

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

**REPLY IN SUPPORT OF MOTION FOR THE COURT TO TAKE
JUDICIAL NOTICE**

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INTRODUCTION

It is unclear why Highland Capital Management, L.P. (“Highland”) opposes Appellants’ Motion for the Court to Take Judicial Notice. Highland argues that the Contested Documents¹ are “disputed” and are not the type of documents subject to judicial notice. Objection to Motion for the Court to Take Judicial Notice [ECF No. 40] (“Obj.”) at 3–4. But Highland does not identify what facts it disputes, nor does it provide any other basis to question the Contested Documents’ accuracy.

Highland’s opposition is all the more perplexing because the Dondero Parties do not offer the Contested Documents to prove the truth of anything contained in those documents. Rather, the Contested Documents show, for example, when documents were filed and by whom. This Court has taken judicial notice of similar documents for the very same purpose on multiple occasions and should do so again here.

ARGUMENT

“[I]t is within the Court’s discretion to take judicial notice of information ‘capable of accurate and ready determination by resort to a source whose accuracy on the matter cannot reasonably be questioned,’”

¹ “Contested Documents” is the term given by Highland to Exhibits 1–8, 11–12, and 14–15 to Appellants’ Motion for the Court to Take Judicial Notice [ECF No. 33.]

such as “copies of publicly-available orders and proceedings” from federal and state courts. *In re Halo Wireless, Inc.*, 684 F.3d 581, 596–97 (5th Cir. 2012) (taking “judicial notice of federal court and state commission proceedings and orders that have been referenced and/or discussed in the parties’ briefing”). To this end, a “court may . . . take judicial notice of its own records or of those of inferior courts.” *In re Deepwater Horizon*, 934 F.3d 434, 440 (5th Cir. 2019) (quoting *ITT Rayonier Inc. v. United States*, 651 F.2d 343, 345 n.2 (5th Cir. 1981)). Bankruptcy records, specifically, are public records appropriate for judicial notice. *PNC Bank, Nat’l Ass’n v. Ruiz*, 2023 WL 3340078, at *4 (5th Cir. May 10, 2023) (“[A]ll bankruptcy records are a matter of public record.”). Even where a publicly available document is not admitted into evidence in the lower court, this Court may take judicial notice “to determine simply what the document contains.” *Kiger v. Doucet & Adams, Inc.*, 209 F.3d 719 (5th Cir. 2000) (“Whether or not the Corps Manual was placed in evidence in the district court, it was discussed by the court and we take judicial notice of it as a public document.”).

The Court has authority to take judicial notice even where an opposing party argues that the documents “come from outside the

record,” were not considered by the lower court, or where judicial notice would “circumvent judicial rules regarding record excerpts and record supplementation.” *See In re Halo*; 684 F.3d at 596; *cf. United States v. Huntsberry*, 956 F.3d 270, 284 (5th Cir. 2020 (“An appellate court may take judicial notice of facts, even if such facts were not noticed by the trial court.”) (quoting *United States v. Herrera-Ochoa*, 245 F.3d 495, 501 (5th Cir. 2001)); *see also United States v. Pinson*, 584 F.3d 972, 979 n.1 (10th Cir. 2009) (taking judicial notice of motion and order “not originally included in the record on appeal”).

The Dondero Parties moved for judicial notice of 15 documents, all of which are on file with—and publicly available from—the Bankruptcy Court. Appellants’ Motion for the Court to Take Judicial Notice [ECF No. 33] (“Mot.”) at 9; Mot. at Exs. 1–15. Of those, Highland opposes 12, *i.e.*, the Contested Documents. Obj. at 1 n.3. The Contested Documents fall into four categories:

- Exhibits 1–5 (the “James Dondero Filings”).
- Exhibits 14–15 (the “Kirschner Filings”).
- Exhibits 6, 11, and 12 (the “Withdrawal Documents”).
- Exhibits 7–8 (the “Renewed Motion to Recuse”).

As discussed further below, each category consists of exactly the type of facts appropriate for judicial notice.

