Docket #0009 Date Filed: 5/26/2022

CIVIL ACTION NO. 3:22-cv-00695-S

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

CHARITABLE DAF FUND, L.P. and
CLO HOLDCO, LTD.,

Appellants,

v.

HIGHLAND CAPITAL MANAGEMENT, L.P., HIGHLAND HCF ADVISOR, LTD., and HIGHLAND CLO FUNDING, LTD., nominally

Appellees.

In re: Highland Capital Management, L.P.,
Debtor.

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

BRIEF OF APPELLANTS THE CHARITABLE DAF FUND, L.P. AND CLO HOLDCO, LTD.

Mazin A. Sbaiti
Jonathan Bridges
SBAITI & COMPANY PLLC
2200 Ross Avenue, Suite 4900W
Dallas, TX 75201
Phone: (214) 432-2899
mas@sbaitilaw.com
jeb@sbaitilaw.com

1934054220527000000000001

RULE 8012 CORPORATE DISCLOSURE STATEMENT

Appellant Charitable DAF Fund, L.P. is the parent of CLO Holdco, Ltd.

TABLE OF CONTENTS

RULE 8012 CORPORATE DISCLOSURE STATEMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

I. JURISDICTIONAL STATEMENT 1

II. STATEMENT REGARDING ORAL ARGUMENT 1

III. ISSUES PRESENTED 2

IV. SUMMARY OF THE ARGUMENT 3

V. STATEMENT OF THE CASE 4

A. An Overview of the Facts of the Underlying Lawsuit 4

B. Relevant Procedural History 9

VI. STANDARD OF REVIEW 10

VII. ARGUMENTS AND AUTHORITIES 11

A. The Lower Court Erred in Dismissing the Adversary Action *Sua Sponte* Based Upon Collateral Estoppel 11

1. The Court's *Sua Sponte* Consideration of Collateral Estoppel Violated Fifth Circuit Precedent 11

2. The Elements of Collateral Estoppel Cannot Be Met Here 12

a. None of the Issues are Clearly Identical 13

b. None of the Claims Were "Actually and Vigorously Litigated" Nor Could Appellants Have Had a Full and Fair Opportunity to Fully Litigate Their Claim as Part of the Rule 9019 Approval Hearing 16

c. None of the Issues Were *Necessary* to the 9019 Order 19

d. It Would be Unfair to Apply Collateral Estoppel Here 20

B. The Lower Court Erred in Dismissing Based Upon Judicial Estoppel 20

1. The Bankruptcy Court *Sua Sponte* but Erroneously Relied Upon an Admission 21

2. Withdrawing the Objection Was Not "Clearly Inconsistent" With Bringing a Claim 24

3. There Was No Acceptance by the Bankruptcy Court 25

4. Appellants' Lack of Knowledge of Critical Facts Until After the Approval Hearing Means That Any Inconsistency Is "Inadvertent" 27

VIII. MOTION FOR LEAVE TO AMEND 29

IX. CONCLUSION 29

CERTIFICATE OF SERVICE 31

CERTIFICATE OF COMPLIANCE 31

TABLE OF AUTHORITIES

Allen v. McCurry,
449 U.S. 90 (1980) 13, 17

Applewood Chair Co. v. Three Rivers Planning & Dev. Dist.,
203 F.3d 914 (5th Cir. 2000) 14

Ashcroft v. Iqbal,
556 U.S. 66 (2009) 10, 11

Ashton Revocable Living Tr. v. Mukamal (In re Palm Beach Fin. Partners, L.P.),
527 B.R. 518 (S.D. Fla. 2015) 25

Bazrowx v. Scott,
136 F.3d 1053 (5th Cir. 1998 12

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) 10

Browning Mfg. v. Mims (In re Coastal Plains, Inc.),
179 F.3d 197 (5th Cir. 1999) 20, 24, 27

Carbonell v. La. Dep't of Health & Human Res.,
772 F.2d 185, 189 (5th Cir. 1985) 12

Carroll v. Fort James Corp.,
470 F.3d 1171 (5th Cir. 2006) 2, 3, 12

Chalmers v. Gavin,
2002 U.S. Dist. LEXIS 5636 (N.D. Tex., Apr. 2, 2002) 17

Collins v. Morgan Stanley Dean Witter,
224 F.3d 496 (5th Cir. 2000) 10

Conn. Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortg. Corp.),
68 F.3d 914 (5th Cir. 1995) 18, 27

Copeland, et al. v. Merrill Lynch & Co., et al.,
47 F.3d 1415 (5th Cir. 1995) 13

Costley v. Richardson,
No. W-14-CA-024, 2014 U.S. Dist. LEXIS 201199 (W.D. Tex. 2014) 16

Flugence v. Axis Surplus Ins. Co. (In re Flugence),
738 F.3d 126 (5th Cir. 2013) 20

Hall v. GE Plastic Pac. PTE Ltd.,
327 F.3d 391 (5th Cir. 2003) 26

Hammervold v. Blank,
3 F.4th 803 (5th Cir. 2021) 16

Harrison Co. LLC v. A-Z Wholesalers, Inc.,
No. 3:19-CV-1057-B, 2021 U.S. Dist. LEXIS 44534
(N.D. Tex. 2021) 26

Hishon v. King & Spalding,
467 U.S. 69 (1984) 11

In re Alfonso,
No. 16-51448-RBK, 2019 Bankr. LEXIS 2816
(Bankr. W.D. Tex. 2019) 18, 26

In re Entringer Bakeries, Inc.,
548 F.3d 344 (5th Cir. 2008) 10

In re Howe,
913 F.2d 1138 (5th Cir. 1990) 20

In re Jack Kline Co.,
440 B.R. 712 (Bankr. S.D. Tex. 2010) .....

In re Keaty,
397 F.3d 264 (5th Cir. 2005) 17

In re Texas Extrusion Corp.,
844 F.2d 1142 (5th Cir. 1988) 18, 27

Kane v. Nat'l Union Fire Ins. Co.,
535 F.3d 380 (5th Cir. 2008) 21

Kirschner v. Dondero (In re Highland Capital Mgmt., L.P.),
Nos. 19-34054-SGJ-11, 3:22-CV-203-S, 21-03076,
2022 Bankr. LEXIS 1028 (Bankr. N.D. Tex. 2022) 16

Nevada v. United States,
463 U.S. 110 (1983) 16

New Hampshire v. Maine,
532 U.S. 742, 121 S. Ct. 1808 (2001) 24, 26

NGM Ins. Co. v. Bexar Cty.,
211 F. Supp. 3d 923 (W.D. Tex. 2016) 25

Official Comm. of Unsecured Creditors v. Moeller (In re Age Ref., Inc.),
801 F.3d 530 (5th Cir. 2015) 18, 19

