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

In re: **HIGHLAND CAPITAL MANAGEMENT, L.P.** **Debtor.**	§ § § § § § § §	**Chapter 11** **Case No. 19-34054-sgj11**
Charitable DAF Fund, L.P. **Plaintiff,** **v.** **Alvarez & Marsal CRF Management, LLC** **Defendant.**	§ § § § § § § § § § §	**Adversary Proceeding No. 24-03073**

REPLY BRIEF IN SUPPORT OF MOTION TO REMAND

Plaintiff, Charitable DAF Fund, L.P. ("DAF"), files this Reply Brief in Support of its Motion for Remand [Dkt. 3] ("Reply"), and would respectfully show:

INTRODUCTION

A&M's Brief in Opposition to Plaintiff's Motion to Remand [Dkt. 6] ("Response") is premised on hyperbole and a distortion of DAF's arguments. It is also full of bad logic and ignores critical legal principles—relying on unsupported rhetoric in the place of sound legal argument to support an improvident removal. A&M seems to think it can twist the existing record because of unsupported references to James Dondero. A&M is wrong on the law and wrong on the facts. A&M cannot manufacture jurisdiction through argument, and this case must be remanded.

A. Subject Matter Jurisdiction is Lacking.

A&M boldly expands the test for "related-to" jurisdiction to include "disputes between non-debtors" simply because "the claims at issue concern [pre-confirmation] conduct."[1] This is not the law. A&M then mistakenly argues that DAF "conveniently omits" discussion of the *Zale* (aka *Feld*) case,[2] which is not true—this case is discussed in depth on pages 9-11 of DAF's Motion. To be clear, *Feld* does not help A&M's position. Neither the *GenOn* (aka *Natixis*), *Galaz* nor *Biloxi Casino* (aka *First Am. Title*) cases, each of which A&M also cites without discussion,[3] support A&M's position. Each of these cases confirm that a debtor's substantive bankruptcy right must be implicated, or the meaning of a plan's provision must be at issue, for related-to jurisdiction to exist. Neither of these two considerations are present here.

The Fifth Circuit in *Feld* recognized jurisdiction over a breach of contract claim where the debtor's assets were implicated in a judgment in the underlying civil proceeding, while simultaneously recognizing that the court did not have jurisdiction over parallel tort claims that were "not property of the estate and [had] no effect on the estate." *See Feld v. Zale Corp. (In re*

[1] Response, 10.
[2] Response, 10.
[3] Response, 10.

Zale Corp.), 62 F.3d 746, 755, 757-59 (5th Cir. 1995). The court also was careful to distinguish the two types of cases that could be brought under "related-to" jurisdiction due to the existence of indemnities owed by the debtor: those cases where "the claims at issue … involved the debtor's behavior, thereby providing a basis for the debtor's obligation that was independent of the indemnification agreement," and those cases where the debtor's behavior is not at issue. *Id.* Finding that the removed tort claims were "unrelated third-party claims" because a third party's conduct (like A&M's) was at issue rather than the debtor's conduct, the Fifth Circuit remanded those claims. *Id.* at 756-57. The same result is mandated here.

In *Natixis*, the 5th Circuit also reiterated that the "usual related-to fare" involves "a situation in which a bankruptcy court seeks to enforce its orders or block alleged violations of ***a debtor's*** *bankruptcy-law rights*," or "a dispute over the *meaning* of provisions of the reorganization plan." *Natixis Funding Corp. v. GenOn Mid-Atlantic, L.L.C. (In re GenOn Mid-Atlantic Dev., L.L.C.)*, 42 F.4th 523, 535 (5th Cir. 2022) (emphasis added). And bankruptcy jurisdiction existed in both *Natixis* and *First Am. Title* for the same limited reason as the contract claim in *Feld—i.e.*, that the debtor's assets, which were directly contemplated as part of the plan, could be potentially used to satisfy a judgment in the case. *Id.* at 536 ("In *Zale*, the dispute … risked disrupting Zale's reorganization by threatening Zale's recovery from and access to [insurance] policy funds [which were embodied in Zale's plan]. Here, NFC's claims risked the same disruptions … ."); *First Am. Title Ins. Co. v. First Tr. Nat'l Ass'n (In re Biloxi Casino Belle Inc.)*, 368 F.3d 491, 496 n.4 (5th Cir. 2004) (bankruptcy jurisdiction implicated because settlement agreement involved "assignment of any recovery in this case" to a trust created by the plan "for the benefit of unsecured creditors.").