A. The Dondero Parties Do Not Offer the Contested Documents in Support of Disputed Facts

Highland is correct that the Court cannot take notice of disputed facts, but the Dondero Parties do not offer the Contested Documents to prove any disputed facts. “It is well-settled that courts may judicially notice court records as evidence of judicial actions.” *Huntsberry*, 956 F.3d at 285 (citing 21B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 5106.4 (2d ed. 2019)). Moreover, a “court may take judicial notice of the record in prior related proceedings, and draw reasonable inferences therefrom.” *Chevron Oronite Co., L.L.C. v. Jacobs Field Servs. N. Am., Inc.*, 951 F.3d 219, 229 n.14 (5th Cir. 2020) (quoting *Wilson v. Huffman (In re Missionary Baptist Found. of Am.)*, 712 F.2d 206, 211 (5th Cir. 1983)).

Even the cases cited by Highland support the Court’s discretion to take judicial notice of the documents at issue here. Appellee’s Objection to Motion to Take Judicial Notice [ECF. 40] at pp. 4-5. As discussed in those cases, the Court may take notice of documents to establish the timing and existence of litigation and particular filings, even if not for

the truth of the matters asserted therein. *Giles v. City of Dallas*, 539 F. App'x 537, 542 n.1 (5th Cir. 2013) (citing, *inter alia*, Charles A. Wright & Arthur R. Miller, 21B Fed. Prac. & Proc. § 5106.4 (2d ed. & Supp.2012); *Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc.*, 146 F.3d 66, 70–71 (2d Cir.1998)); *SB Int'l, Inc. v. Jindal*, 2007 WL 1411042, at *1 (N.D. Tex. May 14, 2007) (“[T]he Fifth Circuit has determined that a court may take judicial notice of a ‘document filed in another court . . . to establish the fact of such litigation and related filings.’”) (quoting *Taylor v. Charter Medical Corporation*, 162 F.3d 827, 829 (5th Cir.1998)).

For example, this Court affirmed judicial notice of a plaintiff's state court petition to show the plaintiff “was on notice of his alleged injury when his state court suit was filed.” *Warden v. Barnett*, 252 F.3d 1356 n.1 (5th Cir. 2001). Relatedly, this Court affirmed taking judicial notice of a publicly available protocol for purpose of “evaluating the timing of changes to the protocol.” *Whitaker v. Collier*, 862 F.3d 490, 496 n.10 (5th Cir. 2017); *see also Kiger*, 209 F.3d at 719 (taking judicial notice of U.S. Army Corps of Engineers Safety and Health Requirements manual “to determine simply what the document contains”).

Highland argues that the Contested Documents are “vigorously disputed.” Obj. at 5. Highland does not, however, explain what about the documents is in dispute. A closer examination of the Contested Documents—and the reasons that the Dondero Parties cite them—reveals that they are offered merely to show the timing of relevant filings, the language contained in the bankruptcy judge’s novels, and other judicially noticeable facts.

1. The James Dondero Filings

The James Dondero Filings consist of the following documents:

- Exhibit 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*, filed May 1, 2020.
- Exhibit 2, Highland bankruptcy docket entry 771, *Objection to Proof of Claim of Acis Capital Management L.P. and Acis Capital Management GP, LLC*, filed June 23, 2020.
- Exhibit 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*, filed July 13, 2020.
- Exhibit 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, filed July 14, 2020.

- Exhibit 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*, filed October 5, 2020.

Mot. at 9; Mot. at Exs. 1–5.

The Dondero Parties offer the James Dondero Filings in support of the following statement: “In the first year after the bankruptcy filing, Mr. Dondero filed only four pleadings: a limited response to a motion by Acis for relief from the automatic stay; an objection to Acis’s proof of claim and joinder in Highland’s similar objection; a response to the Creditor Committee’s motion to compel production by Highland; and a response to Highland’s motion seeking approval of its settlement with Acis.” Appellants’ Br. at 8. The Dondero Parties ask the Court to take judicial notice of the filings merely to show which filings Mr. Dondero made in the first year of the Highland bankruptcy. *Id.* The Dondero Parties do not ask the Court to consider the arguments contained in those filings or take notice of anything about them, other than the fact they were filed.

The dates on which Mr. Dondero filed Exhibits 1–5 are precisely the sort of facts that “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” FED. R. EVID. 201(b); *see also Giles*, 539 F. App’x at 542 n.1. Highland offers no legitimate reason why the Court should not take judicial notice of these documents.