Reynolds v. Tombone,
1999 U.S. Dist. LEXIS 9995 (N.D. Tex., June 24, 1999) 17

Savage & Assocs., P.C. v. Mandl (In re Teligent, Inc.),
417 B.R. 197 (Bankr. S.D.N.Y. 2009) *aff'd* 2010 U.S. Dist.
LEXIS 49010 (S.D.N.Y. 2010) 18

Scanlan v. Texas A&M Univ.,
343 F.3d 533 (5th Cir. 2003) 11

Smith v. United States,
328 F.3d 760 (5th Cir. 2003) 20

Thompson v. City of Waco,
764 F.3d 500 (5th Cir. 2014) 11

United States ex rel. Bias v. Tangipahoa Par. Sch. Bd.,
766 F. App'x 38 (5th Cir. 2019) 25

United States v. *C. I. T. Constr. Inc.*,
944 F.2d 253 (5th Cir. 1991) 26

U.S. v. Shanbaum,
10 F.3d 305 (5th Cir. 1994) 13

Rules, Codes and Statutes

11 U.S.C. § 521 25

11 U.S.C. § 541 25

18 U.S.C. § 1961 15

Fed. Bankr. R. 9019 ..... *passim*

Fed. R. Civil Proc. 12(b)(6) 10, 11, 22, 29

Other

5A Wright & Miller, FED. PRAC. & P. § 1357 (2d ed. 1990) 12

Investment Advisors Act of 1940 5

I.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over the appeal from the Bankruptcy Court of the Northern District of Texas under 28 U.S.C § 158.

II.

STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully request oral argument. Oral argument will allow Appellants to assist the Court in navigating some of the more idiosyncratic issues raised due to the convoluted history of this case.

III.

ISSUES PRESENTED

Issue One

The Fifth Circuit in *Carroll v. Ft. James Corp*. 470 F.3d 1171 (5th Cir. 2006) held that a court may dismiss a matter *sua sponte* only after notice and an opportunity to respond. ***Did the lower court commit reversible error by sua sponte dismissing this action on the basis of collateral estoppel without giving notice and an opportunity to respond?***

Issue Two

The Fifth Circuit holds that the element of collateral estoppel requires evidence that (1) the issue under consideration is identical to that litigated in the prior action; (2) the issue was fully and vigorously litigated in the prior action; (3) the issue was necessary to support the judgment in the prior case; and (4) there is [any] special circumstance that would make it unfair to apply the doctrine. ***Did the lower court commit reversible error by holding that the elements of collateral estoppel were met where case law has affirmatively held that a Rule 9019 hearing cannot be the basis of collateral estoppel for claims by third party objectors?***

Issue Three

Fifth Circuit law holds that judicial estoppel requires proof that (1) the party against whom it is sought has asserted a legal position that is plainly inconsistent with a prior position; (2) a court accepted the prior position; and (3) the party did not act inadvertently. ***Did the lower court commit reversible error by (i) sua sponte relying on an admission, which is due to a transcription error, as to what the representation to the court was, or (ii) in holding that Appellants' position was inconsistent with the current lawsuit, or (iii) that subsequently discovered evidence did not render the ostensible inconsistency "inadvertent"?***

IV.

SUMMARY OF THE ARGUMENT

Plaintiff respectfully submits there are several reasons for reversal:

First, the lower court correctly denied the motion as to *res judicata*, but then decided to *sua sponte* dismiss on the basis of collateral estoppel. This violated Appellants' rights as set forth in *Carroll v. Ft. James Corp.* 470 F.3d 1171 (5th Cir. 2006) and was thus reversible error.

Second, none of the elements of collateral estoppel can be met here because the issues in the 9019 Hearing and here are not identical and were not actually or vigorously litigated—nor could they have been. Had the right of first refusal issue been "actually and vigorously litigated," the 9019 hearing may have foreclosed Appellants' breach of contract claim. But there is no basis for finding that collateral estoppel applies. The lower court's admission that Rule 9019 proceedings do not afford an opportunity to litigate forecloses this critical element.

Third, the lower court *sua sponte* decided that judicial estoppel applied because of a representation made by counsel for CLO Holdco. However, it is now clear that the transcript relied upon inaccurately relayed his statement and the correction vitiates that core finding. Even absent that, the lower court's reliance on the representation was error because, even as mis-transcribed, it professed counsel's *disclaimer* that he was speaking on behalf of his client.

Finally, no court has held that the withdrawal of an objection—or even the failure to bring an objection—in a 9019 context triggers judicial estoppel or waives the underlying claim. Withdrawing the objection is equivalent to not making the claim in the first place. Because a creditor has no duty to bring a 9019 objection at all, the failure to do so is not tantamount to a representation that no such claim exists. And because key facts were not uncovered until after the hearing, any inconsistent position was "inadvertent." Therefore, judicial estoppel cannot apply.

V.

STATEMENT OF THE CASE

A. AN OVERVIEW OF THE FACTS OF THE UNDERLYING LAWSUIT

Appellant Charitable DAF Fund, L.P. ("DAF") is a charitable fund that helps several causes throughout the country, including providing millions of dollars every year to local charities in Dallas and around the country, such as family shelters, education initiatives, veteran's welfare associations, public works (such as museums, parks and zoos), and education (such as specialty schools in underserved communities).[1]

Since 2012, DAF was advised by its registered investment adviser, Defendant/Appellee Highland Capital Management, L.P. ("Highland"), and its

[1] Appellate Record ("AR_") at 000541-000566, Original Complaint ("Compl.") at ¶ 10.

various subsidiaries about where to invest.[2] This relationship was governed by an investment advisory agreement.[3] As the DAF's investment advisor, Highland owed the DAF fiduciary obligations under the Investment Advisors Act of 1940 ("IAA"), including the duty to put the best interests of its advisees ahead of its own, the duty against diverting investments to itself before offering them to its advisees, the duty against self-dealing ,and the duty of honesty and candor.[4] In 2017, Highland advised the DAF to acquire 143,454,001 shares of Highland CLO Funding, Ltd ("HCLOF"), which the DAF did via a holding entity, Plaintiff CLO Holdco, Ltd. ("CLO Holdco").[5]

Shortly thereafter, CLO Holdco entered into a Subscription and Transfer Agreement whereby a series of related entities collectively referred to as "HarbourVest" acquired a 49.98% membership interest in HCLOF (the "HarbourVest Interests").[6] As part of this transaction, DAF retained a 49.02% membership interest,[7] and Highland took a 0.6% interest in HCLOF.[8]

HCLOF's portfolio manager is Appellee/Defendant Highland Advisor, Ltd.

