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

HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**Case No. 3:21-cv-00881-X**
	§	
	§	
HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., et al.,	§	
	§	
	§	
Respondents.	§	
	§	

RESPONSE TO BRIEFING BY MOVER CONCERNING THE ALL WRITS ACT, AS DIRECTED BY THE COURT

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Charitable DAF Fund, L.P.; CLO HoldCo, Ltd.; and Hunter Mountain Investment Trust (collectively, the "Non-Party Respondents") respectfully file this *Response* (the "Response") to Highland Capital Management, L.P.'s ("HCMLP") *Response to Court's Order* [Dkt. No. 215] (the "Additional Briefing") filed pursuant to the Court's *Order* [Dkt. No. 210] requesting briefing on the Court's jurisdiction under the All Writs Act related to HCMLP's *Motion to Deem Dondero Entities Vexatious Litigants and for Related Relief* [Dkt. No. 136] (the "Vexatious Litigant Motion").

Preliminary Statement

1. What HCMLP asks this Court to do pursuant to the All Writs Act is unprecedented and would violate both the Fifth Circuit's and the Supreme Court's express constraints on authority under the All Writs Act. HCMLP moves this Court to issue broad national and international injunctions enjoining the Non-Party Respondents from proceeding in any and all tribunals (*see* below), despite the fact that the Non-Party Respondents (i) are not parties to the case before this Court, and (ii) have not been alleged by HCMLP to be in any way connected to the case before this Court or in any way involved with the parties that have been parties in the case before this Court with respect to the case before this Court. *See Williams v. McKeithen*, 939 F.2d 1100, 1104 (5th Cir. 1991) (explaining that the Fifth Circuit has "noted that the extraordinary power conferred by the All Writs Act ... is firmly circumscribed, its scope depending on the **nature of the case before the court**…") (emphasis added).

2. The Supreme Court and lower courts following its precedent are clear and consistent (and utterly contrary to the arguments and relief sought by HCMLP): to enjoin a third-party under the All Writs Act, it is necessary that the non-party is not "so far removed from the **underlying controversy** that its assistance could not be permissibly compelled…" *United States*

v. New York Tel. Co., 434 U.S. 159, 174, 98 S. Ct. 364, 373, 54 L. Ed. 2d 376 (1977) (emphasis added); *Matter of United States*, 256 F. Supp. 3d 246, 252 (E.D.N.Y. 2017) (where the court found "[t]he record thus shows literally no connection at all to the underlying controversy," the All Writs Act does not authorize a court to grant relief); *In re Apple, Inc.*, 149 F. Supp. 3d 341, 344 (E.D.N.Y. 2016) (considering "the closeness of [nonparty's] relationship to the underlying criminal conduct and government investigation"); *Ford Motor Co. v. Woods*, No. CIV.A. 04-1733, 2006 WL 1581177, at *3 (W.D. La. June 6, 2006).

3. Neither HCMLP's Vexatious Litigant Motion, the Additional Briefing, nor its prior briefing alleges or even attempts to draw any connection between the Non-Party Respondents and the Notes Cases (defined herein) that collectively constitute the "case before the Court". As such, there can be no question that this Court lacks authority under the All Writs Act to enjoin the Non-Party Respondents.

Response

A. The "case before this Court" is the Notes Cases and there is no connection whatsoever between it and the Non-Party Respondents.

4. The case before this Court was a consolidated set of proceedings referred to by this Court as the "Notes Cases."[1] *See* Dkt. No. 49. HCMLP filed several adversary proceedings in the Bankruptcy Court seeking judgment against certain parties on the basis of promissory notes (the "Notes").[2] The Bankruptcy Court recommended withdrawal of the reference upon motion by the defendants, and this Court referred pre-trial matters to the Bankruptcy Court. Upon motion for

[1] The Notes Cases are: 3:21-CV-0880-X; 3:21-CV-1010-X; 3:21-CV-1378-X; 3:21-CV-1379-X; 3:21-CV-3160-X; 3:21-CV-3162-X; 3:21-CV-3179-X; 3:21-CV-3207-X; and 3:22-CV-0789-X.

[2] The Adversary Proceedings were: Adv. Proc. No. 21-03005-sgj; Adv. Proc. No. 21-03004-sgj; Adv. Proc. No. 21-03003-sgj; Adv. Proc. No. 21-03006-sgj; Adv. Proc. No. 21-03007-sgj; and Adv. Proc. No. 21-030821-sgj.

summary judgment by HCMLP before the Bankruptcy Court, the Bankruptcy Court issued a recommendation that summary judgment be granted. This Court granted summary judgment in favor of HCMLP, and that judgment is on appeal to the Fifth Circuit (oral argument has taken place).

