES LLP
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone: (310) 277-6910
Facsimile: (310) 201-0760
Email: jpomerantz@pszjlaw.com
ikharasch@pszjlaw.com
jmorris@pszjlaw.com
gdemo@pszjlaw.com
hwinograd@pszjlaw.com

RESPECTFULLY SUBMITTED this 24th day of February, 2022.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Julian P. Vasek

Davor Rukavina, Esq.
Texas Bar No. 24030781
Julian P. Vasek, Esq.
3800 Ross Tower
500 N. Akard Street
Dallas, Texas 75201-6659
Telephone: (214) 855-7500
Facsimile: (214) 855-7584
Email: drukavina@munsch.com
Email: jvasek@munsch.com

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

-AND-

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

By: /s/ Douglas S. Draper

Douglas S. Draper, La. Bar No. 5073
ddraper@hellerdraper.com
Leslie A. Collins, La. Bar No. 14891
lcollins@hellerdraper.com
Greta M. Brouphy, La. Bar No. 26216
gbrouphy@hellerdraper.com
650 Poydras Street, Suite 2500
New Orleans, LA 70130
Telephone: (504) 299-3300
Fax: (504) 299-3399

**ATTORNEYS FOR THE DUGABOY
INVESTMENT TRUST**

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.

3.

Judgment Approving Indemnity Agreement

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

4.

Opinion to Judgment Approving Indemnity Agreement

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 dism’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

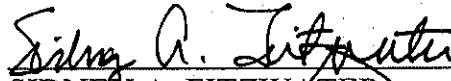
foregoing persons were entitled to indemnification under the Plan Implementation Documents . . .”). Their argument is that the Claimant Trust is obligating itself to indemnify more parties.

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

Optional Documents

5.

Article VIII and IX of the Plan of Reorganization

LATE PROOF OF CLAIM HAS BEEN DEEMED TIMELY FILED BY A FINAL ORDER.

**ARTICLE VIII.
EFFECTIVENESS OF THIS PLAN**

A. Conditions Precedent to the Effective Date

The Effective Date of this Plan will be conditioned upon the satisfaction or waiver by the Debtor (and, to the extent such condition requires the consent of the Committee, the consent of the Committee with such consent not to be unreasonably withheld), pursuant to the provisions of ARTICLE VIII.B of this Plan of the following:

- This Plan and the Plan Documents, including the Claimant Trust Agreement and the Reorganized Limited Partnership Agreement, and all schedules, documents, supplements and exhibits to this Plan shall have been Filed in form and substance reasonably acceptable to the Debtor and the Committee.
- The Confirmation Order shall have become a Final Order and shall be in form and substance reasonably acceptable to the Debtor and the Committee. The Confirmation Order shall provide that, among other things, (i) the Debtor, the Reorganized Debtor, the Claimant Trustee, or the Litigation Trustee are authorized to take all actions necessary or appropriate to effectuate and consummate this Plan, including, without limitation, (a) entering into, implementing, effectuating, and consummating the contracts, instruments, releases, and other agreements or documents created in connection with or described in this Plan, (b) assuming the Executory Contracts and Unexpired Leases set forth in the Plan Supplement, (c) making all distributions and issuances as required under this Plan; and (d) entering into any transactions as set forth in the Plan Documents; (ii) the provisions of the Confirmation Order and this Plan are nonseverable and mutually dependent; (iii) the implementation of this Plan in accordance with its terms is authorized; (iv) pursuant to section 1146 of the Bankruptcy Code, the delivery of any deed or other instrument or transfer order, in furtherance of, or in connection with this Plan, including any deeds, bills of sale, or assignments executed in connection with any disposition or transfer of Assets contemplated under this Plan, shall not be subject to any Stamp or Similar Tax; and (v) the vesting of the Claimant Trust Assets in the Claimant Trust and the Reorganized Debtor Assets in the Reorganized Debtor, in each case as of the Effective Date free and clear of liens and claims to the fullest extent permissible under applicable law pursuant to section 1141(c) of the Bankruptcy Code except with respect to such Liens, Claims, charges and other encumbrances that are specifically preserved under this Plan upon the Effective Date.
- All documents and agreements necessary to implement this Plan, including without limitation, the Reorganized Limited Partnership Agreement, the Claimant Trust Agreement, and the New GP LLC Documents, in each case in form and substance reasonably acceptable to the Debtor and the Committee, shall have (a) been tendered for delivery, and (b) been effected by, executed by, or otherwise deemed binding

upon, all Entities party thereto and shall be in full force and effect. All conditions precedent to such documents and agreements shall have been satisfied or waived pursuant to the terms of such documents or agreements.