[2] AR_000544, Compl. at ¶ 11
[3] AR_000545, Compl. at ¶ 12
[4] AR_000551-553, Compl. at ¶¶ 56–57, 62.
[5] AR_000545, Compl. at ¶ 12
[6] AR_000545, Compl. at ¶¶ 13–14
[7] AR_000545, Compl. at ¶ 13
[8] AR_000547, Compl. at ¶ 25

("HCFA"), which is subsidiary of Highland and is controlled and operated by Highland.[9] As such, both Highland and HCFA owed fiduciary duties to CLO Holdco as an investor in the HCLOF fund. James P. Seery, Jr., CEO of Highland, testified that Highland owed such fiduciary duties under the Advisers Act to investors in the funds that Highland manages.[10]

The HCLOF parties' rights and obligations as members of HCLOF were governed by the *Members Agreement Relating to the Company* dated November 15, 2017 ("Company Agreement").[11] Under the Company Agreement, no member was allowed to sell shares to another member without first providing all other members the right to purchase a pro rata portion thereof at the same price.[12] In October 2019, Highland filed for Chapter 11.[13] As part of this bankruptcy, HarbourVest filed proof of claims against Highland totaling over $300 million, notionally.[14] Highland denied the validity of these claims.[15]

In the meantime, Highland continued to control HCLOF through its subsidiary HCFA.[16] In September 2020, HCLOF was underperforming, and the value of the

[9] AR_000546-547, Compl. at ¶ 24

[10] AR_0008-10, 0014.

[11] AR_000557-559, Compl. at ¶¶ 93–94; *see also* APP_00018-35 (Company Agreement).

[12] AR_000557-559, Compl. at ¶ 95; APP_0026-27

[13] AR_000542, Compl. at ¶ 15

[14] AR_000542, 000546, Compl. at ¶¶ 16, 21-23.

[15] AR_000542, 000547, Compl. at ¶ 17, 26.

[16] AR_000560-561, Compl. at ¶¶ 115–124.

investment had diminished—the HarbourVest Interests had diminished $52 million in value.[17] In September 30, 2020, Highland utilized interstate wires to transmit information to the HCLOF investors regarding the value of their respective interests.[18]

In the following months, however, the value of HCLOF began to improve; by the end of November 2020, the value of HCLOF's total assets increased to $72,969,492 ($36,484,746 allocated to HarbourVest) and by the end of December, HCLOF's net asset value reached $86,440,024 (with $43,202,724 allocated to HarbourVest's Interests).[19] However, Highland did not transmit these valuations to Plaintiffs.[20]

Around November 2020, Highland and HarbourVest—utilizing the interstate wires—entered into discussions about settling HarbourVest's claims in the bankruptcy.[21] Highland and HarbourVest reached a settlement, which Highland requested the bankruptcy court to approve on December 23, 2020.[22] As part of the settlement, Highland agreed to allow HarbourVest $45 million in unsecured claims, which were expected to yield about two cents on the dollar to HarbourVest (roughly

[17] AR_000547, Compl. at ¶ 27.
[18] AR_000560-561, Compl. at ¶ 121.
[19] AR_000560-561, Compl. at ¶¶ 123–124.
[20] AR_000560-561, Compl. at ¶ 120.
[21] AR_000560-561, Compl. at ¶ 119.
[22] AR_000547, Compl. at ¶ 29; AR_0046-64.

$31,500,000).[23] As part of the consideration for the $45 million in allowed claims, HarbourVest agreed to sell its interest in HCLOF to Highland (the "HarbourVest Settlement").[24]

Despite Highland's fiduciary obligations to Plaintiffs, Highland concealed the rising value of HCLOF and the Harbourview Interests, as well as the value that it was buying the interest for. It diverted the entire opportunity to participate in this windfall transaction to itself in violation of its fiduciary duties.[25] CLO Holdco filed an objection to the settlement, contending that the HCLOF Member Agreement entitled Holdco to a Right of First Refusal because HarbourVest, as the seller, failed to meet certain conditions precedent before transferring its rights.[26]

At the January 14, 2021, Bankruptcy Rule 9019 hearing to approve the settlement ("9019 Hearing"), HCF's CEO Jim Seery testified under oath that the value allocated to the HarbourVest Interests was $22.5 million—however, it would later be discovered that his testimony was false, and the interest was actually valued at $41,750,000 just two weeks before.[27] In other words, Highland stood to obtain a windfall and its CEO misrepresented the truth under oath. Highland and Seery

[23] AR_000547, Compl. at ¶ 32; AR_0046-64.

[24] AR_000547, Compl. at ¶ 33.

[25] AR_000553, Compl. at ¶ 67

[26] AR_000558-559.

[27] *See, e.g.,* AR_000548, Compl. at ¶¶ 34-37. This will likely be a hotly contested fact at trial, but it was adequately pled here.

engaged in further violations of the Advisers Act, as well as other deceptive acts and practices, such as disposing of assets of its advisee funds and trading on inside information, in order to enrich itself and its creditors at the expense of investors.[28]

The bankruptcy court issued an order approving the HarbourVest Settlement (the "Order"). The sale of the HarbourVest Interests transformed Highland from a minority member with a 0.6% interest into the controlling member with a 50.49% interest.

B. RELEVANT PROCEDURAL HISTORY

The lawsuit was filed in the United States District Court for the Northern District of Texas on April 21, 2021 (Doc. 1). Defendants filed a motion to transfer venue to the Bankruptcy Court invoking the standing order of reference. Doc. 22. Defendants then filed a motion to dismiss under Rule 12(b)6). (Doc. 26).

In the interim, the debtor waived all conditions precedent to the effectiveness of the final plan of reorganization in the bankruptcy, and the plan went effective on or about August 11, 2021. *See In re Highland Capital Management, L.P.*, No. 19-bk-34054, Doc. 2700. The final plan contained an exculpation clause. That plan is on appeal in front of the Fifth Circuit where oral argument was held on March 9, 2022. Plaintiff filed a motion to stay all proceedings in light of the final injunction pending the appeal on the premise that if the injunction means what it says and is

[28] AR_000550 and AR__000560-564, Compl. ¶¶ 54, 113-133.

upheld, any opinion on the merits would be an advisory opinion. (Doc.44).

On September 20, 2021, Judge Boyle transferred the case to the bankruptcy court. The bankruptcy court held a hearing on both the motion to stay and the motion to dismiss on November 23, 2021, and immediately denied the motion to stay.[29] The Court issued its ruling on the motion to dismiss March 11, 2022 (the "Order"). This timely appeal followed.

VI.

STANDARD OF REVIEW

This Court reviews the lower court's grant of a motion to dismiss an adversary proceeding *de novo*. *See In re Entringer Bakeries, Inc.*, 548 F.3d 344, 348 (5th Cir. 2008) (per curiam). Motions to dismiss for failure to state a claim are viewed with disfavor and are seldom granted. *See Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000). "Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain 'a short and plain statement of the claim showing that the pleader is entitled to the relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 677-678 (2009). Rule 8 does not demand "'detailed factual allegations[.]'" *Id*. at 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In ruling upon a Rule 12(b)(6) motion, the Court cannot decide disputed fact issues. In deciding a motion to dismiss,

[29] The Motion to Stay is also on appeal before Judge Godbey. Case No. 3:21-cv-03129-N. Appellants previously filed a motion to consolidate this appeal with that one and send them both to Judge Boyle. *See* Case No. 3:21-cv-03129-N, at Doc. 9; Case No. 3:22-cv-00695-S, at Doc. 8.

this Court must accept all of the plaintiff's "well-pleaded facts as true and view all facts in the light most favorable to the plaintiff." *Thompson v. City of Waco*, 764 F.3d 500, 502-03 (5th Cir. 2014) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). The court may grant a motion under Rule 12(b)(6) *only if* it can determine with certainty that *the plaintiff cannot prove facts that would allow the relief sought* in the complaint. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Scanlan v. Texas A&M Univ.*, 343 F.3d 533, 536 (5th Cir. 2003) (emphasis added).

