No. 23-10911

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN THE MATTER OF HIGHLAND CAPITAL MANAGEMENT, L.P.

DEBTOR

HIGHLAND CAPITAL MANAGEMENT, L.P.,

APPELLEE

v.

NEXPOINT ASSET MANAGEMENT, L.P., FORMERLY KNOWN AS HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.; NEXPOINT ADVISORS, L.P.; NEXPOINT REAL ESTATE PARTNERS, L.L.C., FORMERLY KNOWN AS HCRE PARTNERS L.L.C.; HIGHLAND CAPITAL MANAGEMENT SERVICES, INCORPORATED; JAMES DONDERO,

APPELLANTS

IN THE MATTER OF HIGHLAND CAPITAL MANAGEMENT, L.P.

DEBTOR

JAMES D. DONDERO,

APPELLANT

v.

HIGHLAND CAPITAL MANAGEMENT, L.P.,

APPELLEE

CONSOLIDATED WITH

No. 23-10921

IN THE MATTER OF HIGHLAND CAPITAL MANAGEMENT, L.P.

DEBTOR

HIGHLAND CAPITAL MANAGEMENT, L.P.,

APPELLEE

v.

NEXPOINT ASSET MANAGEMENT, L.P., FORMERLY KNOWN AS HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.,

APPELLANT

Appeal from the United States District Court
Northern District of Texas
The Honorable Brantley Starr
Civ. Act. No. 3:21-cv-00881-X

RESPONSE TO APPELLANTS' MOTION TO STAY THE APPELLATE MANDATE PENDING PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF INTERESTED PERSONS

Appellee certifies 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 disqualifications or recusal:

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3. Appellants:

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   NexPoint Advisors, L.P.;

NexPoint Real Estate Partners, L.L.C., formerly known as HCRE Partners L.L.C.;

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RESPONSE

Following this Court's unanimous affirmance of the District Court's grant of summary judgment[1] and denial of Appellants' motions for a panel rehearing and a rehearing *en banc*,[2] Appellants move to stay the issuance of the mandate pending their prospective and ill-advised petition for a writ of certiorari (the "**Stay Motion**"). The Stay Motion should be denied.

First, Appellants seek unprecedented relief. Appellants cite no case, and Appellee is aware of none, where this Court granted a stay under Rule 8.9[3] immediately *after* denying a motion for a rehearing *en banc* (let alone where the motion for rehearing failed to elicit a request for the polling of the Court's members or the filing of an opposition brief). Under Rule 8.9, stays of execution following decisions "ordinarily will not be granted," and no basis exists for an exception here.

Second, it is unlikely *any* Supreme Court Justice (let alone four)[4] "would consider the underlying issues sufficiently meritorious for the grant of certiorari" because the Opinion is unremarkable. The Panel utilized long-standing precedent to

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[1] *See* Document numbers 117 (the "**Opinion**") and 118 (the "**Judgment**").

[2] *See* Document numbers 123 (*Appellants' Petition for Hearing En Banc*) (the "***En Banc* Petition**") and 126 (per curiam decision denying petitions for a panel rehearing and for rehearing *en banc*) (the "***En Banc* Denial**").

[3] "**Rule 8.9**" refers to Rule 8.9 of the *Rules and Internal Operating Procedures of the United States Court of Appeals for the Fifth Circuit*.

[4] To obtain a stay of execution under Rule 8.9, an appellant must prove, among other things, that "4 members of the Supreme Court would consider the underlying issues sufficiently meritorious for the grant of certiorari."

analyze whether Appellants created genuine issues of material fact precluding summary judgment. Specifically, the Court properly analyzed whether Appellants created ***genuine*** disputes of material fact by assessing whether "`a reasonable jury could return a verdict for a nonmovant.'"[5]

Appellants' aggressive critique of the Opinion is based on gross mischaracterizations of the law and the Panel's analysis. Contrary to Appellants' suggestion, the Panel was not required to accept the Donderos' statements as true as if considering a motion to dismiss.[6] Moreover, Appellants' contention that the Panel created "new standards and rules" by holding that "self-serving" or "uncorroborated" statements can never defeat summary judgment is baseless. Indeed, Appellants twice assert that the Panel created a new rule requiring nonmovants to produce corroborating evidence to defeat summary judgment, but they fail to quote from or cite to the Panel's decision to support the assertion, for good reason: The Panel created no such rule.[7] In sum, because the Panel applied

[5] Opinion at 6 (quoting *Nall v. BNSF Ry. Co.*, 917 F.3d 335, 340 (5th Cir. 2019)); *id*. at 12 ("The Donderos' statements about the alleged oral agreements are not supported by *their own* divergent statements. No reasonable juror would believe them, meaning that the issue is not 'genuine' for the purposes of summary judgment.") (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (emphasis in original)).

[6] Appellants suggest that any "admissible" statement that contradicts a material fact is sufficient to defeat summary judgment. Br. at 7. That is not the law.

[7] Appellants contend that the Panel "veered further from the established rules of evidence by requiring the Appellants to produce additional corroborating evidence" and "imposed a heightened proof standard requiring written corroboration of facts …." (Br. at 7-8). This is simply untrue. Rather, the Panel focused on whether a trier of fact would expect to find corroborating evidence

long-standing precedent to analyze whether the Donderos' statements created genuine disputes of material facts, there is virtually no probability (let alone a "reasonable probability") that four Supreme Court Justices will disagree with every judge in this Circuit and decide that the underlying issues are "sufficiently meritorious" to warrant further consideration.[8]

Third, Appellants cannot establish that there is a "substantial possibility" that the Supreme Court will reverse the Judgment[9] because the Panel properly applied the law to the facts, finding that no reasonable jury could render a verdict for Appellants (and therefore no "genuine" dispute of material fact existed precluding summary judgment). For example, the Panel found, among other things, that:

- the Donderos' statements lacked detail, were internally inconsistent, "differ[ed] with respect to such vital information as who entered into the agreements and when," contained inconsistencies as to the "date and intent of the agreements," and were "contradictory as to the parties to the agreement" (Opinion at 8-11);
- the "oral agreement" defense was also contradicted by objective evidence such as documents referred to in the declarations as well as interrogatory

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under the circumstances so as to distinguish this case from *Lester v. Wells Fargo Bank, N.A.*, 805 F. App'x 228 (5th Cir. 2020). Opinion at 11.

[8] Appellants strain to concoct a "circuit split" based on their same faulty assertions. Br. at 8-9. Again, the Panel did *not* rule that "self-serving" or "uncorroborated" statements can never defeat summary judgment. Instead, read fairly, the Panel ruled that self-serving, uncorroborated statements that are internally inconsistent and that are directly contradicted by interrogatory responses, pleadings, and objective evidence are not the type of probative evidence that create genuine disputes of material fact. Appellee is unaware of any case from any circuit that conflicts with this ruling. There is no "circuit split."

[9] Rule 8.9 also requires Appellants to prove that there is a "substantial possibility" the Supreme Court will reverse the Panel's decision.

responses and Appellants' pleadings (*id*. at 9);

- the "mutual mistake" defense was contradicted by documents such as an Incumbency Certificate (showing HCMFA's chief financial officer had actual and apparent authority to execute certain of the notes) and contemporaneous written admissions as well as undisputed facts such as HCMFA's receipt of insurance proceeds for the error Appellee supposedly caused (*id*. at 13-18);

- the "prepayment defense" was contradicted by objective evidence, including the plain and unambiguous terms of the Notes, the parties' course of dealing (as reflected in amortization schedules), and a thirteen-week forecast that put the obligors on notice that Annual Installment payments were due on December 31, 2020 (*id*. at 18-20); and

- the "shared services" defense failed because (a) HCMS and HCRE never had a "shared services agreement" and never pleaded the defense, (b) whatever "course of dealing" existed when Dondero controlled Highland and its affiliates became irrelevant after an independent board was appointed to control Highland, and (c) Waterhouse, simultaneously Highland's CFO and the Treasurer of the corporate obligors, admitted that Dondero instructed him not to make the payments due at the end of 2020 (*id*. at 20-22).

The Panel did not side with Appellee and accept its version of events while rejecting Appellants' nor did it make any improper credibility determinations. Instead, the Panel did what the law required: assess whether the evidence submitted in opposition to summary judgment—the Donderos' deposition testimony and declarations—was the type of probative evidence that would create a "genuine" dispute of material fact. When weighed against the inconsistencies, contradictions, and objective contrary evidence, the Panel properly concluded it did not. Given the extensive and unexplained infirmities in the Donderos' statements, there is virtually

no chance (let alone a "substantial possibility") that the Supreme Court will reverse.[10]

Fourth, Appellants' motion is irrelevant as it concerns the "oral agreement" defense because it does not challenge the Panel's alternative holding that the alleged agreements (assuming for the sake of argument that a trier of fact could find they existed) would be unenforceable as a matter of law due to a failure of consideration. Opinion at 13.[11] Thus, the Panel's ultimate ruling in favor of Appellee would be unaltered even if (hypothetically) Appellants prevailed.