- All authorizations, consents, actions, documents, approvals (including any governmental approvals), certificates and agreements necessary to implement this Plan, including, without limitation, the Reorganized Limited Partnership Agreement, the Claimant Trust Agreement, and the New GP LLC Documents, shall have been obtained, effected or executed and delivered to the required parties and, to the extent required, filed with the applicable governmental units in accordance with applicable laws and any applicable waiting periods shall have expired without any action being taken or threatened by any competent authority that would restrain or prevent effectiveness or consummation of the Restructuring.
- The Debtor shall have obtained applicable directors' and officers' insurance coverage that is acceptable to each of the Debtor, the Committee, the Claimant Trust Oversight Committee, the Claimant Trustee and the Litigation Trustee.
- The Professional Fee Reserve shall be funded pursuant to this Plan in an amount determined by the Debtor in good faith.

B. Waiver of Conditions

The conditions to effectiveness of this Plan set forth in this ARTICLE VIII (other than that the Confirmation Order shall have been entered) may be waived in whole or in part by the Debtor (and, to the extent such condition requires the consent of the Committee, the consent of the Committee) and any applicable parties in Section VII.A of this Plan, without notice, leave or order of the Bankruptcy Court or any formal action other than proceeding to confirm or effectuate this Plan. The failure to satisfy or waive a condition to the Effective Date may be asserted by the Debtor regardless of the circumstances giving rise to the failure of such condition to be satisfied. The failure of the Debtor to exercise any of the foregoing rights will not be deemed a waiver of any other rights, and each right will be deemed an ongoing right that may be asserted at any time by the Debtor, the Reorganized Debtor, or the Claimant Trust, as applicable.

C. Dissolution of the Committee

On the Effective Date, the Committee will dissolve, and the members of the Committee and the Committee's Professionals will cease to have any role arising from or relating to the Chapter 11 Case, except in connection with final fee applications of Professionals for services rendered prior to the Effective Date (including the right to object thereto). The Professionals retained by the Committee and the members thereof will not be entitled to assert any fee claims for any services rendered to the Committee or expenses incurred in the service of the Committee after the Effective Date, except for reasonable fees for services rendered, and actual and necessary costs incurred, in connection with any applications for allowance of Professional Fees pending on the Effective Date or filed and served after the Effective Date pursuant to the Plan. Nothing in the Plan shall prohibit or limit the ability of the Debtor's or Committee's

Professionals to represent either of the Trustees or to be compensated or reimbursed per the Plan and the Claimant Trust Agreement in connection with such representation.

ARTICLE IX.
EXCULPATION, INJUNCTION AND RELATED PROVISIONS

A. General

Notwithstanding anything contained in the Plan to the contrary, the allowance, classification and treatment of all Allowed Claims and Equity Interests and their respective distributions and treatments under the Plan shall take into account the relative priority and rights of the Claims and the Equity Interests in each Class in connection with any contractual, legal and equitable subordination rights relating thereto whether arising under general principles of equitable subordination, section 510 of the Bankruptcy Code, or otherwise.

B. Discharge of Claims

To the fullest extent provided under section 1141(d)(1)(A) and other applicable provisions of the Bankruptcy Code, except as otherwise expressly provided by this Plan or the Confirmation Order, all consideration distributed under this Plan will be in exchange for, and in complete satisfaction, settlement, discharge, and release of, all Claims and Equity Interests of any kind or nature whatsoever against the Debtor or any of its Assets or properties, and regardless of whether any property will have been distributed or retained pursuant to this Plan on account of such Claims or Equity Interests. Except as otherwise expressly provided by this Plan or the Confirmation Order, upon the Effective Date, the Debtor and its Estate will be deemed discharged and released under and to the fullest extent provided under section 1141(d)(1)(A) and other applicable provisions of the Bankruptcy Code from any and all Claims and Equity Interests of any kind or nature whatsoever, including, but not limited to, demands and liabilities that arose before the Confirmation Date, and all debts of the kind specified in section 502(g), 502(h), or 502(i) of the Bankruptcy Code.