Turning next to the bases the lower court cited for dismissal.[30]

VII.

ARGUMENTS AND AUTHORITIES

A. THE LOWER COURT ERRED IN DISMISSING THE ADVERSARY ACTION *SUA SPONTE* BASED UPON COLLATERAL ESTOPPEL

1. The Court's *Sua Sponte* Consideration of Collateral Estoppel Violated Fifth Circuit Precedent

The lower court expressly stated that it was taking up the collateral estoppel issue *sua sponte* and so did not have the aid of briefing on the issue.[31] Nothing on the face of Rule 12 allows a bankruptcy or district court to dismiss a claim *sua sponte* for failure to state a claim. The Fifth Circuit has held that while a court may dismiss

[30] The lower court did not rule on any of Appellees' merits-based arguments. To the extent they intend to argue "harmless error," Appellants respectfully rely on and incorporate their briefing to the lower court on those issues and reserve the right to respond in their reply briefing here.

[31] AR_000044.

a claim *sua sponte*, it may only do so if the "procedure employed is fair"–that is, if prior notice is given with adequate time for the plaintiff to prepare a response. *See Carroll v. Fort James Corp.*, 470 F.3d 1171, 1177-78 (5th Cir. 2006) (reversing *sua sponte* dismissal of claim where notice and opportunity to be heard were not afforded) (quoting *Bazrowx v. Scott*, 136 F.3d 1053, 1054 (5th Cir. 1998) (quoting 5A Wright & Miller, FED. PRAC. & P. § 1357, at 301 (2d ed. 1990))).

The lower court relies on *Carbonell v. La. Dep't of Health & Human Res.*, 772 F.2d 185, 189 (5th Cir. 1985) for the proposition that a court may *sua sponte* raise the affirmative defense of *res judicata*. However, even assuming that the Fifth Circuit would extend *Carbonell* to collateral estoppel (which it has not done), nothing in *Carbonell*—and no Fifth Circuit case since—makes an exception to *Carroll* for collateral estoppel or res judicata.

Therefore, the failure of the lower court to give prior notice and an opportunity to dispute the claimed bases for dismissal is reversible error in itself. *See Carroll*, 470 F.3d at 1177-78.[32]

2. The Elements of Collateral Estoppel Cannot Be Met Here

There are four elements for collateral estoppel: "(1) the issue under

[32] Appellees may contend this was harmless error. Whether this is true or not depends on whether they argue that evidence is lacking in the record. While Appellants believe that the arguments herein win the day on collateral estoppel, in the event that Appellees contend that there is evidence missing in the record, and this Court agrees, then clearly the failure to give notice materially prejudiced Appellants, and Appellants would contend that remand is appropriate to develop the factual record before ruling on this premise.

consideration is identical to that litigated in the prior action; (2) the issue was fully and vigorously litigated in the prior action; (3) the issue was necessary to support the judgment in the prior case; and (4) there is no special circumstance that would make it unfair to apply the doctrine." *Copeland, et al. v. Merrill Lynch & Co., et al.*, 47 F.3d 1415, 1422 (5th Cir. 1995) (citing *U.S. v. Shanbaum*, 10 F.3d 305, 311 (5th Cir. 1994)). "[O]ne general limitation the [Supreme] Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case." *Allen v. McCurry*, 449 U.S. 90, 95 (1980). We address the elements in turn.

a) None of the Issues are Clearly Identical

"For an issue to be identical, both the facts and 'legal standard used to assess them' must be identical." *Hamersveld v. Blank*, 3 F.4th 803, 810 (5th Cir. 2021) (emphasis added, citations omitted).

Here, the Objection did not set forth any kind of a "claim" or "cause of action" against the Debtor, Highland.[33] The face of the Objection shows it only addressed whether HarbourVest, another creditor and party to the HCLOF Member Agreement, had performed all conditions precedent to being able to transfer the

[33] *See* AR_004728 to 004737.

interest to Highland *as another co-investor*.[34] Nothing in there suggested a breach of the HCLOF Company Agreement by *Highland* when it transferred to its subsidiary—nor any claim for damages, which is the nature of the claim pled in the Complaint. Thus, CLO Holdco's objection did not bespeak an "identical" claim against Highland (as the co-investor with CLO Holdco) for breach of the HCLOF agreement.

To the extent that the lower court narrowly framed the issue as whether HarbourVest could validly transfer its interest under the HCLOF Member Agreement,[35] it is only Plaintiffs' Second Cause of Action that even arguably relates to this issue.[36] In *Applewood Chair Co. v. Three Rivers Planning & Dev. Dist.*, the Fifth Circuit decided that general language in a bankruptcy court's order overruling or releasing certain claims did not apply to unenumerated claims. 203 F.3d 914, 919 (5th Cir. 2000) (emphasis added).

Thus, even if this one contract issue was fully and vigorously litigated (which it was not), it is not an identical legal or factual issue to the claims for breaches of

[34] AR_004735 ("Harbourvest has not completed its conditions precedent to the transfer of its interest to Transferee under the Member Agreement. As detailed above…Harbourvest must effectuate the Right of First Refusal before it can transfer its interests in HCLOF. Member Agreement § 6.2. Harbourvest is, in essence, bound by the condition precedent in effectuating the Right of First Refusal before it is authorized under the Member Agreement to enter into the Settlement Agreement.").

[35] AR_004735.

[36] *Compare id.* with AR_000557-000559 (Second Cause of Action for Breach of Contract).

fiduciary duty under the Investment Advisers Act of 1940 ("IAA"),[37] negligence,[38] violations of 18 U.S.C. § 1961 et seq.,[39] or tortious interference.[40] Those do not turn on the construction of the HCLOF Member Agreement.

Furthermore, the genesis of the non-contract causes of action were largely based upon violations of the IAA, and other evidence that was not known to Plaintiffs/Appellants at the time of the 9019 hearing.[41] Several of the claims in lawsuit stem from events that either occurred post-hearing, or were not discovered until after that hearing—such as the discovery of Defendants' false statements to the bankruptcy court about the value of the HarbourVest interest, their self-dealing in taking over control of HCLOF, and insider trading.[42] Seery gave false testimony under oath at the 9019 hearing—the truth of the matter was not discovered until after the hearing later.[43] The false and misleading representations as recounted in the IAA

[37] AR_000551-000557 (First Cause of Action for Breach of Advisors Act/Fiduciary Duty).