5. The Non-Party Respondents were not parties to the Notes Cases or the underlying Adversary Proceedings. Nor does HCMLP allege that they have any connection to the Notes that are at issue in the Notes Cases, or that they are in any way involved with the defendants in the Notes Cases with respect to the Notes Cases.

6. Despite characterizing the Notes Cases as a "simple" collection action, HCMLP now argues that the case before this Court is not actually the Notes Cases but rather the **entire** underlying bankruptcy case (the "Highland Bankruptcy Case"), which has been pending since 2019, and involves hundreds if not thousands of entities, disputes, claims, relationships, proceedings that have gone to judgment, etc. *See* Additional Briefing, ¶21. Therefore, says HCMLP, this Court has authority under the All Writs Act over any and all persons and entities that have ever made an appearance in the Highland Bankruptcy Case to determine if they are vexatious litigants and to enjoin them—**because and solely on the basis of their appearance(s) in the Highland Bankruptcy Case**.

7. To be clear, the reference of the Highland Bankruptcy Case to the Bankruptcy Court has never been withdrawn; and the Bankruptcy Court is therefore the presiding court over the Highland Bankruptcy Case.

8. In support of its incorrect pivot, HCMLP cites to the Fifth Circuit's opinion in *Matter of Carroll*. 850 F.3d 811, 816 at n.3 (5th Cir. 2017). There, the debtors' daughters instituted, among other proceedings, an adversary proceeding in the bankruptcy court asserting

rights to property of the estate. Apparently over "*Stern*-concerns," the reference over the adversary proceeding was withdrawn, and the adversary proceeding was heard by the district court. *Id*. at n. 1. The chapter 7 trustee filed a vexatious litigant motion in the bankruptcy court, and the bankruptcy court enjoined the members of the Carroll family, including the daughters, from any filings in either the bankruptcy case or any proceedings within the bankruptcy case, including the case in the district court. Before the bankruptcy court in the bankruptcy case, and on appeal, the daughters argued that they could not be enjoined by the bankruptcy court for conduct before the district court in an adversary proceeding. *Id*. at n. 3.

9. In dismissing this argument, the Fifth Circuit cited to *Collier* for the unremarkable proposition that in bankruptcy, the term "case" should include adversary proceedings and contested matters raised or commenced within the bankruptcy case, before the bankruptcy court. *Id*. (citing 2 Collier on Bankruptcy § 301.03 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2015)).[3]

10. In *Carroll*, the "case" before the bankruptcy court issuing the vexatious litigant injunction was the **bankruptcy case**, presided over by the bankruptcy court. The Carroll daughters were parties in and to the bankruptcy case. So, yes, it would follow that the daughters' adversary proceeding was a part of the bankruptcy case that was the "case before the court" for purposes of the All Writs Act, and that the bankruptcy court, with authority over parties before it, could enjoin the daughters from further filings in proceedings within the bankruptcy case, though such proceedings were pending before other courts. But here, the situation is determinatively different;

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[3] Collier cites to the Advisory Committee Notes on the previous Bankruptcy Rule 101 which stated that: "The term [case] embraces all controversies **determinable by the court of bankruptcy** and all the matters of administration arising during the pendency of the case …" 2 Collier on Bankruptcy P 301.03 (16th 2024) (emphasis added).

the reverse, so to speak. The "case before this Court" is the particularized ("simple") set of Notes Cases against particular defendants—just like any other suits on promissory notes over which this Court can assert jurisdiction. This Court is not presiding over the Highland Bankruptcy Case, over the parties to/in it, or over the actions occurring in the Highland Bankruptcy Case. Nevertheless, HCMLP turns *Carroll* on its head and argues that not only is the Highland Bankruptcy Case the "case before this Court", but so too are all the contested matters, adversary proceedings, appeals therein, and persons and entities that are parties thereto and involved therein, and that for purposes of the All Writs Act, this Court has authority to issue injunctive relief against any and all persons or entities with connection to the Highland Bankruptcy Case (even those not mentioned in or served with the Vexatious Litigant Motion).

