
Case No. 24-10287

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

IN RE HIGHLAND CAPITAL MANAGEMENT, L.P.

**JAMES DONDERO; HIGHLAND CAPITAL MANAGEMENT FUND
ADVISORS, L.P.; the DUGABOY INVESTMENT TRUST; GET GOOD
TRUST; and NEXPOINT REAL ESTATE PARTNERS, LLC,**

Appellants

v.

JUDGE STACEY G. JERNIGAN,

Appellee

On Appeal from the United States District Court for the Northern District of
Texas, Dallas Division
No. 3:23-CV-0726-S
Hon. Karen Gren Scholer, District Judge

**OBJECTION TO MOTION FOR THE COURT TO TAKE JUDICIAL
NOTICE**

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that:

- (a) There are no other debtors associated with this bankruptcy case other than Highland Capital Management L.P., and there are no publicly held corporations that own 10% or more of Highland Capital Management L.P., which is not a corporation and which is not a parent corporation;
- (b) That the following listed persons and entities, as described in the fourth sentence of Rule 28.2.1, have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

1. **Appellants:**

James Dondero
Get Good Trust
Highland Capital Management Fund Advisors, L.P.
NexPoint Real Estate Partners, L.L.C.
The Dugaboy Investment Trust

Counsel for Appellants:

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2. **Appellees:**

The Honorable Stacey G. C. Jernigan, United States Bankruptcy Court for the Northern District of Texas

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PRELIMINARY STATEMENT¹

Appellants appeal an order issued by the United States District Court for the Northern District of Texas (the “District Court”) denying their petition for a writ of mandamus. On June 17, 2024, Appellants filed their opening brief and record on appeal and a separate *Motion for the Court to Take Judicial Notice* [ECF Nos. 33 and 34] (the “Motion”) of the *contents* of certain documents (the “Additional Documents”).² The Motion should be denied with respect to the Contested Documents or, alternatively, the Previously Existing Documents.³

Federal Rule of Evidence 201(b)(2)—the rule upon which Appellants rely—permits courts to take judicial notice of “fact[s] that [are] not subject to reasonable dispute because” the facts “can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned.” The Contested Documents fail to meet this standard because their contents are disputed and do not constitute the type

¹ Capitalized terms not defined in this Preliminary Statement shall have the meanings ascribed to them below.

² The Additional Documents are identified in the chart annexed hereto as **Exhibit A**. Whether by design or neglect, Appellants failed to describe the Additional Documents or disclose the dates they were filed. This information is dispositive because it shows that many of the documents (a) are disputed pieces of advocacy, (b) were available to Appellants before they filed the underlying motion to recuse but are not part of the appellate record, or (c) both. Appellants also inexplicably failed to identify the portions of their brief that discuss the Additional Documents, placing the burden for doing so on Appellee and the Court. For the avoidance of doubt, the Court should respectfully strike or disregard Appellants’ arguments that rely on any of the Additional Documents that are not judicially noticed.

³ Upon further review, Appellee does not object to the Court taking judicial notice of the judgments and orders identified as documents 9, 10 and 13 on **Exhibit A**.

of “facts” the accuracy of which “cannot reasonably be questioned.” Moreover, because many of the Additional Documents were filed before the underlying recusal motion was determined by the Bankruptcy Court and could easily have been included in the record below had Appellants thought to do so, the request for judicial notice of those documents constitutes an improper attempt to supplement the record.

ARGUMENT

A. This Court Cannot Take Judicial Notice of Disputed Facts

Appellants ask this Court to take judicial notice of the Additional Documents because “judicial notice of the *contents* of the pleadings, orders, and transcripts is important to appellate review in this case because these records illustrate why the Dondero Parties’ recusal efforts were timely and help put the presiding bankruptcy judge’s comments and actions into context.” Motion at 6 (emphasis added). But this is not the basis for judicial notice; rather this Court can only take judicial notice of “a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned.” FED. R. EVID. 201(e)(2) (“Rule 201”).