[38] AR_000559-000560 (Third Cause of Action for Negligence).

[39] AR_000560-000564 (Fourth Cause of Action for RICO violations).

[40] AR_000564-000565 (Fifth Cause of Action for tortious interference).

[41] AR_000548 (Compl. ¶¶ 33-38), AR_000549, Compl. ¶¶ 43-50. While Appellants contend that this basis for dismissal should be reversed, Appellants also recognize that when they discovered or should have discovered certain violations are not expressly pled. These are typically items for discovery (and thus, why the motion to dismiss should be reversed). However, the Complaint refers to the deception in Seery's testimony and other deceptive acts, which were obviously uncovered after he made the false testimony. Furthermore, to the extent such pleading amendments would have cured any such deficiency, amendment should have been allowed.

[42] AR_ 000555, Compl. at ¶¶ 29-52, ¶¶ 75-77); AR_000548 (Compl. ¶¶ 33-38), AR_000549, Compl. ¶¶ 43-50.

[43] *Id.*

Fiduciary Duty count, coupled with other post-9019 hearing acts as alleged in the RICO Count, make it impossible to conclude that these post-hearing acts and omissions were the "identical issue" before the lower court during the 9019 hearing.

Those causes of action raise markedly different legal elements and factual issues from the breach of contract question—ergo, they are not "identical" as required under the first element of collateral estoppel. *See Hammervold*, 3 F.4th at 810.

b) None of the Claims Were "Actually and Vigorously Litigated" nor Could Appellants Have Had a Full and Fair Opportunity to Fully litigate Their Claim as Part of the Rule 9019 Approval Hearing

The requirement that an issue be "actually" and "vigorously litigated" for collateral estoppel purposes "requires that the issue is raised, contested by the parties, submitted for determination by the court, and determined." *In re Keaty*, 397 F.3d 264, 272 (5th Cir. 2005). "An issue is actually litigated if the parties are genuinely adverse to each other on the issue. In short, it cannot be an issue the parties agree on—there needs to be actual conflict." *See Costley v. Richardson*, No. W-14-CA-024, 2014 U.S. Dist. LEXIS 201199, at *5 (W.D. Tex. 2014) (citing *Nevada v. United States*, 463 U.S. 110, (1983)).

First, no one contested the withdrawal of the objection. Therefore, it cannot serve as a predicate for collateral estoppel. The withdrawal is equivalent to the objection not having been asserted in the first place. *Accord Kirschner v. Dondero*

(In re Highland Capital Mgmt., L.P.), Nos. 19-34054-SGJ-11, 3:22-CV-203-S, 21-03076, 2022 Bankr. LEXIS 1028, at *21 (Bankr. N.D. Tex. 2022) (citing cases) (holding that in bankruptcy, claim that is withdrawn is as if it was never brought). Thus, the objection was no longer before the court, and a matter not before the court cannot logically or legally "actually [be] litigated." *Accord In re Teligent*, 417 B.R. at 211. *See also See Chalmers v. Gavin*, 2002 U.S. Dist. LEXIS 5636, 2002 WL 511512, at *3 (N.D. Tex., Apr. 2, 2002) (finding that where previous claims were dismissed without prejudice, that could not be the basis of issue or claim preclusion); *Reynolds v. Tombone*, 1999 U.S. Dist. LEXIS 9995, at *12 and n.5 (N.D. Tex., June 24, 1999) (finding that where prior motion was not adjudicated on the merits it could not serve as basis for preclusion). Thus, there no basis for holding that a *withdrawn* objection can be the basis for preclusion.

The law is also clear that the "actually litigated" standard means "the party against whom the earlier decision is asserted [had] a 'full and fair opportunity' to litigate that issue in the earlier case." *Allen*, 449 U.S. at 95. The lower court correctly explained, in rejecting Appellees' res judicata argument, that

> the Plaintiffs were not provided with procedural mechanisms needed in order to bring their causes of action in the Complaint during the HarbourVest Settlement contested matter…. the procedures of Bankruptcy Rule 9014 do not allow for claims of affirmative relief—whether it be RICO violations, breach of contract, breach of fiduciary duties, or tort claims—to be asserted in response to a Bankruptcy Rule 9019 motion to compromise a

controversy.[44]

The Fifth Circuit has also stated that a Rule 9019 order does NOT involve a trial or even a "mini trial" of the facts or issues. *Official Comm. of Unsecured Creditors v. Moeller (In re Age Ref., Inc.)*, 801 F.3d 530, 541 (5th Cir. 2015). Thus, Fifth Circuit law makes clear that the 9019 process is in itself not a process for a third-party objector to a settlement to "fully and vigorously" litigate their claim. *See* Bankr. R. 9019; *see also In re Texas Extrusion Corp.*, 844 F.2d 1142 (5th Cir. 1988); *see also Conn. Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortg. Corp.)*, 68 F.3d 914, 917 (5th Cir. 1995); *In re Alfonso*, No. 16-51448-RBK, 2019 Bankr. LEXIS 2816, at *8 (Bankr. W.D. Tex. 2019) (bankruptcy court "is to 'canvas the issues' to see if the settlement falls 'below the lowest point in the range of reasonableness.'") (citation omitted). *See Savage & Assocs., P.C. v. Mandl (In re Teligent, Inc.)*, 417 B.R. 197, 211 (Bankr. S.D.N.Y. 2009) *aff'd* 2010 U.S. Dist. LEXIS 49010, at *28-29 (S.D.N.Y. 2010) (even if objection is asserted, a bankruptcy court decision in a 9019 approval order overruling a non-settling creditor's objection cannot collaterally estop that party's causes of action for damages against debtor).[45]

[44] APP_000042-43 (Order at P13-14).

[45] "In determining whether a settlement is fair and equitable, we apply the three-part test set out in *Jackson Brewing* with a focus on comparing "the terms of the compromise with the likely rewards of litigation." A bankruptcy court must evaluate: (1) the probability of success in litigating the claim subject to settlement, with due consideration for the uncertainty in fact and law; (2) the complexity and likely duration of litigation and any attendant expense, inconvenience, and delay; and (3) all other factors bearing on the wisdom of the compromise. These "other" factors—the so-called *Mortgage* factors—include: (i) "**the best interests of the creditors, 'with proper**

At least one other court considered whether collateral estoppel can serve as a basis for precluding a later lawsuit that rests on the same legal basis as a 9019 objection. *In re Teligent, Inc.*, 417 B.R. 197, 211. There, the bankruptcy court held that because the objection was not actually before the court it was not litigated. *Id.* The court concluded that even if it were, it would not have been litigated as part of the 9019 process of ensuring that the settlement "does not fall below the lowest point in the range of reasonableness[,]" because the court could approve the settlement even without litigating the issues raised by objectors. *Id.* Thus, the 'actually litigated' element of collateral estoppel could not be met. *Id.*

Accordingly, here, none of the issues were actually and vigorously litigated, and there is nothing in the record to suggest that they were. Indeed, the lower court's reasoning why none of the noncontract claims could be precluded by res judicata [because there was not a full and fair opportunity to litigate them nor even an opportunity to raise them][46] equally applies to the collateral estoppel element.

c) None of the Issues Were *Necessary* to the 9019 Order

Because the (1) 9019 Order can be approved notwithstanding the merits of any objection or claim, and (2) the lower court's admission that Appellants' claims

---

deference to their reasonable views'"; and (ii) "'the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion." *Official Comm. of Unsecured Creditors v. Moeller (In re Age Ref., Inc.)*, 801 F.3d 530, 540 (5th Cir. 2015) (citations omitted) (bolding added).