11. This suggestion of unbounded power is not only not in any way supported by what the Fifth Circuit said in *Carroll*, but its wrongness is magnified by how acutely problematic such an extension of power would be in a case like this. There are over one-thousand distinct proceedings relating to or arising from the Highland Bankruptcy Case. These proceedings/cases are incredibly complex, have completely different parties (hundreds of different parties), and involve facts and legal relationships having absolutely nothing to do with the Notes Cases that were before this Court. Notwithstanding, HCMLP argues that upon its groundless proposal, this Court has authority over all participants in the H

12. While in *Carroll* the Fifth Circuit correctly pointed out that the adversary proceedings within the bankruptcy case were part of the bankruptcy "case" before that bankruptcy court, the corollary proposed by HCMLP is, simply (and generously), false. HCMLP argues that because this Court has before it one "case", the consolidated Notes Cases, this Court is now also presiding over the entire Highland Bankruptcy Case. Of course, this is ridiculous.

13. There are a multitude of courts presiding over pieces of litigation connected to the Highland Bankruptcy Case, including the Fifth Circuit (presiding over matters on appeal, including the appeal of this Court's judgment in the Notes Cases). Are those courts also presiding over the Highland Bankruptcy Case? Of course not.

14. *Carroll* stands for the very simple proposition that a vexatious litigant motion is authorized under the All Writs Act, that a federal court before which litigants appear has authority to enjoin such litigants, and that such an injunction can extend to proceedings related to and involved in the "case before the court." The *Carroll* bankruptcy court had the Carroll daughters before it in the bankruptcy case and enjoined them with respect to the adversary proceeding within the bankruptcy case filed in the bankruptcy court and pending in the district court.

15. *Carroll* does not stand for the proposition espoused by HCMLP, namely, that this Court has authority over parties not before it in the "case before the court" and who are in no way alleged to be connected with the "case before the court" simply because they might be parties to the underlying Highland Bankruptcy Case over which this Court is not presiding.

16. The "case before the Court" is the Notes Cases, and HCMLP has made no attempt to connect the Non-Party Respondents to the Notes Cases, admitting that because the Non-Party Respondents are not involved in any way with the Notes Cases, the only way this Court has authority under the All Writs Act is to assume jurisdiction over each and every action in and party involved in the Highland Bankruptcy Case (such as Zeus had over all those below Olympus). The Notes Cases were before this Court. The Highland Bankruptcy Case is not. Simple as that.

B. This Court does not have authority to enjoin non-parties with no connection to the case before the Court.

17. HCMLP next argues that the All Writs Act authorizes this Court to enjoin "persons, who though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice." *See* Additional Briefing, ¶23 (quoting *U.S. v. New York Tel*., 434 U.S. at 174).

18. Tellingly, HCMLP omits that in the seminal case to which all later cases cite for authority to enjoin non-parties under the All Writs Act—*U.S. v. New York Tel. Co*.—the Supreme Court explained that: the third-party to be enjoined was **not** "a third party so far removed from the underlying controversy that its assistance could not be permissibly compelled." *See* 434 U.S. at 174.

19. A review of all of the cases cited by HCMLP reveals that in each of those cases the enjoined non-parties or the terms of the injunction itself had an extremely close connection to the case before those courts. *See e.g. U.S. v. N.Y. Tel. Co*., 434 U.S. at 174 (the enjoined public utility company's facilities were being used to facilitate a criminal enterprise that was the subject of the case before the court but even knowing that, the utility company would not supply the "meager" assistance to the FBI to stop it); *United States v. Int'l Bhd. of Teamsters*, 907 F.2d 277, 281 (2d Cir. 1990) (the members of the teamsters union which entered into the consent decree in the case—again a criminal matter—were enjoined from litigating issues related to the consent decree in other courts); *United States v. Int'l Bhd. of Teamsters*, 728 F. Supp. 1032, 1044 (S.D.N.Y. 1990), aff'd 907 F.2d 277 (2d Cir. 1990) (same, except subordinate entities were also enjoined from collaterally attacking the consent decree that was entered in the case before the court in other courts); *In re Baldwin-United Corp. (Single Premium Deferred Annuities Ins. Litig.),* 770 F.2d 328 (2d Cir. 1984) (states were enjoined from bringing a lawsuit that would affect the class action before the

court); *Klay v. United Healthgroup, Inc*., 376 F.3d 1092 (11th Cir. 2004) (**reversing** an injunction issued pursuant to the All Writs Act because the conduct to be enjoined did not have any effect on the ongoing case before the court); *United States v. Haddad*, 2022 U.S. Dist. LEXIS 20309, at *9 (N.D. Tex. Feb. 4, 2022) (enjoining the criminal defendant, her husband, and their agents from diverting or concealing her property in attempt to circumvent restitution order in case before the court); *Wiltz v. Beijing New Bldg. Materials Pub. Ltd Co. No. 10-361 (In re Chinese-Manufactured Drywall Pods. Liab. Litig.)*, 2011 U.S. Dist. LEXIS 62222 (M.D. La. Jun. 9, 2011) (enjoining entities from continuing state court lawsuits that would affect the MDL proceeding before the court).