Fifth, Appellants' argument they will suffer "irreparable harm" in the absence of a stay should be rejected because it lacks any evidentiary basis and instead rests upon false statements concerning the estate's financial condition, baseless attacks on Highland's management, and a perverse twisting of the equities:

- Appellants' statements concerning the estate's financial condition are

[10] Appellants continue to try to minimize the extent and import of the numerous inconsistencies and contradictions in the Donderos' statements, contending that they were "minor vagaries of time and numerous moving parts." Br. at 6. But the Panel already rejected this argument. Opinion at 10 ("Although Appellants characterize Dondero's later statements as an 'elaboration' and 'clarification' of his earlier declarations and pleadings, the level of contradiction here is a polar binary.").

[11] The Panel found that Dondero was not required to relinquish his right to compensation as part of the alleged "oral agreements." Opinion at 13. Indeed, Dondero caused Highland to pay him millions of dollars per year in compensation, notwithstanding the alleged oral agreements. *See*, *e.g.*, ROA.70414 (2016 base salary of $1,062,500 with total earnings and awards of $2,287,175); ROA.70145 (2017 base salary of $2,500,024 with total earnings and awards of $4,075,324); ROA.70147 (2018 base salary of $2,500,000 with total earnings and awards of $4,194,925); and ROA.70149 (2019 base salary of $2,500,000 with total earnings and awards of $8,134,500).

false.[12] In fact, the post-confirmation reports Appellants cite make no representations whatsoever with respect to (a) the level of current liquidity, (b) the value of the estate's remaining assets, (c) the net value of assets already monetized, or (d) the estate's ability to fund expenses, satisfy current and future indemnification expenses, and pay allowed creditor claims,

- Recovery on the Notes has been and remains an integral part of Highland's confirmed plan of reorganization since it was first proposed in 2020; the judgment proceeds will be used to fund estate expenses, satisfy senior indemnification obligations, and/or make payments to Claimant Trust Beneficiaries;

- Appellants' irresponsible charge of "manipulation" has no basis in fact. Indeed, the Highland case remains far from resolution only because James Dondero continues to make good on his threat to "burn down the place" through the relentless pursuit of vexatious litigation such as this motion (thereby justifying the "gatekeeper" and "exculpation" provisions in the Plan and other orders); and

- Denial of the motion followed by the prompt release of funds held in the Court Registry to (partially) satisfy the underlying judgments is not "irreparable harm" under the circumstances, but justice.

Appellants have spent nearly four years trying to avoid their obligations to repay tens of millions of dollars in loans. Having failed to convince any of nearly twenty (20) judges in three (3) different courts that their defenses create *genuine* disputes of material fact or warrant further review (and disregarding Appellants' fantasy that the Supreme Court will grant certiorari and reverse the judgments and

[12] Appellants contend that September 30, 2024 "post-confirmation reports demonstrat[e] that there is more than enough money in the estate to satisfy its obligations and to otherwise pay its remaining creditors in full. With more than $100 million in assets remaining to monetize, and almost $550 million in assets already monetized, there is certainly enough money to pay the remaining amounts of allowed creditor claims." As has been established numerous times in numerous proceedings, this statement is false and misleading.

Appellants thereafter prevail in front of a jury), the Appellants will suffer no harm if the motion is denied—even if the judgment proceeds are used to fund estate expenses, satisfy indemnity obligations, and/or make payments to Claimant Trust Beneficiaries, because that was always what was envisioned.

CONCLUSION

For the foregoing reasons, Appellee respectfully requests that this Court deny Appellants' motion to stay the issuance of the mandate and grant such other and further relief as the Court deems just and proper.

October 25, 2024

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CERTIFICATE OF COMPLIANCE WITH FRAP 27 AND 32

1. This document complies with the word limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because, including footnotes and excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 1,906 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced serif (Times New Roman) typeface at 14-point type (12-point for footnotes).

/s/ Zachery Z. Annable
Zachery Z. Annable

CERTIFICATE OF SERVICE

I certify that, on October 25, 2024, the foregoing Response was electronically filed using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

/s/ Zachery Z. Annable
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