[46] AR_000042-44 (Order at P13-15).

for breach of fiduciary duty, RICO, negligence, and tortious interference, could not have even been brought in the 9019 context,[47] there is no basis for concluding that resolution of those claims was "necessary" to the 9019 Order.

d) It Would be Unfair to Apply Collateral Estoppel Here

As already discussed, dismissing on collateral estoppel grounds *sua sponte* without so much as prior notice, was unfair. Also, given the lower court's admission that the 9019 hearing was not even a forum for resolving Appellants' claims on the merits, denying Appellants their day in court would be inequitable.

B. THE LOWER COURT ERRED IN DISMISSING BASED UPON JUDICIAL ESTOPPEL

The burden to prove judicial estoppel is on the party invoking the doctrine. *Smith v. United States*, 328 F.3d 760, 765 (5th Cir. 2003). "Judicial estoppel has three elements: (1) The party against whom it is sought has asserted a legal position that is plainly inconsistent with a prior position; (2) a court accepted the prior position; and (3) the party did not act inadvertently." *Flugence v. Axis Surplus Ins. Co. (In re Flugence)*, 738 F.3d 126, 129 (5th Cir. 2013). Whether judicial estoppel applies is a fact-based inquiry. *See Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 205 (5th Cir. 1999). The Fifth Circuit has noted that the purpose of judicial estoppel is to prevent "debtors or other insiders" from "benefit[ting] to the detriment of creditors." *Id.*

[47] AR_000042 (Order at p. 13 (citing *In re Howe*, 913 F.2d 1138, 1145 (5th Cir. 1990))).

Here, none of these elements of judicial estoppel are met. At its core, the judicial estoppel doctrine does not apply. The Fifth Circuit has explained that it has applied "judicial estoppel to bar an unscheduled claim when others, the debtors or other insiders, would benefit to the detriment of creditors if the claim were permitted to proceed." *See Kane v. Nat'l Union Fire Ins. Co.*, 535 F.3d 380, 386 (5th Cir. 2008). These interests are nowhere implicated here. The Debtor and insiders will not benefit absent application of the estoppel bar to these claims.

To the contrary, the debtor and the Debtor's insiders will reap a windfall if judicial estoppel is applied. That is a wholesale independent reason to reverse.

1. <u>The Bankruptcy Court *Sua Sponte* but Erroneously Relied Upon an Admission</u>

Appellees' underlying Motion to Dismiss raised judicial estoppel arguing simply that (1) "Plaintiffs' current Claims contradict this withdrawal because they are premised on the Debtor's "breach," or violations of, the Plaintiffs' "Right of First Refusal" under the [HCLOF] Member Agreement" and (2) "The Bankruptcy Court, in ruling on the Settlement Motion, necessarily accepted and relied on [CLO Holdco]'s prior position that it was withdrawing any objection premised on the Members Agreement."[48] It did not turn on an any alleged affirmative admission to the court by either Appellant.

[48] Doc. 27 at ¶¶ 24-25.

However, the lower court did not address Appellees' argument whether withdrawing an objection rendered the later assertion of the claim "clearly inconsistent." Instead, the lower court's order on judicial estoppel 100% turned on the following statement attributed to Mr. Kane, then-counsel for CLO Holdco, and made during opening statements in the 9019 Hearing:

> In response to Mr. Morris, I'm not going to enter into a stipulation on behalf of my client, ***but the Debtor is compliant with all aspects of the contract***. We withdrew our objection, and we believe that's sufficient.[49]

The "response to Mr. Morris" was referring to the request by Debtor's counsel just prior for this stipulation:

> I would respectfully request that we just enter into a short stipulation on the record reflecting that the Debtor's acquisition of Harbourvest's interests in HCLOF is compliant with all of the applicable agreements between the parties.[50]

Appellee's motion to dismiss under Rule 12(b)(6) did not raise this transcription, did not cite to the language, nor did it focus on the line that the lower court did—the seeming admission by Mr. Kane that "but the Debtor is compliant with all aspects of the contract."[51] Appellees simply cited to the Court's "acceptance" of it far later on in the transcript.[52]

---

[49] *See* AR_000053 (Order) (bolding and italics in original) and AR_001020 (Tr. Of Hearing).

[50] AR_001020.

[51] *See* AR_000053.

[52] Doc. 27 at ¶¶ 23-26.

The first time the above language was ever mentioned in connection with the judicial estoppel concept was in the Order itself, *sua sponte* raised by the lower court.[53] The lower court focused on—even bolding—the portion that read: "but the Debtor is compliant with all aspects of the contract."[54] This, the lower court reasoned, was an admission, and the assertion of a breach of contract claim contending the opposite to be true was "clearly inconsistent."

Not having had any prior notice of the argument, nor having had the opportunity to do any discovery prior to receiving the Order, Appellants requested the original recording of the hearing in the process of preparing this briefing. The recording was delivered on May 25, 2022, and a corrected transcript is to be issued. The original recording of the 9019 hearing makes clear that Mr. Kane actually said:

> In response to Mr. Morris, I'm not going to enter into a stipulation on behalf of my client **THAT** the Debtor is compliant with all aspects of the contract. We withdrew our objection, and we believe that's sufficient.[55]

The corrected rendition makes a lot more sense than the original, and the recording of the hearing bears it out 100%. People make mistakes. Currently pending is a motion to supplement the appellate record.

The transcription error is highly consequential. Although even without the

[53] *See* AR_000053.

[54] *Id.*

[55] *See* Ex. A hereto (corrected transcript at p. 17) (emphasis added).

correction it is clear that Mr. Kane made no admission *on behalf of CLO Holdco* that the Harbourvest assignment was compliant (he expressly disclaimed making any such representation), the correction completely negates the lower court's finding that there even was an admission in the first place. Therefore, because there is no judicial admission as the lower court found *sua sponte*, there is no "clearly contradictory" position taken in the current lawsuit. The lower court's Order on judicial estoppel must be reversed.

For the sake of completeness, we address Appellants' original argument.