20. HCMLP has not cited the Court to any authority, nor have the Non-Party Respondents found any precedent, where a court enjoins a non-party pursuant to the All Writs Act (i) who has no connection to the case before the Court, and (ii) the injunction has nothing to do with the non-party's conduct's effect or possible effect on the case before the Court. And under the fount of authority discussing non-party-injunctions under the All Writs Act, emanating from and including *U.S. v. New York Tel. Co.*, such an injunction is prohibited.

21. Despite HCMLP's argument that the All Writs Act essentially has no boundaries or limitations, the Act has express limits, and the Fifth Circuit has been clear and consistent that this limit is **the case before the Court**. The Non-Party Respondents have nothing to do with Notes Cases, have not been alleged to have any connection whatsoever with the Notes Cases, and thus, because they are not parties in the case before the Court, this Court is without authority under the All Writs Act to enjoin them.

C. HCMLP's requested injunction is nothing like *Carroll* or *Schum*.

22. HCMLP cites this Court to *Matter of Caroll* and *In re Schum*, arguing that just like the district court did in *Schum* and the bankruptcy court did in *Carroll*, this Court has the authority to enter a vexatious litigant injunction "against [all Respondents] for purposes of this case and all future cases arising in or related to the Bankruptcy Case in both the Bankruptcy Court, this Court, and any other court, agency, or tribunal…" Additional Briefing, ¶25. But parties enjoined by the courts in *Carroll* and *Schum* were parties before those courts, and therefore the injunctions issued by those courts were fully consistent with authority under the All Writs Act. *Carroll* and *Schum* provide no basis for this Court to enjoin the Non-Party Respondents, and the injunctions issued in those cases are therefore nothing like HCMLP's sweeping request.

23. In *Carroll*, the debtors and their daughters engaged in an onslaught of "bad faith" conduct in an attempt to frustrate the administration of the bankruptcy estate by the chapter 7 trustee. 850 F.3d at 814. The bankruptcy court, in **the bankruptcy case**, recounted the debtors' and their daughters' actions in the bankruptcy case and a related adversary proceeding, and entered a vexatious litigant injunction in the bankruptcy case which included that:

> [The debtors and their daughters] are declared vexatious litigants and they, or anyone acting on their behalf, are enjoined from filing any pleading or document **in this case or its associated cases or adversary proceedings**, and **from filing any future cases in this court**, without prior permission from the court.

Case No. 08-10756, Dkt. No. 747 (Bankr. M.D. La. March 16, 2016) (emphasis added).

24. So the injunction in *Carroll* was thus: (i) issued in the bankruptcy case by the bankruptcy court against parties who had committed extensive misconduct before that court, (ii) limited to parties with an undeniably close connection to the case before the court (or those aiding them in the case), and (iii) limited to filings in the bankruptcy case or adversary proceedings within the bankruptcy case.

25. In *Schum*, the case before the Court was an appeal of a motion to reopen the entire bankruptcy case. *Schum v. Fortress Value Recovery Fund I LLC*, No. 3:19-CV-00978-M, 2019 WL 7856719, at *1 (N.D. Tex. Dec. 2, 2019), *aff'd sub nom. Matter of Renaissance Radio, Inc.*, 805 F. App'x 319 (5th Cir. 2020). In that appeal from the bankruptcy case, the district court entered an injunction providing that:

> [the litigant] is enjoined from making any future filings related to the RRI or Watch bankruptcies **in a United States bankruptcy court** without first obtaining leave from the United States Bankruptcy Court for the Northern District of Texas.

Id. at *6 (emphasis added).

26. So the injunction in *Schum* was thus: (i) issued in an appeal from the main bankruptcy case by the district court, (ii) limited to the party before the court who committed misconduct before that court, and (iii) limited to filings in a bankruptcy court. In both cases the injunctions provided the bankruptcy court, the court overseeing the respective bankruptcy cases, with the authority to determine if a suit or proceedings could be filed.

27. But here, HCMLP argues that this supposed precedent (that is not precedent) affords this Court authority under the All Writs Act to issue an injunction—in a case to and in which the Non-Party Respondents have absolutely no connection, involvement or possible involvement, and cannot affect—that enjoins filings by the Non-Party Respondents in **any** "(a) court (whether foreign or domestic), (b) administrative tribunal, or (c) administrative or regulatory agency," alleging **any claim** [importantly not related to the case before this Court but instead] "arising from or related to the Bankruptcy Case or the management of the Highland Entities or the

Highland Entities' property," without permission from, **not the Bankruptcy Court**,[4] but this Court. *See* Dkt. No. 136-1.