Thus, while a litigant might be permitted to include court documents as proof that litigation has taken place or was pending, this Court will generally not “take notice of findings of fact from other proceedings for the truth asserted therein because these findings are disputable and are usually disputed.” *Giles v. City of*

Dallas, 539 F. App'x 537, 542 n.1 (5th Cir. 2013); *see also SB Int'l, Inc. v. Jindal*, 2007 U.S. Dist. LEXIS 34999, at *6 (N.D. Tex. May 14, 2007) (“court concludes that any ‘facts’ contained in the petitions, counterclaims, and motion are subject to reasonable dispute and, therefore, not appropriate for judicial notice”) (citing *Taylor v. Charter Med. Corp.*, 162 F.3d 827, 830 (5th Cir. 1998)).

Here, Additional Documents 1-8, 11-12, and 14-15 (collectively, the “Contested Documents”) are advocates’ pleadings, legal briefs, and oral arguments, the contents of which were vigorously disputed.

The inclusion of Additional Documents 14 and 15 is particularly egregious because they concern a *separate, subsequent* recusal motion that was filed in an unrelated adversary proceeding that was consensually stayed (and remains stayed)⁴ before HCMLP objected or the Bankruptcy Court ruled on the motion.⁵

⁴ Additional Documents 14 and 15 were filed in Adversary Proceeding No. 21-03076-sgj, Docket Nos. 309 and 310. After the parties filed competing motions for a stay (*see* Adv. Pro. Nos. 21-03076-sgj, Docket Nos. 324 and 329), and after holding a hearing, the Bankruptcy Court entered an order staying “the Adversary Proceeding, **including the Motion to Recuse Pursuant to 18 U.S.C. §§ 144 and 455 [Dkt. No. 309].**” *Order Granting the Litigation Trustee’s Motion to Stay the Adversary Proceeding* [Adv. Pro. Nos. 21-03076-sgj, Docket Nos. 338 ¶2] (emphasis added).

⁵ In addition to being improper under Rule 201, it would be prejudicial to effectively permit Appellants to exceed the page limits by adding another brief to the record.

None of the Contested Documents are documents “the accuracy of which cannot be reasonably questioned.” FED. R. EVID. 201(e)(2).⁶ The Motion should therefore be denied with respect to the Contested Documents.⁷

B. Appellants Cannot Rely on Rule 201 to Supplement the Appellate Record with Documents That Existed Before the Recusal Motion Was Determined but Were Never Considered by the Lower Courts

Additional Documents 1 through 8 existed before the underlying motion was determined but were not presented to, or considered by, the lower courts and are not part of the appellate record (the “Previously Existing Documents”). Thus, with

⁶ None of the cases cited by Appellants stand for the proposition that courts can take judicial notice of disputed “facts.” Instead, the cases stand for the unremarkable proposition that, pursuant to Rule 201, this Court may take judicial notice of official public records under circumstances not present here. For example, in *United States v. Hawkins*, 566 F.2d 1006, 1008 n.2 (5th Cir. 1978), a case challenging the method of jury selection, the court took judicial notice of the terms of a plan for the random selection of jurors that the United States District Court for the Southern District of Mississippi had adopted. In *NCBN Tex. Nat’l Bank v. Johnson*, 11 F.3d 1260, 1263 n.2 (5th Cir. 1994), the court took judicial notice of certain documents contained in the record on appeal in a companion case; here, none of the Additional Documents were filed in a related appeal. *See also Tejas Motel, L.L.C v. City of Mesquite*, 63 F.4th 323, 328-29 and n. 10 (5th Cir. 2023) (while the court took judicial notice “that there had been some activity back in state court” there was no indication that the contents of state court pleadings were offered for the truth of the facts asserted therein); *United States v. Hernandez-Adame*, 2023 U.S. App. LEXIS 7471, at *3 (5th Cir. Mar. 29, 2023) (request for judicial notice unopposed); *Colonial Oaks Assisted Living Lafayette, L.L.C. v. Hannie Dev., Inc.*, 972 F.3d 684, 688 n.9 (5th Cir. 2020) (“[w]e may take judicial notice of matters of public record [such as arbitrator’s interim order] **when ruling on a 12(b)(6) motion**”) (emphasis added); *Halo Wireless Inc., v. Alenco Commc’ns Inc. (In re Halo Wireless, Inc.)*, 684 F.3d 581, 596 (5th Cir. 2012) (court took judicial notice of federal and state commission proceedings; no indication that the documents were subject to dispute); *Gibson v. Blackburn*, 744 F.2d 403, 405 n.3 (5th Cir. 1984) (case not decided on Rule 201 grounds; rather, in habeas corpus case regarding pretrial identification process, court permitted consideration of photo used in photo display that had not been added to the district court record until after entry of judgment, and the court exercised discretion in the interests of justice and efficient use of judicial resources to consider the photograph rather than remanding to district court).

⁷ Appellee reserves the right to seek judicial notice of its related pleadings, legal briefs, and oral arguments to the extent the Motion is granted.

respect to the Previously Existing Documents, the Motion is a transparent and improper attempt to supplement the record under the guise of Rule 201.

The Fifth Circuit has previously held that a request that an appellate court take judicial notice of matters that were available to a litigant in the court below but not included in the appellate record constitutes “an impermissible attempt to supplement the record on appeal.” *United States v. Okoronkwo*, 46 F.3d 426, 435 (5th Cir. 1995) (denying request to take judicial notice of newspaper article where neither that article nor any other evidence of pretrial publicity was presented in the lower court); *see also Bd. of Miss. Levee Comm’rs v. United States EPA*, 674 F.3d 409, 417 n.4 (5th Cir. 2012) (“party cannot avoid the rule against supplementing the record with a document not before the district court by requesting that appellate court take judicial notice of the document”); *Brown v. Builders Transp. Inc.*, No. 97-10717, 1998 U.S. App. LEXIS 40904, at *9 (5th Cir. Feb. 26, 1998) (refusing to take judicial notice of facts which were available to the party during pendency of summary judgment motion in the court below).⁸

⁸ Nor can Appellants rely on Rule 10(e) of the Federal Rules of Appellate Procedure; that rule permits correction or modification of the record on appeal only if something “material in the record was omitted from or misstated in the record by error or accident.” *United States v. Page*, 661 F.2d 1080, 1082 (5th Cir. 1981); *see also Ascension Data & Analytics, LLC v. Pairprep, Inc.*, No. 23-11026, 2024 U.S. App. LEXIS 2422, at *2-3 (5th Cir. Feb. 1, 2024) (rule only permits court to grant a motion to supplement the record if anything material to either party is omitted from or misstated in the record by error or accident) (citations omitted). Appellants offer no basis for the application of this rule.

Appellants did not rely on the Previously Existing Documents when making the underlying motion. The lower courts did not consider the Previously Existing Documents when deciding the underlying motion and subsequent appeal. And the Previously Existing Documents are not part of the record on appeal. Having previously decided not to present these documents to the lower courts or seek to include them in the appellate record, Appellants should not be permitted to supplement the record at this juncture.

CONCLUSION

For the foregoing reasons, Appellee respectfully requests that the Motion be denied with respect to the Contested Documents (or, alternatively, the Previously Existing Documents), and that the Court grant such other and relief as it deems appropriate under the circumstances.

Dated: June 27, 2024

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT,
TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS**

1. This objection complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because it contains 2,291 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the objection exempted by Fed. R. App. P. 27(d)(2).

2. This objection complies with the typeface and type style requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

/s/ Zachery Z. Annable
Zachery Z. Annable

*Counsel for Appellee Highland Capital
Management, L.P.*

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2024, an electronic copy of the foregoing Objection was filed with the Clerk of Court for the U.S. Court of Appeals for the Fifth Circuit, using the appellate CM/ECF system. I further certify that all parties in the case are represented by lead counsel who are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Zachery Z. Annable
Zachery Z. Annable

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EXHIBIT A

Number	Docket Entry	Description	Date
1	Highland Bankruptcy Docket Entry 617	James Dondero's Limited Response to Acis Capital Management, L.P and Acis Capital Management GP, LLC's Motion for Relief from the Automatic Stay to Allow Pursuit of Motion for Order to Show Cause for Violations of the Acis Plan Injunction	May 1, 2020
2	Highland Bankruptcy Docket Entry 771	Objection to Proof of Claim of Acis Capital Management L.P. and Acis Capital Management GP, LLC	June 3, 2020
3	Highland Bankruptcy Docket Entry 827	James Dondero's (i) Objection to Proof of Claim of Acis Capital Management, L.P. and Acis Capital Management GP, LLC; and (ii) Joinder in Support of Highland Capital Management, L.P.'s Objection to Proof of Claim of Acis Capital Management L.P. and Acis Capital Management GP, LLC	July 13, 2020
4	Highland Bankruptcy Docket Entry 832	Response of James Dondero to the Official Committee of Unsecured Creditors' Emergency Motion to Compel Production by the Debtor	July 14, 2020
5	Highland Bankruptcy Docket Entry 1121	James Dondero's Response to Debtor's Motion for Entry of an Order Approving Settlement with (a) Acis Capital Management, L.P. and Acis Capital Management GP LLC (Claim No. 23), (b) Joshua N. Terry and Jennifer G. Terry (Claim No. 156), and (c) Acis Capital Management, L.P. (Claim No. 159), and Authorizing Actions Consistent Therewith	October 5, 2020

Number	Docket Entry	Description	Date
6	Highland Bankruptcy Docket Entry 3519	Transcript Regarding Hearing Held September 12, 2022 re (1) Motion to Withdraw Proof of Claim for NexPoint Real Estate Partners, LLC re: Claim No. 146 and (2) Motion to Compel Discovery Depositions	September 14, 2022
7	Highland Bankruptcy Docket Entry 3541	Renewed Motion to Recuse Pursuant to 28 U.S.C. § 455	September 27, 2022
8	Highland Bankruptcy Docket Entry 3542	Movants' Memorandum of Law in Support of Renewed Motion to Recuse Pursuant to 28 U.S.C. § 455	September 27, 2022
9	Highland Bankruptcy Docket Entry 4038	Memorandum Opinion and Order Granting Highland Capital L.P.'s Motion for (A) Bad Faith Filing Finding and (B) Attorneys Fees Against NextPoint Real Estate Partners LLC (f/k/a HRCE Partners LLC) in Connection with Proof of Claim #146	March 5, 2024
10	Highland Bankruptcy Docket Entry 4039	Judgement on Highland Capital L.P.'s Motion for (A) Bad Faith Filing Finding and (B) Attorneys Fees Against NextPoint Real Estate Partners LLC (f/k/a HRCE Partners LLC) in Connection with Proof of Claim #146	March 5, 2024
11	Highland Bankruptcy Docket Entry 4040	Motion for Relief from Order	March 18, 2024
12	Highland Bankruptcy Docket Entry 4041	Memorandum of Law in Support of Motion for Relief from Order	March 18, 2024
13	Highland Bankruptcy Docket Entry 4069	Order Denying Motion of NexPoint Real Estate Partners, LLC (f/k/a/ HCRE Partners, LLC) Seeking Relief from Order Pursuant to Fed. R. of Bankr. P. 9024 and Fed. R. Civ. P. 60(b)(1) and (6).	May 21, 2024

Number	Docket Entry	Description	Date
14	Kirschner v. Dondero, et al. Case No. 3:21-03076-sgj (Bankr. N.D. Texas) Dkt. No. 309	Motion to Recuse Judge Jernigan Filed by Defendant Highland Capital Management Fund Advisors, L.P.	February 27, 2023
15	Kirschner v. Dondero, et al. Case No. 3:21-03076-sgj (Bankr. N.D. Texas) Dkt. No. 310	Brief in Support of Motion to Recuse Judge Jernigan Filed by Defendant Highland Capital Management Fund Advisors, L.P.	February 27, 2023