C. Exculpation

Subject in all respects to ARTICLE XII.D of this Plan, to the maximum extent permitted by applicable law, no Exculpated Party will have or incur, and each Exculpated Party is hereby exculpated from, any claim, obligation, suit, judgment, damage, demand, debt, right, Cause of Action, remedy, loss, and liability for conduct occurring on or after the Petition Date in connection with or arising out of (i) the filing and administration of the Chapter 11 Case; (ii) the negotiation and pursuit of the Disclosure Statement, the Plan, or the solicitation of votes for, or confirmation of, the Plan; (iii) the funding or consummation of the Plan (including the Plan Supplement) or any related agreements, instruments, or other documents, the solicitation of votes on the Plan, the offer, issuance, and Plan Distribution of any securities issued or to be issued pursuant to the Plan, including the Claimant Trust Interests, whether or not such Plan Distributions occur following the Effective Date; (iv) the implementation of the Plan; and (v) any negotiations, transactions, and documentation in connection with the foregoing clauses (i)-(iv); *provided, however*, the foregoing will not apply to (a) any acts or omissions of an Exculpated Party arising out of or related to acts or omissions that constitute bad faith, fraud, gross

negligence, criminal misconduct, or willful misconduct or (b) Strand or any Employee other than with respect to actions taken by such Entities from the date of appointment of the Independent Directors through the Effective Date. This exculpation shall be in addition to, and not in limitation of, all other releases, indemnities, exculpations, any other applicable law or rules, or any other provisions of this Plan, including ARTICLE IV.C.2, protecting such Exculpated Parties from liability.

D. Releases by the Debtor

On and after the Effective Date, each Released Party is deemed to be, hereby conclusively, absolutely, unconditionally, irrevocably, and forever released and discharged by the Debtor and the Estate, in each case on behalf of themselves and their respective successors, assigns, and representatives, including, but not limited to, the Claimant Trust and the Litigation Sub-Trust from any and all Causes of Action, including any derivative claims, asserted on behalf of the Debtor, whether known or unknown, foreseen or unforeseen, matured or unmatured, existing or hereafter arising, in law, equity, contract, tort or otherwise, that the Debtor or the Estate would have been legally entitled to assert in their own right (whether individually or collectively) or on behalf of the holder of any Claim against, or Interest in, a Debtor or other Person.

Notwithstanding anything contained herein to the contrary, the foregoing release does not release: (i) any obligations of any party under the Plan or any document, instrument, or agreement executed to implement the Plan, (ii) the rights or obligations of any current employee of the Debtor under any employment agreement or plan, (iii) the rights of the Debtor with respect to any confidentiality provisions or covenants restricting competition in favor of the Debtor under any employment agreement with a current or former employee of the Debtor, (iv) any Avoidance Actions, or (v) any Causes of Action arising from willful misconduct, criminal misconduct, actual fraud, or gross negligence of such applicable Released Party as determined by Final Order of the Bankruptcy Court or any other court of competent jurisdiction.

Notwithstanding anything herein to the contrary, any release provided pursuant to this ARTICLE IX.D (i) with respect to a Senior Employee, is conditioned in all respects on (a) such Senior Employee executing a Senior Employee Stipulation on or prior to the Effective Date and (b) the reduction of such Senior Employee's Allowed Claim as set forth in the Senior Employee Stipulation (such amount, the "Reduced Employee Claim"), and (ii) with respect to any Employee, including a Senior Employee, shall be deemed null and void and of no force and effect (1) if there is more than one member of the Claimant Trust Oversight Committee who does not represent entities holding a Disputed or Allowed Claim (the "Independent Members"), the Claimant Trustee and the Independent Members by majority vote determine or (2) if there is only one Independent Member, the Independent Member after discussion with the Claimant Trustee, determines (in each case after discussing with the full Claimant Trust Oversight Committee) that such Employee (regardless of whether the Employee is then currently employed by the Debtor, the Reorganized Debtor, or the Claimant Trustee):

- sues, attempts to sue, or threatens or works with or assists any entity or person to sue, attempt to sue, or threaten the Reorganized Debtor, the Claimant Trust, the Litigation

Sub-Trust, or any of their respective employees or agents, or any Released Party on or in connection with any claim or cause of action arising prior to the Effective Date,

- has taken any action that, impairs or harms the value of the Claimant Trust Assets or the Reorganized Debtor Assets, or
- (x) upon the request of the Claimant Trustee, has failed to provide reasonable assistance in good faith to the Claimant Trustee or the Reorganized Debtor with respect to (1) the monetization of the Claimant Trust Assets or Reorganized Debtor Assets, as applicable, or (2) the resolution of Claims, or (y) has taken any action that impedes or frustrates the Claimant Trustee or the Reorganized Debtor with respect to any of the foregoing.