28. Of course, the Non-Party Respondents cannot knowingly violate this Court's orders or "act on behalf" of another to violate this Court's orders (it is unclear how such would be possible, when the case before the Court is the collection of simple Notes Cases that have gone to judgment). But that is not even the relief that HCMLP is moving for, as it knows it cannot allege the possibility of such an eventuality. Rather, HCMLP moves this Court to enjoin non-parties, with no connection to the case before this Court (and parties with no notice of this proceeding),[5] adjudge them to be vexatious litigants, and require them to seek permission from this Court before filing in **any** other court, agency or tribunal, and to file a copy of such any such order by this Court in any ongoing proceeding. *See* Dkt. No. 136-1. All because such named and unnamed persons

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[4] The Non-Party Respondents understand that this footnote may not fit directly into the All Writs Act briefing, but believe it is important to point out the undeniable fallacy of the HCMLP request. The reason that HCMLP is not requesting this injunction from the Bankruptcy Court, is that there is currently a pre-filing injunction contained in the *Order (I) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (II) Granting Related Relief* [Highland Bankruptcy Case, Dkt. No. 1943] which requires all Respondents to obtain permission from the Bankruptcy Court to file any suit that "arises from or is related to the Chapter 11 Case, the negotiation of the Plan, the administration of the Plan or property to be distributed under the Plan, the wind down of the business of the Debtor or Reorganized Debtor, the administration of the Claimant Trust or the Litigation Sub-Trust, or the transactions in furtherance of the foregoing." There are also pre-confirmation gatekeeper orders currently in effect. HCMLP seeks to layer on top of these gatekeeper orders an injunction from this Court, under which this Court would also be a gate keeper (over parties not before it). As HCMLP knows full well, such a situation creates an immediate impossibility for any Respondent, whether party or Non-Party. Any person or entity would be precluded from taking any action - if relief would be sought before the Bankruptcy Court, such party would be in violation of the injunction requested by HCMLP from this Court, and if relief would be requested from this Court such party would violate the Bankruptcy Court Gatekeeper Order(s).

[5] According to HCMLP, the "DAF, CLOH, and HMIT, among others, are included only as examples of entities controlled by, and acting in concert with Dondero," and the parties to be enjoined include "any entity directly or indirectly controlled by, or acting in concert with, Dondero" even if not named or served with notice of this proceeding. Additional Briefing, ¶20. The Non-Party Respondents, of course, deny any allegation that are "controlled by" or "acting in concert with" Mr. Dondero.

and entities may be parties to or involved in the Highland Bankruptcy Case, a sprawling bankruptcy case not before this Court.

29. The requested injunction would be unprecedented and would far exceed any authority under the All Writs Act or any case law concerning authority under the All Writs Act found by the Non-Party Respondents in their research.

Conclusion

30. This Court does not have authority to issue the injunction sought by HCMLP against the Non-Party Respondents (or any Respondents, for that matter). Particularly as to Non-Party Respondents, the limits on this Court's authority to enjoin non-parties under the All Writs Act are clear: "the extraordinary power conferred by the All Writs Act ... is firmly circumscribed, its scope depending on the **nature of the case before the court,**" and nonparties may not be "so far removed from the **underlying controversy** that [their] assistance could not permissibly compelled," to be enjoined. *See William*, 939 F.2d at 1104 (emphasis added); *U.S. v. N.Y. Tel. Co.*, 434 U.S. at 174 (emphasis added).

31. The Non-Party Respondents are not only far removed from the "case before the Court", but they also they have no involvement whatsoever, and therefore could not be further removed from it. If this Court were to grant HCMLP's request for injunctive relief over the Non-Party Respondents, such a ruling would embrace and authorize unlimited power over non-parties that could not be further removed from a case before this Court, in violation of the circumscribed authority under the All Writs Act. Therefore, the Vexatious Litigant Motion must be denied and dismissed as to the Non-Party Respondents, without the necessity of any further proceedings.

[*signature blocks on following page*]

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Certificate of Service

I, undersigned counsel, hereby certify that a true and correct copy of the above and foregoing document and all attachments thereto were sent via electronic mail via the Court's ECF system to all parties authorized to receive electronic notice in this case on this August 26, 2024.

/s/ Louis M. Phillips
Louis M. Phillips