2. The Kirschner Filings

The Kirschner Filings consist of two documents, both filed in *Kirschner v. Dondero, et al.*, Case No. 3:21-03076-sgj (Bankr. N.D. Tex.) (the “Adversary Proceeding”):

- Exhibit 14, Adversary Proceeding docket entry 309, *Highland Capital Management Fund’s Motion to Recuse Pursuant to 18 U.S.C. §§ 144 and 455*, filed February 27, 2023.
- Exhibit 15, Adversary Proceeding docket entry 310, *Memorandum of Law in Support of Highland Capital Management Fund’s Motion to Recuse Pursuant to 18 U.S.C. §§ 144 and 455*, filed February 27, 2023.

Mot. at 9; Mot. at Exs. 14–15. The Kirschner Filings support four statements in Dondero Parties’ Brief:

- “*Hedging Death* involves a Dallas-based investment firm, Ranger Capital, which is described as a ‘multi-billion-dollar conglomerate, which manage[s] not just hedge funds, but private equity funds, CDOs, CLOs, REITS, life settlement, and all manner of complicated financial products.’” Appellants’ Br. at 22 (also citing ROA.3209).

- “By comparison, Highland is a Dallas-based investment firm formerly called Ranger Asset Management that the bankruptcy judge has described as a “multibillion-dollar” enterprise and that manages exactly the same unusual mix of investments.” Appellants’ Br. at 22 (also citing ROA.3209; ROA.14280).
- “The novel describes ‘byzantine’ international tax structures and off-shore transactions as pretexts for hiding illegal activity and money laundering.” Appellants’ Br. at 22.
- “The novel describes the life settlement industry as ‘creepy.’” Appellants’ Br. at 38 (also citing ROA.3209–210).

Like the James Dondero Filings, the Kirschner Filings are not to prove any of the allegations contained in those filings. *See* Appellants’ Br. at 22, 38. For example, the Dondero Parties do not ask the Court to take judicial notice that the life settlement industry is actually “creepy,” nor do the Dondero Parties seek judicial notice of the novel’s claim that byzantine international tax structures actually hide illegal activity and money laundering. Rather, the Dondero Parties merely ask the Court to take notice of the fact that the presiding bankruptcy judge published two novels (something that is readily ascertainable in the public domain) and that the novels contain language about life settlement industry and international tax structures (again, which is readily verifiable by reference to the published novels themselves).

The point is not whether the statements in *Hedging Death* are true—the point is that the bankruptcy judge made statements in *Hedging Death* about financial industry executives, the financial industry generally, and the financial instruments specifically at issue in Highland’s bankruptcy while, at the same time, presiding over Highland’s bankruptcy. In other words, the Court should take judicial notice of the Kirschner Filings “for the purpose of determining what statements the documents contain, not to prove the truth of the documents’ contents.” *See Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1018 (5th Cir. 1996) (judicial notice of disclosures made in SEC reports was proper on motion to dismiss).

3. The Withdrawal Documents

The Withdrawal Documents consist of three documents from the record of the Highland bankruptcy:

- Exhibit 6, Highland bankruptcy docket entry 3519, *Transcript of Hearing on Motion to Withdraw Proof of Claim #146 By HCRE Partners, LLC (3443) and Reorganized Debtor’s (A) Objection to Motion to Quash and For Protection [Docket No. 3464] and (B) Cross-Motion to Enforce Subpoenas to Enforce Subpoenas and to Compel a Deposition (3484)*, held September 1, 2022.
- Exhibit 11, Highland bankruptcy docket entry 4040, *Motion for Relief From Order*, filed March 18, 2024.

- Exhibit 12, Highland bankruptcy docket entry 4041, *Memorandum of Law in Support of Motion for Relief From Order*, filed March 18, 2024.

Mot. at 9; Mot. at Exs. 6, 11–12.

The Dondero Parties seek judicial notice of the Withdrawal Documents to support (1) that a hearing was in fact held on NexPoint Real Estate Partners, LLC’s (“NPRE”) motion to withdraw its proof of claim, (2) that “Highland and the [Bankruptcy] Judge insisted NPRE’s agreement to withdraw the claim ‘with prejudice’ was insufficient to ensure that NPRE would not pursue the claim in another forum,” and (3) that NPRE offered to abandon the claim and curtail further expense. Appellants’ Br. at 23–24. The Dondero Parties do not ask the Court to do anything other than read the statements of record and note that the exchanges occurred as represented. Whether the Court agrees with anything said by the parties or the Bankruptcy Court is irrelevant. And again, this Court previously has held that it can take judicial notice of precisely these types of proceedings. *See In re Halo Wireless, Inc.*, 684 F.3d at 596–97 (taking “judicial notice of federal court and state commission proceedings and orders that have been referenced and/or discussed in the parties’ briefing”). In any event, Highland does not state

that it disputes these facts, only that that it opposes judicial notice of the Withdrawal Documents because a court cannot take judicial notice of contested facts, but the Dondero Parties are not offering the Withdrawal Documents for that reason. As Highland's argument is incorrect, it is not a legitimate reason to reject the Dondero Parties' motion.

4. The Renewed Motion to Recuse

The Renewed Motion to Recuse consists of the following documents:

- Exhibit 7, Highland bankruptcy docket entry 3541, *Renewed Motion to Recuse Pursuant to 28 U.S.C. § 455*, filed September 27, 2022.
- Exhibit 8, Highland bankruptcy docket entry 3542, *Memorandum of Law in Support of Renewed Motion to Recuse Pursuant to 28 U.S.C. § 455*, filed September 27, 2022.

Mot. at 9; Mot. at Exs. 7–8.

The Dondero Parties offer the Renewed Motion to Recuse to support a single fact: “The Dondero Parties initially filed their renewed motion to recuse in September 2022.” Appellants’ Br. at 20 n.6. Just like the James Dondero Filings, the Dondero Parties do not offer the Renewed Motion to Recuse to prove any allegation or argument contained therein. And Highland offers no basis to reasonably question whether the Renewed Motion to Recuse was filed any time other than September 2022. Judicial notice of these documents is appropriate.

B. The Court May Notice Documents that Existed Before the Recusal Motion Was Determined but Were Never Considered by the Lower Courts

Highland also argues 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.’” Obj. at 7 (quoting *United States v. Okoronkwo*, 46 F.3d 426, 435 (5th Cir. 1995)). But Highland’s reliance on *Okoronkwo* is misplaced. The Court’s opinion in *Okoronkwo* concerned a newspaper article, 46 F.3d at 435, whereas the Contested Documents are records from the Bankruptcy Court in the Highland bankruptcy and a related adversary proceeding, Mot. at 9; Mot. at Exs. 1–8, 11–12, 14–15. That distinction is important because a court’s “own records or of those of inferior courts” are appropriate for judicial notice. *In re Deepwater Horizon*, 934 F.3d at 440 (taking judicial notice of federal court complaint and docket). The distinction is even more important where, as here, the lower court records consist of bankruptcy records. *See PNC Bank, Nat’l Ass’n*, 2023 WL 3340078, at *4 (affirming judicial notice of bankruptcy records because “all bankruptcy records are a matter of public record”); *see also* 11 U.S.C.A. § 107(a) (“a paper filed in

a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge”).

Moreover, Highland ignores the many opinions (cited in the Dondero Parties’ opening brief) in which this Court took judicial notice of documents that were available to the parties in proceedings before the lower court but not included in the record on appeal. *See, e.g., In re Halo*, 684 F.3d at 596–97 (taking judicial notice of federal court and state commission proceedings and orders not before the district court, over objection of party relying on *Okoronkwo*); *Gibson v. Blackburn*, 744 F.2d 403, 405 n.3 (5th Cir.1984) (taking judicial notice of photograph not included in record on appeal); *Reece v. Howmet Corp.*, 639 F. App’x 245, 246 n.1 (5th Cir. 2016) (“An appellate court may take judicial notice of facts, even if such facts were not noticed by the trial court.”) (citing *United States v. Herrera–Ochoa*, 245 F.3d 495, 501 (5th Cir.2001)). The *Okoronkwo* opinion does not prevent this Court from taking judicial notice of the documents at issue in *In re Halo*, and it should not prevent this Court from taking judicial notice here.

CONCLUSION

For the foregoing reasons, the Dondero Parties respectfully request that the Court take judicial notice of the Contested Documents.

Dated: July 5, 2024,

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that, on July 5, 2024, a true and correct copy of the foregoing document was served via the Court's e-filing system.

/ s/ Michael J. Lang
Michael J. Lang