2. Withdrawing the Objection Was Not "Clearly Inconsistent" With Bringing a Claim

The first element of judicial estoppel is that the earlier position must be "clearly inconsistent" with the later one. *See New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (citing, *inter alia*, *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 206 (5th Cir. 1999)).

Nor can it be that the withdrawal of the objection was tantamount to a statement that the objection was meritless when filed. Indeed, Mr. Kane *rejected* that implication by refusing the proffered stipulation.

Thus, the question is whether the mere withdrawal—or non-assertion of—a 9019 objection is tantamount to a representation to the court that the objector has no causes of action whatsoever. This turns on whether there was an affirmative duty on the part of Appellants as creditors to disclose all of their causes of action and bring

them in the 9019 proceeding. No such duty exists.

While the Fifth Circuit has held that a *debtor* may be judicially estopped from bringing a claim that was not disclosed on its mandatory disclosure schedules under 11 U.S.C. § 521 and § 541, *see United States ex rel. Bias v. Tangipahoa Par. Sch. Bd.*, 766 F. App'x 38, 41 (5th Cir. 2019), there is no equivalent rule for creditors.

Indeed, the Fifth Circuit has expressly held, because of the "quick" and non-adversarial nature of a 9019 hearing, non-settling creditors are not even entitled to bring claims for damages in a 9019 hearing. *See In re Howe*, 913 F.2d 1138, 1145 (5th Cir. 1990) (and authorities cited).[56]

Therefore, because there was no duty for Appellants to bring any of their claims or lodge any objection to the 9019 in the first place, there is no basis for finding a "clearly inconsistent" position between Appellants' 9019 inaction and this lawsuit.

3. There Was No Acceptance by the Bankruptcy Court

The lower court's Order purported to accept Mr. Kane's alleged—and now retracted—judicial admission. Absent that, there is no record of any "acceptance" of any position or admission. Moreover, this element is only met where the party

[56] This squares with those cases applying judicial estoppel to non-debtors in the 9019 context, which only did so to preclude the settling-creditor; none applied it to a potential objecting creditor. *See, e.g., NGM Ins. Co. v. Bexar Cty.*, 211 F. Supp. 3d 923, 929-30 (W.D. Tex. 2016); *Revocable Living Tr. v. Mukamal (In re Palm Beach Fin. Partners, L.P.)*, 527 B.R. 518, 524-25 (S.D. Fla. 2015).

successfully "convinced" the lower court to accept its position. *See Harrison Co. LLC v. A-Z Wholesalers, Inc.*, No. 3:19-CV-1057-B, 2021 U.S. Dist. LEXIS 44534, at *18 (N.D. Tex. 2021) ("'[T]wo bases for judicial estoppel must be satisfied before a party can be estopped. First, it must be shown that the position of the party to be estopped is clearly inconsistent with its previous one; and second, that party must have ***convinced*** the court to accept that previous position.'") (quoting *Hall v. GE Plastic Pac. PTE Ltd.*, 327 F.3d 391, 396 (5th Cir. 2003)) (emphasis added). *See also New Hampshire*, 532 U.S. at 750-51 ("Absent success in a prior proceeding, a party's later inconsistent position introduces no 'risk of inconsistent court determinations,' and thus poses little threat to judicial integrity.") (quoting *United States* v. *C.I.T. Constr. Inc.*, 944 F.2d 253, 259 (5th Cir. 1991)).

So, what did Appellants "convince" the bankruptcy court of? Appellees never say.

There is no logical way to claim that Appellants "convinced" the bankruptcy court that their position was meritless simply by withdrawing the objection (and refusing to stipulate that their objection was essentially wrong-headed). As already discussed, when approving a settlement under Rule 9019, the bankruptcy court is not even attempting to rule on the merits of any third-party claim or objection. *Moeller*, 801 F.3d at 541; *In re Alfonso*, 2019 Bankr. LEXIS 2816, at *8. The bankruptcy court has *discretion* to approve the settlement notwithstanding an

objection—even one that is wholly meritorious—if the court decides that the benefits of settlement outweigh the objections. *See* Fed. R. Bankr. 9019; *In re Texas Extrusion Corp.*, 844 F.2d at 1145; *In re Foster Mortg. Corp*, 68 F.3d at 917.

Accordingly, this element cannot be met.

4. Appellants' Lack of Knowledge of Critical Facts Until After the Approval Hearing Means that Any Inconsistency is "Inadvertent"

It is established law in the Fifth Circuit that if a party did not have knowledge of the facts giving rise to the claim at the time of the prior decision, or have no pecuniary reason to not bring their claims at the time, then any inconsistency is "inadvertent," and judicial estoppel does not apply. *See Browning*, 179 F.3d at 210 ("Our review of the jurisprudence convinces us that, in considering judicial estoppel for bankruptcy cases, the debtor's failure to satisfy its statutory disclosure duty is 'inadvertent' only when, in general, the debtor either lacks knowledge of the undisclosed claims *or* has no motive for their concealment.").

Here, Appellees did not even attempt to meet this element in their briefing. Nor did the lower court. As already discussed above, not only did Plaintiffs not have knowledge of the bases of several of their claims prior to the 9019 hearing, certain of their claims only arose because of and after the 9019 hearing. At the hearing, Jim Seery gave false testimony under oath about the value of the HarbourVest interest

by saying it was worth $22.5 million,[57] when in fact it was worth substantially more (almost double), thus diverting a valuable corporate opportunity to Highland.[58] He would have had to have produced a valuation, and that said valuation would have shown that in January 2021, the value of the interests had doubled as compared to four or five months prior.[59] The truth was not uncovered until after the false testimony was given.[60] Therefore, the true value of the asset as reflected in the motion papers and in Mr. Seery's testimony was intentionally concealed.[61] Furthermore, since the Seery testimony, Highland has committed several violations of various statutes—and several more since Appellants have had the chance to amend their pleadings—all amounting to an enterprise actionable under the RICO statutes.[62]

Appellees' implied position that this was all knowable prior to the 9019 hearing is preposterous and a question for discovery—Appellants do not have a

[57] AR_000547, Compl. at ¶ 32; AR_0046-64.

[58] AR_000553, Compl. at ¶ 67.

[59] AR_000549-550, and 554, Compl. ¶¶ at 43-47, 71-76.

[60] AR_000549-550, and 554, Compl. ¶¶ at 43-47, 71-76; *see also* AR_000551-557 (Fiduciary Duty allegations); AR_000559-564 (RICO allegations);

[61] *See* AR_000542 Compl. p. 2 ("Defendants are liable for a pattern of conduct that gives rise to liability for their conduct of the enterprise consisting of HCM in relation to HCFA and HCLOF, through a pattern of concealment, misrepresentation, and violations of the securities rules. In the alternative, HCFA and HCM, are guilty of self-dealing, violations of the Advisers Act, and tortious interference by (a) not disclosing that Harbourvest had agreed to sell at a price well below the current NAV, and (b) diverting the Harbourvest opportunity to themselves.").