Provided, however, that the release provided pursuant to this ARTICLE IX.D will vest and the Employee will be indefeasibly released pursuant to this ARTICLE IX.D if such Employee's release has not been deemed null and void and of no force and effect on or prior to the date that is the date of dissolution of the Claimant Trust pursuant to the Claimant Trust Agreement.

By executing the Senior Employee Stipulation embodying this release, each Senior Employee acknowledges and agrees, without limitation, to the terms of this release and the tolling agreement contained in the Senior Employee Stipulation.

The provisions of this release and the execution of a Senior Employee Stipulation will not in any way prevent or limit any Employee from (i) prosecuting its Claims, if any, against the Debtor's Estate, (ii) defending him or herself against any claims or causes of action brought against the Employee by a third party, or (iii) assisting other persons in defending themselves from any Estate Claims brought by the Litigation Trustee (but only with respect to Estate Claims brought by the Litigation Trustee and not collection or other actions brought by the Claimant Trustee).

E. Preservation of Rights of Action

1. Maintenance of Causes of Action

Except as otherwise provided in this Plan, after the Effective Date, the Reorganized Debtor or the Claimant Trust will retain all rights to commence, pursue, litigate or settle, as appropriate, any and all Causes of Action included in the Reorganized Debtor Assets or Claimant Trust Assets, as applicable, whether existing as of the Petition Date or thereafter arising, in any court or other tribunal including, without limitation, in an adversary proceeding Filed in the Chapter 11 Case and, as the successors in interest to the Debtor and the Estate, may, and will have the exclusive right to, enforce, sue on, settle, compromise, transfer or assign (or decline to do any of the foregoing) any or all of the Causes of Action without notice to or approval from the Bankruptcy Court.

2. Preservation of All Causes of Action Not Expressly Settled or Released

Unless a Cause of Action against a Holder of a Claim or an Equity Interest or other Entity is expressly waived, relinquished, released, compromised or settled in this Plan or any Final

Order (including, without limitation, the Confirmation Order), such Cause of Action is expressly reserved for later adjudication by the Reorganized Debtor or Claimant Trust, as applicable (including, without limitation, Causes of Action not specifically identified or of which the Debtor may presently be unaware or that may arise or exist by reason of additional facts or circumstances unknown to the Debtor at this time or facts or circumstances that may change or be different from those the Debtor now believes to exist) and, therefore, no preclusion doctrine, including, without limitation, the doctrines of res judicata, collateral estoppel, issue preclusion, claim preclusion, waiver, estoppel (judicial, equitable or otherwise) or laches will apply to such Causes of Action as a consequence of the confirmation, effectiveness, or consummation of this Plan based on the Disclosure Statement, this Plan or the Confirmation Order, except where such Causes of Action have been expressly released in this Plan or any other Final Order (including, without limitation, the Confirmation Order). In addition, the right of the Reorganized Debtor or the Claimant Trust to pursue or adopt any claims alleged in any lawsuit in which the Debtor is a plaintiff, defendant or an interested party, against any Entity, including, without limitation, the plaintiffs or co-defendants in such lawsuits, is expressly reserved.

F. Injunction

Upon entry of the Confirmation Order, all Enjoined Parties are and shall be permanently enjoined, on and after the Effective Date, from taking any actions to interfere with the implementation or consummation of the Plan.

Except as expressly provided in the Plan, the Confirmation Order, or a separate order of the Bankruptcy Court, all Enjoined Parties are and shall be permanently enjoined, on and after the Effective Date, with respect to any Claims and Equity Interests, from directly or indirectly (i) commencing, conducting, or continuing in any manner any suit, action, or other proceeding of any kind (including any proceeding in a judicial, arbitral, administrative or other forum) against or affecting the Debtor or the property of the Debtor, (ii) enforcing, levying, attaching (including any prejudgment attachment), collecting, or otherwise recovering, enforcing, or attempting to recover or enforce, by any manner or means, any judgment, award, decree, or order against the Debtor or the property of the Debtor, (iii) creating, perfecting, or otherwise enforcing in any manner, any security interest, lien or encumbrance of any kind against the Debtor or the property of the Debtor, (iv) asserting any right of setoff, directly or indirectly, against any obligation due to the Debtor or against property or interests in property of the Debtor, except to the limited extent permitted under Sections 553 and 1141 of the Bankruptcy Code, and (v) acting or proceeding in any manner, in any place whatsoever, that does not conform to or comply with the provisions of the Plan.

The injunctions set forth herein shall extend to, and apply to any act of the type set forth in any of clauses (i)-(v) of the immediately preceding paragraph against any successors of the Debtor, including, but not limited to, the Reorganized Debtor, the Litigation Sub-Trust, and the Claimant Trust and their respective property and interests in property.

Subject in all respects to ARTICLE XII.D, no Enjoined Party may commence or pursue a claim or cause of action of any kind against any Protected Party that arose or

arises from or is related to the Chapter 11 Case, the negotiation of the Plan, the administration of the Plan or property to be distributed under the Plan, the wind down of the business of the Debtor or Reorganized Debtor, the administration of the Claimant Trust or the Litigation Sub-Trust, or the transactions in furtherance of the foregoing without the Bankruptcy Court (i) first determining, after notice and a hearing, that such claim or cause of action represents a colorable claim of any kind, including, but not limited to, negligence, bad faith, criminal misconduct, willful misconduct, fraud, or gross negligence against a Protected Party and (ii) specifically authorizing such Enjoined Party to bring such claim or cause of action against any such Protected Party; *provided, however*, the foregoing will not apply to a claim or cause of action against Strand or against any Employee other than with respect to actions taken, respectively, by Strand or by such Employee from the date of appointment of the Independent Directors through the Effective Date. The Bankruptcy Court will have sole and exclusive jurisdiction to determine whether a claim or cause of action is colorable and, only to the extent legally permissible and as provided for in ARTICLE XI, shall have jurisdiction to adjudicate the underlying colorable claim or cause of action.

G. Duration of Injunctions and Stays

ARTICLE II. Unless otherwise provided in this Plan, in the Confirmation Order, or in a Final Order of the Bankruptcy Court, (i) all injunctions and stays entered during the Chapter 11 Case and in existence on the Confirmation Date shall remain in full force and effect in accordance with their terms; and (ii) the automatic stay arising under section 362 of the Bankruptcy Code shall remain in full force and effect subject to Section 362(c) of the Bankruptcy Code, and to the extent necessary if the Debtor does not receive a discharge, the Court will enter an equivalent order under Section 105.

H. Continuance of January 9 Order

Unless otherwise provided in this Plan, in the Confirmation Order, or in a Final Order of the Bankruptcy Court, the restrictions set forth in paragraphs 9 and 10 of the *Order Approving Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course*, entered by the Bankruptcy Court on January 9, 2020 [D.I. 339] shall remain in full force and effect following the Effective Date.

**ARTICLE X.
BINDING NATURE OF PLAN**

On the Effective Date, and effective as of the Effective Date, the Plan, including, without limitation, the provisions in ARTICLE IX, will bind, and will be deemed binding upon, all Holders of Claims against and Equity Interests in the Debtor and such Holder's respective successors and assigns, to the maximum extent permitted by applicable law, notwithstanding whether or not such Holder will receive or retain any property or interest in property under the Plan. All Claims and Debts shall be fixed and adjusted pursuant to this Plan. The Plan shall also bind any taxing authority, recorder of deeds, or similar official for any county, state,

6.

Motion for Approval of Indemnity Trust Agreement

PACHULSKI STANG ZIEHL & JONES LLP

Jeffrey N. Pomerantz (CA Bar No. 143717) (admitted pro hac vice)
Ira D. Kharasch (CA Bar No. 109084) (admitted pro hac vice)
John A. Morris (NY Bar No. 266326) (admitted pro hac vice)
Gregory V. Demo (NY Bar No. 5371992) (admitted pro hac vice)
Hayley R. Winograd (NY Bar No. 5612569) (admitted pro hac vice)
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone: (310) 277-6910
Facsimile: (310) 201-0760

HAYWARD PLLC

Melissa S. Hayward
Texas Bar No. 24044908
MHayward@HaywardFirm.com
Zachery Z. Annable
Texas Bar No. 24053075
ZAnnable@HaywardFirm.com
10501 N. Central Expy, Ste. 106
Dallas, Texas 75231
Tel: (972) 755-7100
Fax: (972) 755-7110

Counsel for the Debtor and Debtor-in-Possession

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

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

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

¹ The Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

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

INTRODUCTION²

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

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

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

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

JURISDICTION

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

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

STATEMENT OF FACTS

A. The Debtor’s Bankruptcy Case

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

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

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

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

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

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

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

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

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

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

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

C. Conditions to the Effective Date of the Plan.

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

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

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

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

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

D. **Post-Effective Date Governance and Management**

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

E. **Post-Effective Date Indemnification**

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

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

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

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

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

A. The Indemnity Subtrust and Trust Agreement

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

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

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

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

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

Beneficiaries:	The Indemnified Parties
Indemnity Trustee	A corporate trustee with appropriate trust powers under applicable state and/or federal law.
Indemnity Trust Administrator	Mr. Seery, initially in his capacity as the Claimant Trustee or in his individual capacity if no longer serving as the Claimant Trustee.
Indemnity Trust Corpus	At the inception of the Indemnity Trust, the trust corpus shall consist of the following, to be irrevocably contributed by the Grantor: <ol style="list-style-type: none"> 1. Cash of \$2.5 million; and 2. the Indemnification Funding Note, in the principal amount of \$22.5 million. <p>The foregoing contributions are intended to create and maintain a balance of liquid assets in the Indemnity Trust Account of not less than \$25 million (the "Indemnity Trust Account Minimum Balance").</p>
Indemnification Funding Note	The Indemnification Funding Note will represent and document the Claimant Trustee's obligation to make additional cash deposits into the Indemnity Trust Account to satisfy the obligations of the Claimant Trust, the Litigation Sub-Trust, and the Reorganized Debtor, each of which will be jointly and severally liable under the Indemnification Funding Note. <p>After the initial funding of principal under the Indemnification Funding Note, the principal balance thereof will at all times equal the amount representing the difference between (i) the Indemnity Trust Account Minimum Balance and (ii) the balance of liquid assets held in the Indemnity Trust Account, as reported on the most recent quarterly statement issued by the Indemnity Trustee.</p>
Withdrawal of Trust Assets	Consistent with the Indemnity Trust's purpose as a collateral mechanism, withdrawals from the Indemnity Trust Account are contemplated only following a tender of for indemnity pursuant to Section 8.2 of the Claimant Trust Agreement and the failure of such Beneficiary to receive payment in full of such indemnity claim from the Claimant Trust within [30] days.
Duration of the Indemnity Trust	The Indemnity Trust will exist and remain in full force and effect until the <i>earlier of</i> (i) the expiry of all indemnification rights under Section 8.2 of the Claimant Trust Agreement, due to expiration of all applicable statutes of limitations (as determined by the Indemnity Trust Administrator, in his sole and absolute discretion), and (ii) the mutual agreement to terminate the Indemnity Trust by the Grantor and the Indemnity Trust Administrator.
Liquidation and Final Distribution of Trust Assets	Upon dissolution and liquidation of the Indemnity Trust, any assets remaining in the Indemnity Trust Account will be transferred to the Claimant Trust; provided, however, if the Claimant Trust is no longer in existence, then such distribution of the Indemnity Trust assets will be made according to the same distribution methodology contemplated in Section 9.2 of the Claimant Trust

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

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

Governance of the Indemnity Trust

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Notice

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

States Attorney for the Northern District of Texas; (c) the Debtor's principal secured parties; (d) counsel to the Committee; and (e) parties requesting notice pursuant to Bankruptcy Rule 2002.

The Debtor submits that, in light of the nature of the relief requested, no other or further notice need be given.

[Remainder of Page Intentionally Blank]

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

Dated: June 25, 2021

PACHULSKI STANG ZIEHL & JONES LLP

Jeffrey N. Pomerantz (CA Bar No.143717) (*pro hac vice*)
Ira D. Kharasch (CA Bar No. 109084) (*pro hac vice*)
John A. Morris (NY Bar No. 266326) (*pro hac vice*)
Gregory V. Demo (NY Bar No. 5371992) (*pro hac vice*)
Hayley R. Winograd (NY Bar No. 5612569) (*pro hac vice*)
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone: (310) 277-6910
Facsimile: (310) 201-0760
E-mail: jpomertanz@pszjlaw.com
ikharasch@pszjlaw.com
jmorris@pszjlaw.com
gdemo@pszjlaw.com
hwinograd@pszjlaw.com

-and-

HAYWARD PLLC

/s/ Zachery Z. Annable

Melissa S. Hayward
Texas Bar No. 24044908
MHayward@HaywardFirm.com
Zachery Z. Annable
Texas Bar No. 24053075
ZAnnable@HaywardFirm.com
10501 N. Central Expy, Ste. 106
Dallas, Texas 75231
Tel: (972) 755-7100
Fax: (972) 755-7110

Counsel for the Debtor and Debtor-in-Possession