Finally, *Galaz* is not a "related-to" case. Bankruptcy jurisdiction existed in *Galaz* because the "[plaintiff's] suit in state court [wa]s arguably a violation of [*the debtor's*] *discharge rights*,

directly implicating the bankruptcy court's '***arising under***' jurisdiction." *Galaz v. Katona (In re Galaz)*, 841 F.3d 316, 322 (5th Cir. 2016) (emphasis added). *Galaz* also concerned a core proceeding (*see id.*, at 323), which A&M effectively concedes is not relevant here by arguing for related-to jurisdiction. *See Principal Life Ins. Co. v. JPMorgan Chase Bank, N.A. (In re Brook Mays Music Co.)*, 363 B.R. 801, 807-08 (Bankr. N.D. Tex. 2007) (Jernigan, J.).

Thus, A&M is wrong to suggest that "it's far less relevant *how* the litigation involves Mr. Seery than *that* it involves him."[4] This proposition ignores the essence of "related-to" bankruptcy jurisdiction, which is that either a *debtor's* fundamental bankruptcy right, or the *meaning* of a plan's provision, is implicated. *RDNJ Trowbridge v. Chesapeake Energy Corp. (In re Chesapeake Energy Corp.)*, 70 F.4th 273, 281 (5th Cir. 2023). Otherwise, there are merely "shared facts," which the Fifth Circuit has held repeatedly are not sufficient to confer jurisdiction. *Feld*, 62 F.3d at 753-54; *Natixis*, 42 F.4th at 538.

i. <u>*Discovery conduct does not confer jurisdiction.*</u>

A&M's argument for related-to jurisdiction is disingenuous and self-contradictory. On the one hand, A&M argues that only the substance of a party's claims can confer subject matter jurisdiction while, on the other hand, A&M indicates that it is DAF's "***discovery requests*** that form the basis of A&M's removal."[5] This latter argument is a departure from the well-settled rule that claims, not conduct, creates jurisdiction. *Principal Life*, 363 B.R. at 811 (citing *In re Jensen*, 946

[4] Response, 14 (emphasis in original).

[5] Response, 1-2 ("adding those amended claims ***and seeking discovery relating to the Debtor's CEO*** … should be good enough to create bankruptcy jurisdiction"; acknowledging Mr. Seery is not a defendant), 12-14 (acknowledging "the allegations in the state law petition" are the relevant jurisdictional hook), 21; *see* Notice, ¶¶ 5 ("Making the connection to this bankruptcy action and the prior Dondero discovery efforts patently clear, the discovery DAF seeks in the State Court Action includes the identical subjects of discovery that Mr. Dondero sought in the Rule 202 proceeding … ."), 29-30 (quoting the discovery requests allegedly requiring Mr. Seery's involvement).

F.2d 369, 373-74 (5th Cir. 1991)).[6] Not only does A&M reject this well-settled principle by seemingly arguing that A&M should be allowed to base its removal on extrinsic discovery,[7] but A&M also contends (discussed below) that it should be relieved of complying with related timeliness requirements. These arguments are not founded on any recognized legal principle and warrant rejection out of hand.

The Court should (and must) look to the substance of DAF's claims to determine whether jurisdiction exists. But A&M does not actually argue that DAF's *claims* purportedly implicate the Plan—specifically the Gatekeeper provisions. Rather A&M repeatedly focuses on *discovery* that *may hypothetically* implicate the Gatekeeper provisions.[8] But DAF's claims have nothing to do with the Gatekeeper provisions. Although A&M falsely accuses DAF of engaging in "relentless efforts to obtain discovery from Mr. Seery,"[9] A&M offers not one shred of evidence that DAF has ever sought discovery from Mr. Seery in connection with the State Court Action. A&M's attempt to manufacture jurisdiction through meaningless distractions falls short.

A&M's acknowledgement that "Mr. Seery is not (yet) a defendant and has not (yet) been served with discovery"[10] confirms the impropriety of A&M's removal. A&M hinges its jurisdictional argument on the Gatekeeper provisions, but admits the purpose of the Gatekeeper provisions is to "*protect[]* people like Mr. Seery."[11] Thus, *if, and only if*—under A&M's hypothetical—Mr. Seery is ultimately implicated in this case, *then Mr. Seery* could *potentially*

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[6] For this reason, the prior Rule 202 proceeding involving Mr. Dondero does not warrant discussion because any purported relatedness between the sets of discovery is immaterial to the jurisdictional analysis. In fact, this Court's order remanding Mr. Dondero's Rule 202 proceeding confirms that discovery cannot form the basis for removal to bankruptcy court. *Dondero v. Alvarez & Marsal CRF Mgmt., LLC (In re Highland Capital Mgmt., L.P.)*, Nos. 19-34054-sgj11, 21-03051, 2022 Bankr. LEXIS 5, at *10-31 (Bankr. N.D. Tex. 2022).

[7] *See* Notice, ¶¶ 5, 29-30.

[8] Response, 12-14.

[9] Response, 13.

[10] Response, 1-2.

[11] Response, 13.

remove the case based on the Gatekeeper provisions. *But see Feld*, 62 F.3d at 758 ("the effect must be on the *estate*, not merely on the debtor" (emphasis added)). But A&M has no such right. To be clear, A&M does not argue that A&M itself is protected by the Gatekeeper provisions.[12]

B. Abstention is Appropriate.

A&M must concede, by failing to argue, that the first three elements required for Mandatory Abstention are met, and A&M is wrong to suggest that DAF relies "primarily on the fourth factor."[13] Quite the opposite—the foundation of DAF's right to a remand is that this Court lacks subject matter jurisdiction because the State Court Action involves non-core matters which could not have been commenced in federal court. Thus, even if A&M's argument as to the fourth element is entertained, A&M's failure to address the first three factors for mandatory abstention confirms that permissive abstention or equitable remand is appropriate.

i. Timely Adjudication.

Movants "need not show that the action can be '*more timely* adjudicated in state court.'" *WRT Creditors Liquidation Tr. v. C.I.B.C. Oppenheimer Corp.*, 75 F. Supp. 2d 596, 605 (S.D. Tex. 1999) (emphasis added). "[F]ederal courts have found that state courts could adjudicate the dispute in a timely manner [where] the movant introduced evidence that the suit had already been prosecuted to some extent in the state court, which had issued various orders and become familiar with the case." *See Mugica v. Helena Chem. Co. (In re Mugica)*, 362 B.R. 782, 793 (Bankr. S.D. Tex. 2007) (Isgur, J.) (quoting *Veldekens v. GE HFS Holdings, Inc. (In re Doctors Hosp. 1997, L.P.)*, 351 B.R. 813, 846 (Bankr. S.D. Tex. 2006)). As described in DAF's Motion, Judge Parker[14]

[12] Even if the Gatekeeper provisions were implicated, A&M has not shown (and does not argue) that there is a dispute over the *meaning* of those provisions. *See Natixis*, 42 F.4th at 535.
[13] Response, 14.
[14] A&M's arguments regarding Judge Parker's potential replacement are moot because Judge Parker was not elected to the Fifth Court of Appeals. *See* https://www.dallasnews.com/election-results/dallas-county/.

is already familiar with over two years of court proceedings and has already entered significant orders, including discovery orders.[15] Indeed, A&M expressly recognizes that Judge Parker has overseen "***multiple hearings and discovery disputes***."[16]

A&M's misguided argument that the State Court Action could not be timely adjudicated is based on delays of A&M's own making. First, A&M takes issue with the fact that the State Court Action was "nearly dismissed for want of prosecution,"[17] but that was due to A&M's request to extend the answer deadline after being served with process.[18] A&M then sought to delay resolution of this case: (1) refusing to exchange basic discovery (which Judge Parker has already ordered A&M to respond to, but A&M has not), and (2) rescheduling, or participating in rescheduling, the hearing on A&M's Motion for Protective Order and Motion to Abate ***four separate times***.[19] A&M's desire to avoid discovery and repeated requests to engage in settlement negotiations are what delayed resolution of the State Court Action.[20] There is no indication that A&M will refrain from engaging in the same delay tactics if this case remains in federal court.

A&M does not (because it cannot) argue that this case cannot be timely adjudicated in state court. Rather, A&M alleges a laundry list of additional *actions A&M will take* to further delay resolution of this matter and confounds the issue by presenting the incorrect question: whether the

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[15] *See, e.g.*, Order Denying Defendant's Motion for Protective Order and Motion to Abate [Dkt. 1-4, p. 359] ("Order Denying Motion to Abate"); Order Granting Plaintiff's Motion to Compel Discovery [Dkt. 1-4, p. 360] ("Order Granting Motion to Compel") (collectively the "Discovery Orders").

[16] Response, 15 (emphasis added).

[17] Response, 15.

[18] Plaintiff's Verified Motion to Retain, ¶¶ 3-4 [Dkt. 1-3, p. 21].

[19] *See* Notice of Hearing on Defendant Alvarez & Marsal's Motion for Protective Order and Motion to Abate [Dkt. 1-4, p. 167]; Fifth Amended Notice of Hearing on Defendant Alvarez & Marsal's Motion for Protective Order and Motion to Abate [Dkt. 1-4, p. 355].

[20] *See* Plaintiff's Verified Motion for Continuance and for Entry of Amended Scheduling Order, ¶¶ 4-6 [Dkt. 1-4, p. 199]; Agreed Motion for Continuance and Entry of Amended Scheduling Order, ¶¶ 2-6 [Dkt. 1-4, p. 310-11]; Amended Agreed Motion for Continuance and Entry of Amended Scheduling Order, ¶¶ 2-8 [Dkt. 1-4, p. 339-41].

case could possibly be decided more quickly in federal court?[21] Although this argument is improper (*WRT Creditors*, 75 F. Supp. 2d at 605), A&M has submitted no argument or evidence that this is actually the case.

Put simply, A&M offers no distinction between the state and federal forums at issue that would permit the Court to determine whether a case could or could not be timely adjudicated in either court under these circumstances. Nor does A&M account for the fact that A&M stalled the State Court Action, including by postponing scheduled hearings and resisting legitimate discovery. Furthermore, DAF and A&M already ***committed*** to Judge Parker that "[t[he Parties will not request any further agreed continuances absent unforeseen and compelling reasons,"[22] but A&M now seeks to avoid this commitment by removing the case to a different forum. In light of the record evidence, including that which establishes Judge Parker's familiarity with this case, A&M's argument against the fourth element for mandatory abstention fails.

ii. *Diversity Jurisdiction.*

A&M also finds no support in the *Teal* case; A&M is wrong to rely on *Teal* as a back-door to establishing diversity jurisdiction.[23] That case involved a removal based expressly on diversity jurisdiction. *Teal Energy USA, Inc. v. GT, Inc.*, 369 F.3d 873, 875 (5th Cir. 2004). Here, A&M's Notice never mentions diversity jurisdiction, nor does A&M's response establish diversity jurisdiction—A&M only argues that "the parties *appear* completely diverse."[24] The *Teal* court confirmed that "[t]he party invoking federal jurisdiction bears the burden of proof if diversity is challenged." *Id.* at 878 n.16. A&M cannot hide the ball by failing to assert diversity as a basis for

[21] Response, 15.
[22] Amended Agreed Motion for Continuance and Entry of Amended Scheduling Order, ¶ 8 [Dkt. 1-4, p. 341].
[23] *See* Response, 16.
[24] Response, 16.

jurisdiction in its Notice, and then claim it is relieved of its burden to establish jurisdiction because DAF filed a motion for remand based on § 1334—A&M's only asserted basis for jurisdiction—rather than § 1332.

The claims on which A&M seeks removal were not asserted until after the State Court Action had been on file far beyond the one-year limit to remove cases based on diversity.[25] *See* 28 U.S.C. § 1446(c)(1). Thus, even if A&M was able to establish diversity jurisdiction, the State Court Action "could not have been asserted in federal court" based on diversity jurisdiction at the time DAF's Second Amended Petition was filed. *See Mugica*, 362 B.R. at 789-91 (**declining to retain jurisdiction based on diversity more than three years after case commenced; applying mandatory abstention to remand case**).

iii. *Equitable Remand/Permissive Abstention.*

A&M's only argument against equitable remand relies on A&M's flawed argument that "no part of this case is non-bankruptcy related." This is an unquestionable distortion, but, in any event, is irrelevant because related-to jurisdiction is one of the required elements for abstention. *See Schuster v. Mims (In re Rupp & Bowman Co.)*, 109 F.3d 237, 239 (5th Cir. 1997); *Edge Petroleum Operating Co. v. GPR Holdings, L.L.C. (In re TXNB Internal Case)*, 483 F.3d 292, 300 (5th Cir. 2007); *See Southmark Corp. v. Coopers & Lybrand (In re Southmark Corp.)*, 163 F.3d 925, 929 (5th Cir. 1999). Here, again, A&M concedes that "some, but not all, of the requirements for mandatory abstention are satisfied," and DAF's "claims hinge solely on questions of state law and invoke no substantive right created by federal bankruptcy law." *See* Motion, 20 n. 38 (citing *Lain v. Watt (In re Dune Energy, Inc.)*, 575 B.R. 716, 730-31 (Bankr. W.D. Tex. 2017) ("[A]

[25] *See* Notice, ¶ 30. If, as A&M suggests, diversity jurisdiction exists in this case, then this case was removable to federal court from the outset in 2022.

bankruptcy court may still permissively abstain under 28 U.S.C. § 1334(c)(1) when some, but not all, of the requirements of mandatory abstention are satisfied."); *Gober v. Terra+Corp. (In re Gober)*, 100 F.3d 1195, 1207 (5th Cir. 1996) ("find[ing] no abuse of discretion [where the plaintiff's] claims hinge[d] solely on questions of state law and invoke[d] no substantive right created by federal bankruptcy law")); *Seven Talents, LLC v. Neugebauer (In re With Purpose, Inc.)*, 654 B.R. 715, 730 (Bankr. N.D. Tex. 2023) (permissively abstaining where the "critical factors"—non-core, predomination of state law issues, non-debtor parties, and only 'related-to' jurisdiction—favored abstention, even where other factors weighed against abstention). Permissive abstention is clearly warranted in this case, as an alternative to mandatory abstention.

C. Untimely Removal.

To the extent A&M attempts to exceed the bounds of a properly removable case under § 1334, and relies on discovery requests to support its removal, A&M cannot ignore those requests when confronted with the lack of timeliness of A&M's Notice. *See In re Shaffer*, 42 B.R. 522, 525 (Bankr. N.D. Tex. 1984) (looking to § 1446 for guidance in construing bankruptcy removal rules). A&M cannot, on the one hand, argue that "DAF's relentless efforts to obtain discovery from Mr. Seery are all but certain to run afoul of the Plan's injunction,"[26] while arguing, on the other hand, that those "efforts to obtain discovery" are irrelevant to the timeliness analysis.

A&M wholly fails to address the *Moran* case, a Northern District case, which held that "although Plaintiff's state court pleading does not allege a federal claim, Plaintiff has shown 'a clear intent to pursue an ERISA claim' ***through his discovery requests***." *Moran v. Stevens Transp., Inc.*, Civil Action No. 3:10-CV-0153-K, 2010 U.S. Dist. LEXIS 36553, at *2-4 (N.D. Tex. 2010). Moreover, the *Garcia v. MVT Servs.* case is directly relevant here because A&M attempts to

[26] Response, 13.

introduce extrinsic evidence—like the settlement agreement described in A&M's February 21, 2023 letter, which references DAF's discovery requests,[27] or DAF's discovery requests themselves[28]—as evidence of an alleged intent to bring a federal claim (which DAF has not asserted). 589 F. Supp. 2d 797, 803 (W.D. Tex. 2008). Here, DAF's second set of discovery requests were served, at a minimum, by July 29, 2024,[29] and proposed interrogatories on the same topics were circulated between the parties well before then.[30]

D. Fees & Costs.

The fact that "related-to" jurisdiction is implicated ***is an essential element of mandatory abstention***. Whether A&M is right or wrong about "related-to" jurisdiction is irrelevant—mandatory abstention is required either way. Conspicuously, A&M does not argue it had an "objectively reasonable" justification for ignoring the principles of mandatory abstention. This is highlighted by A&M's failure to even argue against the first three elements of mandatory abstention—which also confirms the propriety of permissive abstention in the alternative. In any event, costs are appropriately awarded where removal serves to delay litigation and increase costs—as A&M has done here—regardless of whether there is an "objectively reasonable" basis for removal. *See Martin v. Franklin Capital Corp.*, 546 U.S. 132, 140 (2005).

PRAYER

For the foregoing reasons, DAF respectfully requests the Court grant DAF's Motion, remand this adversary proceeding to the 116th Judicial District Court of Dallas County, Texas, award DAF its attorneys' fees and costs incurred due to A&M's wrongful removal, and grant DAF all such other and further relief to which it may be justly entitled in law or in equity.

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[27] Dkt. 1-3, p. 93.
[28] *See* Notice, ¶¶ 5, 29-30.
[29] Response, 5; Motion, 17-18.
[30] *See* February 21, 2023 Letter from Gibson Dunn, p. 2 [Dkt. 1-3, p. 93].

Dated: November 18, 2024

Respectfully Submitted,

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CERTIFICATE OF SERVICE

On November 18, 2024, I filed the foregoing document with the clerk of court for the U.S. Bankruptcy Court, Northern District of Texas. I hereby certify that I have served the document on all counsel and/or pro se parties of record by a manner authorized by Federal Rules of Civil Procedure 5 (b)(2).

/s/ Ian B. Salzer
Ian B. Salzer