[62] AR_000559-564.

crystal ball to divine the myriad ways that Appellees will violate federal law. All of these allegations are well pleaded. And the lower court had the duty to credit them as true at the 12(b)(6) stage.

Moreover, because Appellants could not have brought their claims in the 9019, their failure to do so is not "concealing" anything, and there is nothing in the record to show that Appellants had anything to gain by "concealing" their claims. Neither Appellant could have litigated them in the 9019 hearing. Therefore, there is no basis for judicial estoppel.

VIII.

MOTION FOR LEAVE TO AMEND

In their response to the Motion to Dismiss, Appellants requested leave to amend which was not granted. Plaintiffs respectfully submit that to the extent the Court determines that any allegation falls short, leave to amend should have been granted. It would be the first amendment and thus, no prejudice would inure.

IX.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court reverse the dismissal of the action and remand for further proceedings.

Dated: May 26, 2022

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti
Texas Bar No. 24058096
Jonathan Bridges
Texas Bar No. 24028835
JPMorgan Chase Tower
2200 Ross Avenue – Suite 4900W
Dallas, TX 75201
T: (214) 432-2899
F: (214) 853-4367
E: mas@sbaitilaw.com
jeb@sbaitilaw.com

Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on counsel for Appellees via the Court's CM/ECF system on this 26th day of May, 2022.

/s/ Mazin A. Sbaiti
Mazin A. Sbaiti

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the type-volume limitations of Federal Rule of Bankruptcy Procedure ("Rule") 8015(h) as it contains 6,958 words, excluding the portions of the document exempted by Rule 8015(g).

I further certify that this document complies with the typeface requirements of Rule 8015(a)(5) and the type-style requirements of Rule 8015(a)(7)(B) because it has been prepared in a proportionally-spaced typeface using Microsoft Word in 14 point Times New Roman.

/s/ Mazin A. Sbaiti
Mazin A. Sbaiti

Amended 05/26/2022

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

In Re:	**Case No. 19-34054-sgj-11**
	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	Dallas, Texas
	Thursday, January 14, 2021
	9:30 a.m. Docket
Debtor.	
	- MOTION TO PREPAY LOAN [1590]
	- MOTION TO COMPROMISE CONTROVERSY [1625]
	- MOTION TO ALLOW CLAIMS OF HARBOURVEST [1207]

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

WEBEX APPEARANCES:

For the Debtor:	Jeffrey Nathan Pomerantz PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 13th Floor Los Angeles, CA 90067-4003 (310) 277-6910
For the Debtor:	John A. Morris Gregory V. Demo PACHULSKI STANG ZIEHL & JONES, LLP 780 Third Avenue, 34th Floor New York, NY 10017-2024 (212) 561-7700
For the Official Committee of Unsecured Creditors:	Matthew A. Clemente SIDLEY AUSTIN, LLP One South Dearborn Street Chicago, IL 60603 (312) 853-7539
For CLO Holdco, Ltd.:	John J. Kane KANE RUSSELL COLEMAN LOGAN, P.C. 901 Main Street, Suite 5200 Dallas, TX 75202 (214) 777-4261

APPEARANCES, cont'd.:

For James Dondero:	John T. Wilson D. Michael Lynn John Y. Bonds, III Bryan C. Assink BONDS ELLIS EPPICH SCHAFER JONES, LLP 420 Throckmorton Street, Suite 1000 Fort Worth, TX 76102 (817) 405-6900
For Get Good Trust and Dugaboy Investment Trust:	Douglas S. Draper HELLER, DRAPER & HORN, LLC 650 Poydras Street, Suite 2500 New Orleans, LA 70130 (504) 299-3300
For HarbourVest, et al.:	Erica S. Weisgerber M. Natasha Labovitz Daniel E. Stroik DEBEVOISE & PLIMPTON, LLP 919 Third Avenue New York, NY 10022 (212) 909-6621
For Highland CLO Funding, Ltd.:	Rebecca Matsumura KING & SPALDING, LLP 500 West 2nd Street, Suite 1800 Austin, TX 78701 (512) 457-2024
Recorded by:	Michael F. Edmond, Sr. UNITED STATES BANKRUPTCY COURT 1100 Commerce Street, 12th Floor 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.

and the Court is here to assess the Debtor's business judgment and whether the Debtor has properly analyzed the issues and gone through the process. And the evidence will show conclusively that it will. That it has.

Mr. Seery will testify at some length as to the risks that he saw. I think that you'll hear counsel for Mr. Dondero ask both Mr. Seery and Mr. Pugatch a number of questions designed to elicit testimony about this defense or that defense. And it's a little -- it's a little ironic, Your Honor, because, really, every defense that they're going to try to suggest to the Court was a valid defense is a defense that the Debtor considered. In fact, it's, you know, it's a little spooky, how they've -- how they've been able to identify kind of the arguments that the Debtor had already considered in the prosecution of their objections here.

But be that as it may, the evidence will conclusively show that the Debtor acted consistent with its fiduciary duties, acted in the best interests of the Debtor's estate, acted completely appropriately here in getting yet another very solid achievement for the Debtor, leaving very few claims that are disputed at this point, all but one of which I believe are in the hands of Mr. Dondero.

So, that's what we think that the evidence will show.

I do want to express my appreciation to Mr. Kane for reflecting on the arguments that we made with respect to the

ability of the Debtor to engage in the transfer or the acquisition of the asset from HarbourVest. I would -- I would respectfully request that we just enter into a short stipulation on the record reflecting that the Debtor's acquisition of HarbourVest's interests in HCLOF is compliant with all of the applicable agreements between the parties.

And with that, Your Honor, I look forward to putting Mr. Seery on the stand and presenting the Debtor's case.

THE COURT: All right. Other opening statements?

OPENING STATEMENT ON BEHALF OF CLO HOLDCO, LTD.

MR. KANE: Yes, Your Honor. Sorry. John Kane on behalf of CLO Holdco.

In response to Mr. Morris, I'm not going to enter into a stipulation on behalf of my client that the Debtor is compliant with all aspects of the contract. We withdrew our objection, and we believe that's sufficient.

THE COURT: All right. Well, I'm content with that.

Other opening statements?

OPENING STATEMENT ON BEHALF OF HARBOURVEST

MS. WEISGERBER: Your Honor, Erica Weisgerber on behalf of HarbourVest.

HarbourVest joins in Mr. Morris's comments in support of the settlement, and we believe that the question of whether the settlement between HarbourVest and the Debtor satisfies the Rule 9019 standard is not even a close one.

MR. BONDS: Thank you, Your Honor.

(Proceedings concluded at 2:04 p.m.)

--oOo--

CERTIFICATE

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

/s/ Kathy Rehling **01/16/2021**

/s/ Kathy Rehling **As Amended 05/26/2022**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber