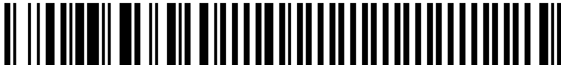
Docket #0007 Date Filed: 2/27/2025

IN THE UNITED STATES DISTRICT 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.	§ § § § § § § § § § §	*Case No. 3:25-CV-00236-L* *On Appeal from the United States Bankruptcy Court for the Northern District of Texas, Dallas Division Adversary Proceeding No. 24-03073-sgj*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MOTION FOR STAY PENDING APPEAL

Plaintiff, Charitable DAF Fund, L.P. ("DAF"), files this Motion to Stay Pending Appeal ("Motion") and would respectfully show:

I. Introduction

A stay of the underlying bankruptcy court Adversary Proceeding No. 24-03073[1] (the "Adversary Proceeding") pending interlocutory appeal is necessary to prevent a state court dispute from proceeding in a bankruptcy court that has no subject matter jurisdiction to hear it. This appeal involves the serious legal question of the bankruptcy court's *post*-confirmation assertion of subject matter jurisdiction over a *state law* dispute between *non-debtor* parties. As even the bankruptcy court recognized, "we're in a post-confirmation time-period where subject matter jurisdiction is narrowed." [Transcript of Hearing on Motion to Stay at 41, attached as **Exhibit A**]. To create jurisdiction where none exists, the bankruptcy court adopted an expansive new test for "related-to" jurisdiction that exceeds binding law. That decision warrants interlocutory appellate review[2] and a stay. Under the factors and equities that govern a stay request, DAF has satisfied all of them.

II. Background

DAF, an investor in an offshore fund ("Crusader Fund"), sued that offshore fund's investment manager, Alvarez & Marsal CRF Management, LLC ("A&M" or the

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[1] The Adversary Proceeding is pending in in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division.

[2] DAF has filed a Motion for Leave for Interlocutory Appeal of the bankruptcy court's written order denying remand. [Doc. 1-1]. DAF submits this Motion for Stay in coordination with its Motion for Leave.

"Investment Manager"), in state court over two years ago. DAF sued A&M to recover its investment, alleging in an amended petition that the Investment Manager breached its duty to DAF, one of its investors. DAF alleged that A&M committed this breach primarily by improperly segregating DAF's interest in the Crusader Fund, thereby establishing independent fiduciary duties separate from those owed to the remainder of the investors in the Crusader Fund, and then expediently monetized the Crusader Fund's claims in the Highland Capital Management L.P. ("Highland") bankruptcy case and timed the sale of those claims to deprive DAF of its investment. The fact that the Crusader Fund could have earned substantially more on its claims simply by holding them and waiting until distributions were made by Highland supports the conclusion that the sale was hastily conducted solely to harm DAF. This purely *state law* dispute was pending in Texas state court for *over two years* until A&M wrongfully removed it to the bankruptcy court—where it saw a favorable venue. That removal came on the eve of A&M's duty to make court-ordered discovery responses and when it faced the prospect of sanctions the state court judge was soon to determine.

DAF filed a motion to remand the case back to Texas state court. Principally, DAF argued that the bankruptcy court lacks subject matter jurisdiction over this post-confirmation dispute between two non-debtor parties—which clearly does not involve implementation, interpretation, or execution of the Highland plan **that was confirmed in 2021** (the "Plan"). The underlying litigation (despite the bankruptcy court's wide-ranging

foray into innuendo and resort to multiple "it is believed" determinations that lack factual bases (and are demonstrably false)), cannot upset, affect, involve, or even relate to the Plan. Nor does or could the underlying dispute and action involve claims or controversies that could affect the interests of any person or entity dealt with by the Plan.

The bankruptcy court denied DAF's motion to remand, finding that the case was "related to" the bankruptcy of Highland and the Plan. The bankruptcy court's expansive interpretation of its post-confirmation jurisdiction is in sharp contrast to the Fifth Circuit's clear and consistent precedent: "Following the confirmation of a chapter 11 plan, bankruptcy jurisdiction is limited to matters pertaining to the implementation or execution of the plan." *Matter of Chesapeake Energy Corp*., 70 F.4th 273, 281 (5th Cir. 2023).

DAF filed its Motion For Leave to File Interlocutory Appeal seeking an interlocutory appeal of the denial of remand. [Doc. 1-1].[3] As well, DAF sought a stay of the bankruptcy court's denial of remand under Federal Rule of Bankruptcy Procedure 8007(a) (to halt further proceedings in the matter DAF asserts the bankruptcy court has no jurisdiction to hear). [AP Doc. 30]. The bankruptcy court denied the requested stay, in a general order without written reasons. [AP Doc. 40].

At a hearing, however, the court stated that its "main reason" for assuming jurisdiction (and then denying a stay) was a hypothetical future *defense*—namely, the

[3] "Doc." refers to docket entries in this District Court case, where as "AP Doc." refers to docket entries in the underlying Adversary Proceeding No. 24-03073.

court's "belie[f]" that the "claims may be estopped or precluded by prior bankruptcy court litigation and prior bankruptcy court orders." [Ex. A at 41]. On this invalid speculation, the court determined that it had jurisdiction to enforce its own orders and DAF could not demonstrate a likelihood of success on appeal or a "substantial case on the merits." [Ex. A at 41]. DAF responded—and reminded the bankruptcy court—that a defense cannot create subject matter jurisdiction and DAF's claims do not implicate the bankruptcy court's prior orders at all; "[that's not what is implicated in this lawsuit[.]" [*Id.* at 21-22]. Indeed, this holding is expressly contrary to the bankruptcy court's own prior rulings and established Fifth Circuit law. [*Compare* Ex. A at 13, 19-21, 41, *with Principal Life Ins. Co., et al. v. JP Morgan Chase Bank, N.A., et al.*, 363 B.R. 801, 810-11 (N.D. Bankr. 2007) (Jernigan, J.) ("[W]hile a court always has the inherent power to enforce its own orders, this cannot serve as an independent basis for federal jurisdiction" and a "defense cannot itself create subject matter jurisdiction")]; *Malesovas v. Sanders*, No. H-04-3122, 2005 U.S. Dist. LEXIS 42344, at *10 (S.D. Tex. 2005).

Now, DAF seeks a stay of the Adversary Proceeding pending interlocutory appeal from this Court in accordance with Federal Rule of Bankruptcy Procedure 8007. Because a stay is warranted to prevent wasteful and injurious litigation before a court that lacks subject matter jurisdiction to hear it, the Court should grant a stay. Fed. R. Bankr. P. 8007.

III. Argument

A. A stay is warranted under the governing four-factor test.

In determining whether to grant a stay of litigation pending appeal, this Court applies a familiar four-factor test:

> (1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest.

Ruiz v. Estelle, 650 F.2d 555, 565 (5th Cir. 1981); *see Trend Intermodal Chassis Leasing LLC v. Zariz Transp. Inc.*, 711 F. Supp. 3d 627, 640 (N.D. Tex. 2024) (same). But while familiar, these factors are neither rigid nor mechanical. *U.S. v. Baylor Univ. Med. Ctr*., 711 F.2d 38, 39 (5th Cir. 1983) (citing *Ruiz*, 650 F.2d at 39). Instead, a movant "need only present a substantial case on the merits when a serious legal question is involved and show the balance of equities weighs heavily in favor of granting the stay." *Ruiz*, 650 F.2d at 565; *see Trend Intermodal*, 711 F. Supp. 3d at 640; *e.g.*, *In re Deepwater Horizon*, 732 F.3d 326, 345 (5th Cir. 2013) (finding stay appropriate pending appeal of district court's decision regarding interpretation of settlement agreement). While the bankruptcy court's departure from binding law is clear, the Fifth Circuit has emphasized that a strict mathematical "probability of success on the merits" standard is not the test:

> If a movant were required in every case to establish that the appeal would probably be successful, the Rule would not require as it does a prior

> presentation to the [bankruptcy] judge whose order is being appealed. That judge has already decided the merits of the legal issue.

Ruiz, 650 F.2d at 565. Instead, the balance of the equities control.

1. DAF has shown a likelihood of success and a substantial case on the merits.

The Court should issue a stay because DAF has shown a likelihood of success on its interlocutory appeal[4] or, put differently, a substantial case involving the serious legal issue of a bankruptcy court's limited *post*-confirmation jurisdiction. Subject matter jurisdiction is a pure matter of law. *EOG Res., Inc. v. Chesapeake Energy Corp*., 605 F.3d 260, 264 (5th Cir. 2010); *Dean v. City of Shreveport*, 438 F.3d 448, 460 (5th Cir. 2006). Thus, the bankruptcy court's decision denying remand is subject to broad *de novo* review and will be reversed if incorrect. *See EOG Res., Inc*., 605 F.3d at 264. Here, the bankruptcy court's strained interpretation of its post-confirmation jurisdiction is an obvious and erroneous expansion of Fifth Circuit law.

As the Fifth Circuit has explained time and time again, post-confirmation jurisdiction is proper only where the dispute pertains to the plan's implementation or execution, which means that "*few* disputes between non-debtors qualify." *In re GenOn*

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[4] A&M has suggested that DAF must show a likelihood of success of this Court granting leave to hear the interlocutory appeal—as opposed to a likelihood of success on the merits of that appeal if accepted (a pure legal issue A&M wants to avoid). Regardless, the reasons that demonstrate likelihood of success on the merits are the reasons that influence why the Court should accept the interlocutory appeal. The bankruptcy court's order involves a controlling question of law (the scope of post-confirmation jurisdiction); there is a substantial ground for difference of opinion (as shown in DAF's motion for leave and here); and the appeal will materially advance the litigation (and a stay is supported) because it will resolve the jurisdictional matter at the outset (rather than the end) and prevent the waste, inconvenience, and irreparable harms resulting from improper proceedings in the wrong court.

Mid-Atl. Dev., L.L.C., 42 F.4th 523, 538 (5th Cir. 2022) (emphasis added). Further, the Fifth Circuit has specifically stated that neither "[s]hared facts between the third-party action" a bankruptcy conflict nor "judicial economy alone" can "justify a court's finding of jurisdiction over an otherwise unrelated suit." *Feld v. Zale Corp. (in Re Zale Corp.),* 62 F.3d 746, 753-54 (5th Cir. 1995).

Rather, to fall within post-confirmation jurisdiction, a dispute typically must implicate a specific plan provision. *Id*. Here, the bankruptcy court—perhaps recognizing that there is no plan implementation nor execution at issue—added a brand new basis to extend jurisdiction beyond its arguable limits. According to the bankruptcy court, its subject matter jurisdiction could be derived from its ability to "interpret and enforce its own orders and to assure that the rights afforded to a debtor under the Bankruptcy Code are fully vindicated." Memorandum Opinion and Order Denying Motion to Remand of Charitable DAF Fund, L.P. [AP Doc. 21] ("Memorandum Order") at 25-26; [Ex. A at 13, 19-21, 41]. But what rights of the Debtor are at issue? None. The only rights at issue are those of the DAF and A&M. Neither the Debtor nor any person or entity affected by the Plan are involved in the underlying dispute here.

While it is of course true that the Crusader Settlement was approved by the bankruptcy court, DAF seeks no relief that could affect any party under the Plan. It is beyond question that the bankruptcy court's order confirming the Crusader Settlement is set in stone; it is only A&M's conduct in arriving at that settlement that is at issue.

Indeed, while the bankruptcy court loosely wobbles in large circles about other actions that are **not** the underlying action, it is irrefutable that Crusader sold its claim(s), so (i) it cannot be a party under the HCMLP confirmed plan, (ii) the bankruptcy court was not involved in the sale transaction, and (iii) and any relief sought by DAF because the Investment Manager breached its duty to DAF cannot affect in any way the rights of any party under the Plan.[5] And, A&M can point to no effect on any person or entity (except in its imagination as to what DAF might be thinking outside of its actual pleadings). This Court should not abide an inherently-speculative assertion of clairvoyance as ground for subject matter jurisdiction. Under binding Fifth Circuit law, an assertion of post-confirmation subject matter jurisdiction requires more. *See GenOn*, 42 F.4th at 538; *see also Feld*, 62 F.3d at 753-54..

DAF does not dispute that the Crusader claims were claims filed in the HCMLP bankruptcy case. Crusader cannot dispute that it sold claims for some 50% on the dollar or that the claims will be fully paid with interest. The question then is whether A&M's actions in monetizing the claims were made with the intent to harm DAF; logically, the circumstances surrounding the sale and subsequent distribution of the proceeds unequivocally point to the answer being "yes." So, while the claims were bankruptcy

[5] To the extent A&M argues that an action based on the sale of the claims is a derivative claim belonging to the Crusader Fund: (1) A&M chose to segregate DAF's interest from the rest of the Crusader Fund, thereby creating separate and independent fiduciary duties owed to DAF; and (2) whether or not the claim is derivative or direct has no impact on subject-matter jurisdiction. As mentioned, the Crusader Fund is not, and cannot, be a party under the Plan.

claims and were traded as such, the question whether DAF's claims against the Investment Manager now can involve the Bankruptcy Court or jurisdiction under 28 U.S.C. § 1334 must be answered with "no."

Indeed, the duties owed from non-debtor A&M to non-debtor DAF at issue here were never at issue in the Highland bankruptcy or the Plan nor do they arise from the Highland bankruptcy or the Plan. In fact, there is <u>nothing</u> that can occur in this litigation or that can be an effect of this litigation that would or could have any effect on the Highland bankruptcy or the Plan. DAF is not seeking to undo the effects of the bankruptcy court's orders or even to interpret them. Instead, DAF seeks only recourse against its Investment Manager based on an independent breach of state law duties.

Stated otherwise, DAF's claims are rooted in (non-debtor) A&M's violation of its duties owed to (non-debtor) DAF as the investment manager of the Crusader Fund. And as courts have routinely recognized, even if A&M was somehow crafting a defense based upon the Highland bankruptcy or Plan, the assertion of a defense based on an interpretation of the confirmed plan or order of a bankruptcy court is <u>not sufficient</u> to invoke bankruptcy jurisdiction. *In re Dune Energy, Inc.*, 575 B.R. 716, 728–29 (Bankr. W.D. Tex. 2017) (collecting cases).

At most, the bankruptcy court, at A&M's urging, conjured the chilling prospect of the underlying action somehow triggering the gatekeeper orders within the Highland bankruptcy case and Plan. On this basis, the bankruptcy court suggested it had post-

confirmation jurisdiction because the "claims may be estopped or precluded" by "prior bankruptcy court orders." [*See* Ex. A at 13, 19-2, 41]. But there is no basis for this speculation, which rests on a hypothetical defense that cannot create jurisdiction, regardless.

First, DAF's pleadings are the operative object for decision in any removal analysis. *See Malesovas*, 2005 U.S. Dist. LEXIS 42344, at *10 (collecting *numerous* cases and outlining well-pleaded complaint rule). Here, there is not even a suggestion in any of the actual DAF pleadings that the underlying litigation could trigger some action related to the gatekeeper orders. Thus, neither the bankruptcy court nor A&M have pointed to any pleading of DAF's to support their argument. Nor can they. DAF has repeatedly, in actual pleadings, denied any prospect of triggering any such orders. That the underlying litigation has been ongoing for years without even a peep about gatekeeper orders (until A&M removed the state court dispute to avoid discovery sanctions and responses) is strong evidence of the fictitious nature of A&M's and the bankruptcy court's position.

As a matter of law, moreover, the gatekeeper provisions in the Plan cannot create an independent grant of post-confirmation subject matter jurisdiction over matters which would not otherwise meet the Fifth Circuit's exacting standards for post-confirmation jurisdiction. *See In re Coho Energy, Inc.*, 309 B.R. 217, 220 (Bankr. N.D. Tex. 2004) (explaining that a plan cannot create jurisdiction where it does otherwise exist). Indeed, in prior cases, this bankruptcy court has rejected the very argument it accepted as its

"main reason" for denying remand and a stay, here. [Ex. A at 41]; *Principal Life*, 363 B.R. at 810-11 (Jernigan, J.) ("[W]hile a court always has the inherent power to enforce its own orders, this cannot serve as an independent basis for federal jurisdiction" and a "defense cannot itself create subject matter jurisdiction"); *Malesovas*, 2005 U.S. Dist. LEXIS 42344, at *10 (collecting *numerous* cases).

Ultimately, there is simply no Plan provision at issue nor are the bankruptcy court's previous orders at issue in this litigation—which is what the Fifth Circuit requires to permit the exercise of post-confirmation jurisdiction. The lack of legal support for the bankruptcy court's new standard itself suggests a likelihood of success on the merits and a substantial ground for disagreement. At a minimum, the bankruptcy court's new and expanded standard—to "assure that the rights afforded to a debtor under the Bankruptcy Code are fully vindicated"—presents a substantial case on the merits, particularly where the debtor is not even a party. Memorandum Order [AP Doc. 21 at 25-26]. Under the law, these serious legal questions justify an immediate appellate answer and a stay to allow for it.

2. Being forced to litigate before a court with no subject matter jurisdiction is distinct from normal "litigation costs" and justifies a stay under the second factor.

Under the second factor, the absence of a stay will result in irreparable and needless harm. Without it, DAF will be forced to litigate a case—previously pending in

state court for two years—in a federal bankruptcy court that lacks jurisdiction to hear it. For multiple reasons, that is an irreparable and compelling harm.

Courts have consistently issued stays pending appeal of matters that implicate the all-important and threshold issue of subject matter jurisdiction. *E.g., U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 75 (1988) (order holding that party lacked "standing" was "stayed pending appeal"); *see also, e.g.*, *DDB Techs., L.L.C. v. MLB Advanced Media, L.P.*, 676 F. Supp. 2d 519, 532-33 (W.D. Tex. 2009) (issuing stay pending interlocutory appeal over issue that implicated "standing" and subject matter jurisdiction). Likewise, courts have recognized that where the effect of an order is to force a party to litigate before a court that cannot afford complete relief, that is necessarily irreparable harm. *In re Essar Steel Minnesota LLC*, No. 16-11626 (BLS), 2019 WL 2356979, at *5 (D. Del. June 4, 2019) (where a party was ordered to bring its claims before an arbitral body that could not enter certain orders, that constituted irreparable harm). These holdings recognize that when *jurisdiction* is substantially in question, the waste of private and judicial resources resulting from proceeding in the wrong court results in irreparable and costly harms that cannot be undone.

Indeed, proceeding in the wrong court ensures delay of a proceeding that *should* be marching to resolution *elsewhere*. The ensuing delay—which often spans *years*—allows evidence to age and memories to fade. It also allows the party wrongly asserting

jurisdiction to frustrate the timely prosecution of a claim or to evade the *correct* jurisdiction as a litigation tactic, as here.

Here, those harms are especially pronounced because, while jurisdiction is wholly lacking in federal court, the wrongful federal proceedings will burden and involve *two* judges and *two* courts, rather than the rightful state proceedings that involve one. Subject matter jurisdiction over DAF's state law claims does not exist in any federal court. But if an interlocutory appeal and stay is not entertained, the parties will be forced to undergo pretrial proceedings in the bankruptcy court only to move to the district court for a jury trial (because the bankruptcy court cannot conduct jury trials). Conversely, if the dispute remained in state court where jurisdiction exists, a single state-court judge would preside over the entire case, eliminating this judicial waste. None of this—the time, the cost, or the aging evidence—can be restored or recovered. The enormous waste of proceedings in two federal courts that lack jurisdiction is senseless, because the purely legal jurisdictional dispute will not go away and it can and should be decided now.

Battling against this obvious conclusion, A&M argues that the only harm to DAF are litigation costs that always exist when a stay is not granted. But A&M ignores that subject matter jurisdiction is different. Here, DAF is being forced to litigate its claims before the bankruptcy court (and, absent a stay and interlocutory review, a district court too in a jury trial) based on alleged *post*-limited confirmation jurisdiction, when subject matter jurisdiction is lacking or, at a minimum, seriously in question. So, while the non-

recoupable costs are an irreparable harm, there are greater harms at issue here than mere litigation costs. *FTC v. Educare Ctr. Servs.*, No. EP-19-CV-196-KC, 2020 U.S. Dist. LEXIS 135341, at *11 (W.D. Tex. 2020) ("[T]he Fifth Circuit recognizes monetary injuries as irreparable when they arise in '[t]he absence of an available remedy by which the movant can later recover monetary damages.'"); *see Enter. Intern., Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 473 (5th Cir. 1985).

3. A stay pending appeal will not harm A&M.

Conversely, a stay pending interlocutory appeal on the substantial and threshold legal question will cause no harm to A&M. As the defendant in this matter, A&M will not incur any injury by halting litigation to ensure the case proceeds in the *correct* court. That, after all, is what any defendant should want.

To be sure, A&M seems to have different motivations. Its primary motivation in removing this case from the outset was to delay a resolution on the merits, to avoid court-ordered discovery, and to avoid a sanctions hearing. While suspect, A&M's pursuit of delay certainly demonstrates that *legitimate* delay—to permit appellate resolution on a threshold issue of jurisdiction—is not harmful.

Indeed, A&M will only benefit from a stay. The jurisdictional question will not go away; it will remain a strong and central issue for appeal. The only question is whether this Court decides that issue now or later. On the threshold question, *now* is the logical and economical course, and it will not harm A&M. After all, A&M will incur the same

appellate expenses regardless—and it is quite likely, if not certain, to incur *greater* expense if a stay is not granted. If DAF is correct that subject matter jurisdiction is lacking, *all* of DAF's—and A&M's—efforts and expenditures in the bankruptcy court become meaningless.[6]

From every perspective, therefore, a stay will *save* expense and promote justice, not harm A&M. Accordingly, this third factor strongly favors a stay because A&M cannot demonstrate any relevant harm—while the harm to DAF and the waste of judicial resources is substantial.

4. There is a public interest in ensuring disputes are tried in the proper jurisdiction.

Finally, the public interest weighs heavily in favor of staying these proceedings because "there is a strong public interest 'not to have the Court exercise authority over parties over whom the Court lacks jurisdiction.'" *Trend Intermodal*, 711 F. Supp. 3d at 641; *see also*, *e.g.*, *DDB Techs*, 676 F. Supp. 2d at 532-33 (issuing stay pending interlocutory appeal over issue that implicated "standing").

IV. Conclusion

For the foregoing reasons, DAF respectfully requests the Court grant DAF's Motion, stay the Adversary Proceeding in its entirety until the issue of this Court's subject

[6] Finally, should DAF proceed with discovery pending a determination on A&M's Motion to Dismiss, it is almost certain A&M will request a stay until a decision is reached (which calls into question the bankruptcy court's stated claim that it is better suited to ensure a timely adjudication, (*see* Memorandum Order [AP Doc. 21] at 28).

matter jurisdiction can be fully and finally resolved on interlocutory appeal, and grant DAF all such other and further relief to which it may be justly entitled, general or special, in law or in equity.

Respectfully Submitted,

PARSONS MCENTIRE MCCLEARY PLLC

By: *_/s/ Sawnie A. McEntire_*
Sawnie A. McEntire
Texas State Bar No. 13590100
smcentire@pmmlaw.com
James J. McGoldrick
State Bar No. 00797044
jmcgoldrick@pmmlaw.com
Ian B. Salzer
State Bar No. 24110325
isalzer@pmmlaw.com
1700 Pacific Avenue, Suite 4400
Dallas, Texas 75201
Telephone: (214) 237-4300
Facsimile: (214) 237-4340

Roger L. McCleary
Texas State Bar No. 13393700
rmccleary@pmmlaw.com
One Riverway, Suite 1800
Houston, Texas 77056
Telephone: (713) 960-7315
Facsimile: (713) 960-7347

Attorneys for Charitable DAF Fund, L.P.

CERTIFICATE OF CONFERENCE

On February 27, 2025, counsel for DAF conferred with A&M counsel Marshall King (via telephone), who stated that A&M does not agree to a stay and opposes the relief requested in this Motion to Stay.

/s/ Roger L. McCleary
Roger L. McCleary

CERTIFICATE OF SERVICE

The undersigned certifies that on February 27, 2025, the foregoing document was filed with the clerk of court for the U.S. District Court, Northern District of Texas. I hereby certify that a copy of the foregoing document has served on all counsel and/or pro se parties of record by a manner authorized by Federal Rules of Civil Procedure 5(b)(2).

/s/ Roger L. McCleary
Roger L. McCleary

3178228.1

EXHIBIT A

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

In Re: HIGHLAND CAPITAL MANAGEMENT, L.P., Reorganized Debtor.	**Case No. 19-34054-sgj-11** Chapter 11 Dallas, Texas February 10, 2025 2:30 p.m. Docket
CHARITABLE DAF FUND, L.P., Plaintiff, v. ALVAREZ & MARSAL CRF MANAGEMENT, LLC, Defendant.	**Adversary Proceeding 24-3073-sgj** MOTION TO STAY PENDING APPEAL FILED BY PLAINTIFF CHARITABLE DAF FUND, LP [30]

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

APPEARANCES:

For the Plaintiff/ Movant:	Roger L. McCleary PARSONS MCENTIRE MCCLEARY, PLLC 1 Riverway, Suite 1800 Houston, TX 77056 (713) 960-7315
For the Plaintiff/ Movant:	Sawnie A. McEntire PARSONS MCENTIRE MCCLEARY, PLLC 1700 Pacific Avenue, Suite 4400 Dallas, TX 75201 (214) 237-4300
For the Defendant/ Respondent:	Marshall R. King GIBSON, DUNN & CRUTCHER, LLP 200 Park Avenue, Suite 47th Floor New York, NY 10166 (212) 351-4000

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3
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21
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24
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1 APPEARANCES, cont'd.

2 For the Defendant/ Respondent:

Andrea Louise Calhoun
3 GIBSON, DUNN & CRUTCHER, LLP
2001 Ross Avenue, Suite 2100
4 Dallas, TX 75201
(214) 698-3279

5 Recorded by:

Hawaii S. Jeng
6 UNITED STATES BANKRUPTCY COURT
1100 Commerce Street, 12th Floor
7 Dallas, TX 75242
(214) 753-2006

8 Transcribed by:

Kathy Rehling
9 311 Paradise Cove
Shady Shores, TX 76208
10 (972) 786-3063

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14

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25 Proceedings recorded by electronic sound recording; transcript produced by transcription service.

1 DALLAS, TEXAS - FEBRUARY 10, 2025 - 2:44 P.M.
2 THE CLERK: All rise. The United States Bankruptcy
3 Court for the Northern District of Texas, Dallas Division, is
4 now in session, the Honorable Stacey Jernigan presiding.
5 THE COURT: All right. Good afternoon. Please be
6 seated.
7 All right. We will get started now on our 2:30 setting in
8 Charitable DAF Fund, LP versus Alvarez & Marsal. This is
9 Adversary 24-3073. And we have an emergency motion for a stay
10 pending interlocutory appeal. I'll begin by getting lawyer
11 appearances, please.
12 MR. MCCLEARY: Your Honor, this is Roger McCleary
13 representing Movant, Charitable DAF Fund, LP. And I'm with
14 Parsons McEntire McCleary, and we appreciate the Court making
15 itself available today for this motion. Thank you.
16 THE COURT: All right. You had technical problems
17 connecting, I heard. Is that correct?
18 MR. MCCLEARY: That is correct, Your Honor. I
19 apologize for that.
20 THE COURT: Okay. Anything you can report? We
21 always like to know if something is going on, by chance, at
22 our end versus your end versus something we can report to IT.
23 So why don't you tell me.
24 MR. MCCLEARY: Your Honor, it was probably my end
25 because I had, you know, I had to put in my email address and

1 join here and there and some things that I just had difficulty
2 finding at first. So I would imagine it was all on my end,
3 and I apologize for that.
4 THE COURT: Okay. All right.
5 I'll now take appearance for Respondent.
6 MR. KING: Yes, Your Honor. It's Marshall King and
7 Andrea Calhoun from Gibson, Dunn & Crutcher on behalf of the
8 Defendant, Alvarez & Marsal.
9 THE COURT: All right. Thank you.
10 All right. I see Mr. McEntire has now joined. Were you
11 also wanting to make an appearance?
12 (No response.)
13 THE COURT: All right. Well, I don't know if he
14 could hear me or not, but there must be --
15 MR. MCCLEARY: He may not. Sawnie, can you hear?
16 MR. KING: That seems like --
17 MR. MCCLEARY: Sawnie, can you hear me?
18 MR. KING: That seems like a no.
19 THE COURT: It seems like a no.
20 MR. MCCLEARY: I can try to, Your Honor, I can try to
21 call him real quickly and see if he can hear and just let us
22 know.
23 THE COURT: Well, let's go ahead and get started. It
24 looks like you're probably going to be the one to make the
25 presentation. I don't think I -- well, he's gone now. I

1 didn't see a jacket on Mr. McEntire, so my guess is he was
2 going to defer to you, Mr. McCleary.
3 So, anyway, let's go ahead and begin. You may make your
4 presentation, Mr. McCleary.
5 MR. MCCLEARY: Your Honor, thank you. Is it possible
6 for me to do a share screen?
7 THE COURT: Absolutely. Go ahead.
8 MR. MCCLEARY: Thank you so much. Let me -- okay,
9 Your Honor. Hopefully, you can see the PowerPoint program I
10 have up.
11 THE COURT: Yes. I can.
12 MR. MCCLEARY: Okay. Thank you. Your Honor, we
13 appreciate, again, you taking the time to see us here today.
14 This motion concerns a stay of adversary proceeding pending
15 appeal from your order denying my client's motion for remand
16 to state court.
17 I want to emphasize, Your Honor, the only parties to this
18 action are my client, the Plaintiff, DAF, Charitable DAF Fund,
19 LP, which I'll refer to as DAF. And DAF's mission, Your
20 Honor, is a charitable mission, and they have supporting
21 organizations that have committed over $42 million to
22 nonprofit organizations and funded over approximately $32
23 million of commitments. And those causes, those charitable
24 causes, include education, veterans benefits, health and
25 medical research, and economic and community initiatives,

1 among others.
2 DAF, Your Honor, is a limited partnership which owns a
3 partnership interest in one of the Crusader Funds --
4 specifically, the Highland Crusader Fund II, Ltd., which I'll
5 refer to as Offshore Fund II.
6 The only other party in this action, Your Honor, is
7 Defendant Alvarez & Marsal CRF Management, LLC, which is
8 referred to, well, in my presentation, as A&M or Alvarez.
9 Your Honor, Alvarez was the investment manager for the
10 Offshore Fund II at all times relevant to my client's claims
11 in the state court lawsuit.
12 I'd note that obviously Highland Capital is not a party to
13 this lawsuit. James Seery is not a party to the lawsuit. The
14 Redeemer Committee is not a party to the lawsuit. It's only
15 DAF and Alvarez, A&M.
16 The underlying state court action, Your Honor, were the
17 petition that was filed on August 15th of 2022, which was over
18 two years prior to the removal of this case by A&M. We, of
19 course, in our motion for leave to appeal, to file the
20 interlocutory appeal, which is incorporated into our motion
21 for stay, note and address that A&M sought to implicate the
22 HCM or Highland Capital bankruptcy way back in March of 2023
23 in discovery responses, also in a motion to abate it filed in
24 August of 2023.
25 And, but it failed to remove within 30 days after the

1 initial pleading. So we assert, of course, and we've briefed
2 that the removal in this case is untimely, which, of course,
3 goes to the likelihood of success of the motion for leave for
4 interlocutory appeal.
5 Our second amended petition, Your Honor, DAF's second
6 amended petition in the state court action, alleges claims
7 that are solely against A&M. It's premised on A&M's wrongful
8 conduct regarding the Offshore Fund II. We -- DAF alleges A&M
9 improperly refused to make timely distributions to DAF and
10 deprived DAF of those distributions. It treated DAF's
11 interest in Offshore Fund as canceled. Offshore Fund II;
12 pardon me, Your Honor.
13 We allege DAF's preferred interest of other Crusader Fund
14 II interest holders over DAF, and failed to ensure fair
15 treatment of all interest holders, of course, including DAF,
16 and failed to maximize the interest holders' recovery,
17 including DAF's.
18 The causes of action pled, Your Honor, are breach of
19 fiduciary duties against A&M, conversion, and tortious
20 interference.
21 In regard to the removal and the motion to dismiss that is
22 now pending, A&M filed a notice of removal on September 13th
23 of -- let me make sure I've got -- okay, September 13th of
24 2024. And in that, they alleged related to jurisdiction,
25 related to the Highland bankruptcy case under 28 U.S.C. §

1 1452(a).

2 Again, that removal was filed August 15th, 2022, over --

3 or over two years after the filing of the state court lawsuit,

4 Your Honor. The removal was filed September 13th, but over

5 two years after the August 15th filing of the lawsuit.

6 Also, Your Honor, we of course have asserted the position

7 that the removal is premised on the -- kind of a straw man

8 argument that the state court action aims to discover and

9 pursue claims against Mr. Seery. Again, Mr. Seery is not a

10 party to the state court action at all. That's a straw man

11 argument on the part of A&M. A&M admits that the petition

12 filed by DAF does not even expressly refer to James Seery.

13 So, on October 14th of 2025, DAF filed its motion to

14 remand. That was timely filed. We argued there was no

15 subject matter --

16 THE COURT: I think you mean 2024, but --

17 MR. MCCLEARY: Oh, I apologize. You're right. 2024.

18 Excuse me. Thank you. Thank you.

19 In 2024, that no subject matter jurisdiction exists and

20 the state court lawsuit is not related to the Highland Capital

21 Management bankruptcy and that the notice of removal was

22 untimely. And we also, of course, have asserted principles of

23 abstention under 1334(c) and 1452 in our motion for leave to

24 file an interlocutory appeal.

25 On November 15th, A&M filed its motion to dismiss for lack

1 of standing and judgment on the pleadings in a brief in
2 support that contends that DAF lacks standing to bring its
3 fiduciary duty claim only. This motion does not extend to the
4 conversion or the tortious interference claims. And they
5 allege that there was -- does not -- that we don't satisfy the
6 requirements that would permit DAF to maintain a derivative
7 claim under the bankruptcy procedure or Bermuda law with
8 respect to the fiduciary duty claim.
9 They also allege that we fail to state a fiduciary duty
10 claim against A&M for matters related to the handling of the
11 bankruptcy claim.
12 On January 14th, this Court entered its memorandum opinion
13 and order denying DAF's motion for remand. On January 28th,
14 DAF filed a notice of appeal of the order. I'll refer to the
15 memorandum opinion and order denying the motion to remand as
16 the Order.
17 Then, on January 28th, DAF filed a motion for leave to
18 file interlocutory appeal. That's Document 29, which we've
19 incorporated into our motion to stay.
20 Tomorrow, Your Honor, is the current deadline for my
21 client to file a response to A&M's motion to dismiss relating
22 to the fiduciary duty claims, and the Court has set a hearing
23 on February 27th on A&M's motion to dismiss.
24 In regard to what we're considering here, DAF has asked
25 the Court to consider whether to grant a stay here of this

1 case. And under the *Plaquemines* decision that we've briefed
2 for the Court, there are four factors that are to be
3 considered in regard to the pending motion, Your Honor.
4 The first is whether the stay applicant has made a strong
5 showing of likelihood to succeed on the merits.
6 The second is whether the applicant will be irreparably
7 harmed absent a stay.
8 The third being whether issuance of a stay will
9 substantially injure the other parties interested in the
10 proceeding.
11 And fourth and finally, where the public interest lies.
12 Your Honor, we submit that all four of those factors weigh
13 in favor of granting our motion to stay, as we've briefed in
14 our motion for leave to file interlocutory appeal and our
15 motion for stay.
16 With respect to the likelihood of success on the merits,
17 Your Honor, we cite the *Trend Intermodal* case, noting that the
18 likelihood of success on the merits also can be met when the
19 party presents a substantial case on the merits, when a
20 serious legal question is involved that shows that the balance
21 of equities weighs heavily in favor of granting a stay, and
22 that a serious legal question has far-reaching effects or is a
23 matter of public concern going beyond the interests of the
24 parties.
25 Here, with respect to the element of likelihood of success

1 on the merits, Your Honor, we have a very strong case of
2 likelihood of success on the merits, we submit, Your Honor.
3 We realize, of course, we're appealing from your order, and in
4 a sense, kind of addressing you're grading your own paper
5 here. But, of course, we, in representing our client, we'll
6 make our case to the court of appeals.
7 And here, we've asserted that the Court lacked post-
8 confirmation bankruptcy jurisdiction over the underlying
9 lawsuit, which is between a nondebtor investor against a
10 nondebtor investment advisor, with no effect on the
11 implementation or execution of the amended plan, the Fifth
12 Amended Plan of Reorganization, as Modified, or administration
13 of the bankruptcy.
14 We also, of course, have briefed and assert, Your Honor,
15 that the order denying remand is premised on a presumption
16 that there will be a claim in the state court action against
17 Mr. Seery, who was CEO of Highland Capital Management at one
18 time in the underlying case, or that we'll be obtaining
19 discovery from Seery that will somehow impact the Highland
20 Capital estate.
21 We assert, Your Honor, there's simply no basis in the
22 record to support that, frankly. And that -- and also,
23 frankly, if there is not remand, we're kind of faced with a
24 scenario where, if there's ever discovery, frankly, requested
25 from Seery, it would somehow necessarily be subject to

1 gatekeeping orders, where it would necessarily implicate the
2 bankruptcy estate, Your Honor.
3 We reassert those assumptions concern and address very
4 serious legal questions that militate in favor of the motion
5 for leave for interlocutory appeal and a motion for stay in
6 this case.
7 We also, of course, have asserted that the removal is
8 untimely. It was not filed within 30 days of the filing of
9 the initial pleading, as we again briefed in our motion for
10 interlocutory appeal and remand motion.
11 So, in this case, Your Honor, part of the relevant inquiry
12 is we're looking at whether the potential outcomes of DAF's
13 claims may have any impact on the interpretation or
14 implementation of the confirmed plan of reorganization.
15 Obviously, we assert in the brief that it does not. We assert
16 that the opinion that denied the motion to remand was based on
17 kind of a hypothetical future action against a third party to
18 the litigation, Mr. Seery, and that we've distinguished the
19 various bases for the Court's holding with authorities in
20 support of our arguments in our briefing relating to the
21 motion to remand, the motion for leave to appeal, and the
22 motion for stay.
23 We assert, Your Honor, that there is a very serious legal
24 question presented here with respect to the ability of the
25 Court -- and the bankruptcy courts in general -- to look

1 beyond the actual claims pled and asserted in the pleading in
2 the state court action to determine subject matter
3 jurisdiction, and note that that has very profound, wide-
4 reaching consequences on expansion of what is limited Article
5 III jurisdiction in the forums involving the litigants.
6 Right now, Your Honor, with respect to the irreparable
7 harm consideration, --
8 THE COURT: Okay. Mr. McCleary, before you go to the
9 second requirement, I did not hear you address what I
10 considered my most significant reason for determining there
11 was bankruptcy subject matter jurisdiction, and that was this
12 Court concluded that DAF's claims might be estopped by prior
13 bankruptcy court orders in prior bankruptcy litigation. Okay?
14 And regardless of pre-confirmation/post-confirmation, a
15 bankruptcy court -- and a trial court, frankly -- always has
16 the ability to enforce its prior orders. So you did not
17 address that basis for bankruptcy subject matter jurisdiction
18 in --
19 MR. MCCLEARY: Your Honor?
20 THE COURT: -- likelihood of success on the merits.
21 MR. MCCLEARY: Thank you.
22 THE COURT: Okay?
23 MR. MCCLEARY: Thank you, Your Honor. Thank you,
24 Your Honor. Let me point out that we simply don't believe and
25 don't assert -- well, we assert that our claims don't

1 implicate the prior bankruptcy orders. They're not related to
2 the prior orders. So there would be no estoppel here.
3 And, of course, with respect to many of those prior
4 orders, or at least some of those prior orders, as we've
5 briefed, my client was not a party to some of the adversary
6 proceedings or matters that went on in the underlying
7 bankruptcy court --
8 THE COURT: Okay. Well, again, your client was an
9 active party during the bankruptcy case and did get notice and
10 opportunity to object to the 9019 settlement of the Redeemer
11 Committee/the Crusader Funds' proofs of claim during the
12 bankruptcy case. So that was one order that I was worried
13 about this might be relitigation of things that could have
14 been litigated there.
15 And then, as I pointed out in my ruling on denying the
16 motion for remand, that settlement was, again, addressed in
17 the confirmation order.
18 And then, last but not least, my remand order addressed
19 the different litigation we've had regarding what I will call
20 the claims trading.
21 So, again, that was my main reason, I think, for
22 determining bankruptcy subject matter jurisdiction existed.
23 We might have estoppel issues. We might have preclusion
24 issues based on prior orders of the bankruptcy court. And a
25 court always can enforce its prior orders.

1 MR. MCCLEARY: Yes, Your Honor. Let me respond
2 briefly to that. I appreciate you bringing that point up.
3 And first, we do not believe there are any estoppel issues
4 here. We don't believe implications of the Court's prior
5 orders are involved. And our claim is specifically and
6 directly against A&M for its conduct as the manager of this
7 fund.
8 I'd also point out, Your Honor, in addition to the
9 briefing that we filed on these points, that the order that
10 the Court entered approving the settlement agreement with
11 respect to the underlying claims, not the -- certainly not the
12 state court claims, but the claims in the bankruptcy, that
13 settlement agreement referenced an exhibit that was a
14 confidential exhibit in the underlying bankruptcy that
15 identified this specific claim -- or I should say interest,
16 excuse me -- and that's DAF's interest in the Offshore Fund
17 II.
18 That was a confidential document that my client did not
19 have at any time relevant to all those -- the arbitration, the
20 order approving the settlement agreement -- my client didn't
21 have those. So my client was not even aware that its interest
22 in this Offshore Fund II was, frankly, at risk. So for this
23 and the other --
24 THE COURT: Your client? What human being would have
25 been in control of your client during those relevant times?

1 MR. MCCLEARY: That would have been Mark Patrick.
2 THE COURT: No. No.
3 MR. MCCLEARY: Or his predecessor -- pardon me?
4 THE COURT: I know it wasn't Mark Patrick because
5 I've heard him testify on the stand --
6 MR. MCCLEARY: Or -- yes.
7 THE COURT: -- when he became the person in control
8 of DAF.
9 MR. MCCLEARY: Yes. And I was going to say, or his
10 -- his immediate predecessor. And, frankly, well, I'm
11 blanking on his name at this moment. However, I know the
12 Court has expressed concerns about her views about James
13 Dondero. James Dondero was not in control of DAF during any
14 time relevant to our claims in the underlying state court
15 action. So I just want to emphasize that. It was not James
16 Dondero.
17 THE COURT: Okay. So you can continue.
18 MR. MCCLEARY: Thank you, Your Honor.
19 With respect to the irreparable harm element of the
20 factors and considerations, again, practically, of course, we
21 believe we're correct and that the appellate court will
22 determine that there isn't subject matter jurisdiction here.
23 And practically, we're looking at trying to stay activities
24 and litigation as to avoid --
25 THE COURT: Yes. Your screen is showing your email,

1 by the way. I'm not looking at the emails, but they're there.
2 MR. MCCLEARY: Well, let me try to correct that.
3 Thank you. (Pause.) Technology is wonderful unless it isn't.
4 Let me try to -- here we go. Does this now -- does that fix
5 it, Your Honor?
6 THE COURT: Okay. That fixed it. And I --
7 MR. MCCLEARY: Thank you.
8 THE COURT: Before you go on, there's another issue
9 you did not address on likelihood of success on the merits.
10 And Alvarez & Marsal pointed this out, actually, in their
11 response they filed a few days ago. You didn't address
12 likelihood of the motion for interlocutory appeal being
13 granted. Isn't that part of what you have to address here?
14 MR. MCCLEARY: Well, that is the point, that the
15 motion for interlocutory appeal is likely to be granted
16 because of the -- what we've pointed out, of course, in our --
17 in that motion and in our motion for stay here, that the
18 underlying order does not -- it relies on and finds facts and
19 relationships that, frankly, are not based on the underlying
20 pleadings, and finds subject matter jurisdiction that doesn't
21 properly lie, based on the allegations and pleadings in the
22 underlying case.
23 THE COURT: What do you mean by that? What do you
24 mean?
25 MR. MCCLEARY: And further, that the lack of --

1 THE COURT: I didn't make findings of fact.
2 MR. MCCLEARY: -- timeliness --
3 THE COURT: I didn't make findings of fact. Okay? I
4 made determinations.
5 MR. MCCLEARY: Yes, Your Honor.
6 THE COURT: I made determinations.
7 MR. MCCLEARY: Yes, Your Honor.
8 THE COURT: What do you mean, though, I looked
9 outside the pleadings?
10 MR. MCCLEARY: With respect to -- the Court's order,
11 of course, referred to James Dondero's involvement quite
12 substantially. In particular, though, it referred to the
13 presumption that there would be claims sought against Mr.
14 Seery --
15 THE COURT: No. No. No.
16 MR. MCCLEARY: -- as the CEO --
17 THE COURT: No. No. I keep going back to my main
18 reason was I thought claims were being raised that might be
19 precluded by prior litigation in the bankruptcy court and
20 prior orders of the bankruptcy court.
21 MR. MCCLEARY: Yes, Your Honor.
22 THE COURT: How is that going outside your petition?
23 MR. MCCLEARY: Well, because the petition only
24 alleges claims against A&M for its conduct with respect to
25 being the manager of the fund as to my client. It doesn't

1 relate to Highland Capital Management or Mr. Seery.
2 And the Court's determinations, frankly, that implicate
3 the bankruptcy, we frankly don't agree with, respectfully, and
4 believe that that's not something implicated by our pleadings
5 in this case.
6 THE COURT: Okay. I'm looking at Paragraph 21 and 22
7 of the Second Amended Petition. I've got it in front of me.
8 I pulled it out before walking in here. And if you've got
9 them handy, you'll see Paragraph 21, A&M and the Redeemer
10 Committee then entered into a settlement with Highland Capital
11 Management which reduced the claims to the allowed amount of
12 $136.7 million in favor of the Redeemer Committee and $50,000
13 in favor of the Crusader Funds. A motion to approve the
14 claims was filed in the bankruptcy court by Highland Capital
15 -- you give a docket reference to the settlement motion --
16 which confirms that A&M allowed the Redeemer Committee to
17 control negotiations concerning funds to which the Crusader
18 Funds asserted entitlement. You cite a specific paragraph in
19 the settlement motion filed in the bankruptcy court. In doing
20 so, the Redeemer Committee became one of the largest creditors
21 in Highland's bankruptcy estate and held a position on the
22 Unsecured Creditors' Committee, while A&M effectively sat on
23 the sideline, abdicating its responsibilities. In effect, A&M
24 abdicated to the Redeemer Committee its duties to manage
25 Crusader Fund II's assets, thereby failing to ensure fair

1 treatment of all interest holders and maximization of
2 recovery.
3 Now, and then when you go on and assert the breach of
4 fiduciary duty claim, you use that same language again about
5 Alvarez abdicating its responsibility.
6 That, in my mind -- and let's put the claims trading
7 aside, which I think there's another order that concerns me
8 that we might be relitigating things -- but this language
9 suggests that your claim seeks to look behind a settlement
10 motion and a contested evidentiary hearing this Court had on
11 the settlement and an order this Court entered, which was
12 appealed by a billion-dollar creditor, UBS, and look at one of
13 the professionals involved, their role in this. And I held,
14 over an objection to a billion-dollar creditor that wasn't
15 your client, UBS, that the compromise was fair and equitable
16 and in the best interests of all creditors.
17 So, what I'm getting at is I might be wrong at the end of
18 the day in thinking that there is preclusion, but this at
19 least seems related to an order of the bankruptcy court and a
20 collateral attack of an order. Again, who knows at the end of
21 the day if I'll find that preclusion applies. But we're
22 talking about bankruptcy subject matter jurisdiction right
23 now. And doesn't a bankruptcy court have the ability to
24 interpret and enforce its own orders forever? Didn't the U.S.
25 Supreme Court say that in the *Travelers* case? There, it was a

1 20-year-old order.

2 MR. MCCLEARY: Your Honor, certainly, the Court has

3 the ability to interpret and enforce its orders in accordance

4 with the law. We would respectfully submit that's not what is

5 implicated in this lawsuit, Your Honor.

6 As argued before, what we are asserting here isn't going

7 behind or interpreting the Court's orders. This is -- this is

8 a straightforward claim against A&M for its own tortious

9 conduct that we allege in the petition. It doesn't seek to go

10 behind or change or modify any of your orders. It doesn't

11 seek to affect the bankruptcy estate by any means.

12 So that would -- I would assert that's the difference

13 here, Your Honor. At least one of the differences.

14 THE COURT: Okay. And what --

15 MR. MCCLEARY: May I proceed?

16 THE COURT: What about the claims trading aspect of

17 this? I mean, clearly, there's a theme in here that, by

18 participating in the trading of the Redeemer Committee claims,

19 Alvarez breached fiduciary duties. And, again, I know it was

20 Hunter Mountain, not DAF. But if the Court has good reasons

21 to think there might be some privity between Hunter Mountain

22 and DAF, haven't I looked at that issue and whether there

23 could be a colorable claim extensively in my Hunter Mountain

24 orders that are on appeal?

25 MR. MCCLEARY: Your Honor, again, there's, we would

1 respectfully submit, no basis in the record to consider any
2 privity between Hunter Mountain and DAF, much less Hunter
3 Mountain, DAF, and James Dondero. So we respectfully disagree
4 with that.
5 And then, again, I would point out that we're not trying
6 to undo the claims trade. We're -- we're relying on the fact
7 that it's a fact and, because of A&M's conduct -- again, not
8 the conduct of the estate or the Redeemer Committee or Mr.
9 Seery -- that there were breaches and tortious conduct by A&M.
10 And it does not implicate the Court's orders, though.
11 THE COURT: Okay.
12 Do we know why the picture's frozen?
13 MR. MCCLEARY: Let me -- let me -- is I may need to
14 probably pull up my chart again here. Let me do that.
15 THE COURT: Okay.
16 MR. MCCLEARY: I don't --
17 THE COURT: Yes. Can everyone pause for just a
18 moment? We've got frozen screens at the moment in our
19 courtroom, and we're going to --
20 MR. MCCLEARY: Yes, ma'am.
21 THE COURT: Just hold on a moment.
22 MR. MCCLEARY: Yes, ma'am.
23 (Pause.)
24 THE COURT: Okay. We've got you back. Do you hear
25 us and see us clearly?

1 MR. MCCLEARY: Yes, Your Honor. Can you hear me?
2 THE COURT: Yes.
3 MR. KING: Yes, Your Honor. I can hear and see.
4 THE COURT: Good deal.
5 MR. MCCLEARY: We're good.
6 THE COURT: We're back in business here in the
7 courtroom, so you may proceed, Mr. McCleary.
8 MR. MCCLEARY: Thank you, Your Honor.
9 On the second consideration, the irreparable harm to DAF
10 absent a stay, A&M, of course, as you pointed out, has this
11 pending motion to dismiss. Our deadline is to respond
12 tomorrow. The hearing on the motion to dismiss is set on
13 February 27th of this year.
14 Practically speaking, again, any orders we think the Court
15 may enter while this appeal is pending will be void. We think
16 that we -- the Court does not have subject matter
17 jurisdiction. If course, if we're correct in establishing
18 that, we're wasting the Court's resources, which we don't want
19 to do, in addition to my client's resources, in filing -- in
20 preparing and filing tomorrow a response and having a hearing
21 on the motion to dismiss as to just one issue in the case.
22 And so our stay motion is calculated to avoid waste of
23 resources that are not recoverable by my client. And that's
24 very important. We're not talking about just the normal
25 expenses of litigation that parties sometimes have an

1 opportunity to recover. We have no opportunity to recover
2 them in this case, and A&M doesn't even assert otherwise.
3 So, DAF will incur legal fees in defending against the
4 motion to dismiss with respect to filing a response, with
5 respect to a hearing. None of those expenses are recoverable.
6 And absent a stay, Your Honor, whichever side wins this motion
7 to dismiss, DAF or A&M will be expending resources to litigate
8 a case where we believe jurisdiction is lacking, only to have
9 to relitigate on remand to the state court.
10 Also, DAF would be prejudiced by having to prosecute
11 multiple ongoing appeals based on subject matter jurisdiction
12 in the unlikely event litigation proceeds and the Court grants
13 A&M's motion to dismiss. Were there to be an appeal from the
14 motion to dismiss, we have this pending appeal, and then we of
15 course have this ongoing litigation which, depending on the
16 result in that, itself could be the subject of an appeal.
17 So the decision on subject matter jurisdiction is just a
18 fundamental ruling that would enable the Court and all the
19 parties to avoid this harm and irreparable harm to my client.
20 We would be able to avoid additional expenditure and
21 litigation resources where we'd, you know, arguably, just end
22 up in the same spot, depending on all the rulings here,
23 without DAF having any ability to recoup expenses.
24 And we've cited the Court to the *FTC v. Educare* case in
25 our brief, 20 U.S. Dist. LEXIS 135341, at *11, in which the

1 court noted that the Fifth Circuit recognizes monetary
2 injuries are irreparable when they arise in the absence of an
3 available remedy by which the movant can later recover
4 monetary damages.
5 We have no such remedy here, Your Honor, and A&M doesn't
6 argue otherwise.
7 On the third consideration, whether it was --
8 THE COURT: Okay. Okay. Will you at least
9 acknowledge that it's extremely rare for expense, monetary
10 harm like this, to be irreparable harm?
11 MR. MCCLEARY: Not like this, Your Honor, because
12 it's -- it's certainly rare in the cases I saw in which the
13 litigant had an opportunity to recover those expenses. And
14 that's the distinguishing factor here, Your Honor.
15 THE COURT: Okay. In the *FTC* case you cited, I've
16 got it right here in front of me, that was a sovereign, okay,
17 an agency of the U.S. Government. So, zero chance the other
18 litigant is going to have any recovery of fees and expenses.
19 I don't know what the underlying agreements provide here or
20 any other statute, but I know that Alvarez & Marsal is not a
21 sovereign. Okay?
22 And then there was another case -- I've looked to see what
23 case *FTC v. Educare* was citing in the Fifth Circuit, and it
24 was a case involving the EPA, where the interim order, the
25 cost of compliance to the counterparty was going to be

1 enormous and overwhelming.
2 I mean, these both seem like very extraordinary examples,
3 but this is your chance to tell me that it's more common than
4 I realize to say irreparable harm is some legal expenses for a
5 few weeks.
6 MR. MCCLEARY: Well, Your Honor, I would say that the
7 principle and the proposition laid out in the *FTC* case, which
8 is a Western District of Texas case within the Fifth Circuit,
9 stands here. And regardless of whether you have a sovereign
10 involved or whatever other circumstances may apply, the
11 principle stands in this case. And that is, if you're
12 incurring monetary injuries and expenses and costs that you
13 can't recover in the case, then that qualifies under *FTC* as
14 irreparable injury.
15 I don't have a litany of cases, you know, for the specific
16 amounts we have, but I would submit, Your Honor, that the
17 cases I read actually didn't talk about the amounts. They
18 focused more on the premise on whether the costs and expenses
19 were recoverable or not. And here, they're not.
20 THE COURT: Okay. So the brief or the response to
21 the motion to dismiss and brief, your timetable showed me is
22 due tomorrow. So you haven't already done 90 percent of the
23 work on that?
24 MR. MCCLEARY: Well, Your Honor, --
25 THE COURT: That's hard for me to believe.

1 MR. MCCLEARY: Your Honor, we certainly have done
2 work on it. I am not in a position where I can accurately
3 tell you what percentage we are from being completed, to be
4 honest.
5 THE COURT: Okay. You've had the motion to dismiss,
6 though, since some date in, I'm guessing, early January.
7 Right? Maybe sooner than that.
8 MR. MCCLEARY: Yes, Your Honor. Yes, Your Honor.
9 But we still also have the hearing scheduled on the 27th of
10 this month, Your Honor.
11 THE COURT: Uh-huh. Okay.
12 MR. MCCLEARY: Okay. If I may proceed?
13 THE COURT: You may.
14 MR. MCCLEARY: Thank you, Your Honor.
15 With respect to the third consideration on substantial
16 injury and balancing that injury, any injury from A&M, there
17 just is no prejudice to A&M here. They haven't really
18 demonstrated or suggested that they have any injury, certainly
19 substantial injury, or prejudice of any kind.
20 Of course, they suggest they want to have their motion
21 heard, but they haven't suggested that a stay would somehow
22 prejudice any substantive right that they have, or interest.
23 So, given the injury that is established by DAF, the balance
24 weighs in favor of granting the motion to stay, Your Honor.
25 And then, finally, with respect to the public interest

1 element, the public interest weighs in favor of staying the
2 proceedings because, as we -- as the *Trend* case indicated that
3 we cited at 711 F.Supp.3d 627 at 641, there's a strong public
4 interest in not having to have a court exercise authority over
5 parties over whom the court lacks jurisdiction.
6 I'm prepared to kind of address some of A&M's response,
7 unless the Court would like me to wait until A&M and its
8 counsel respond.
9 THE COURT: Well, I mean, you get the last word in
10 rebuttal today. It's up to you whether you want to use that.
11 MR. MCCLEARY: Well, I certainly would like to have
12 rebuttal time, Your Honor, yes.
13 THE COURT: Okay. Well, it's up to you, if you want
14 to say this now or just wait and see what you want to say
15 after rebuttal.
16 MR. MCCLEARY: I'll wait. I'll wait until they
17 finish, Your Honor. Thank you.
18 THE COURT: Okay. Thank you.
19 Will it be Mr. King or Ms. Calhoun?
20 MR. KING: It will be me, Your Honor.
21 THE COURT: All right.
22 MR. KING: Marshall King from Gibson, Dunn &
23 Crutcher.
24 THE COURT: Thank you.
25 MR. KING: I don't know, can Mr. McCleary take his

1 slides down? I can't -- you know, Your Honor is very small on
2 my screen.
3 THE COURT: Oh. Well, maybe that's good.
4 MR. MCCLEARY: There you go.
5 THE COURT: Okay.
6 MR. KING: There we go. Thank you.
7 THE COURT: All right.
8 MR. KING: Thank you, Mr. McCleary.
9 MR. MCCLEARY: Yes, Mr. King.
10 MR. KING: Your Honor, I didn't come here today
11 thinking that we were going to be relitigating the motion to
12 remand for roughly 45 minutes. I came here to address the
13 motion for a stay pending appeal. And I think,
14 notwithstanding Mr. McCleary's disagreements with Your Honor's
15 ruling, Your Honor has ruled and made findings that Your Honor
16 has jurisdiction, related to jurisdiction, and that the
17 elements of mandatory abstention were not met here.
18 In light of that, he's got to show not just that he has a
19 meritorious appeal -- and I don't think he's even done that --
20 but leaving that aside, he's got to show a likelihood that the
21 district court is going to accept the appeal and disregard the
22 usual circumstances and procedures in cases that defers
23 appellate review until the end of the case. And I think he's
24 really -- other than disagreeing with Your Honor's ruling --
25 made no showing whatsoever on that basis.

1 The gist of his argument is, well, this concerns subject
2 matter jurisdiction, so there's reason to think they'll care
3 about the authority of the Court to hear it, and if they rule
4 our way -- but only if they rule our way, is the subtext of
5 his argument -- then the old case will go away and everything
6 else will be for naught.
7 That argument could be made in literally every case where
8 there is a threshold issue challenged on a motion to dismiss
9 or a motion to remand, like the one here. There is nothing
10 exceptional about this case that would suggest that the
11 district court is going to reach out on a very unique set of
12 factual circumstances to take an interlocutory and immediate
13 appeal of this case as opposed to any other case. And if one
14 opens the door to hearing every single jurisdictional issue on
15 an interlocutory basis, then the exceptional nature of
16 interlocutory appeals will disappear entirely.
17 I think the other key element, Your Honor, is, as we
18 pointed out in our papers, as Your Honor asked Mr. McCleary
19 about, the work that DAF needs to do in opposing our motion to
20 stay must be already done, or at least 90-plus percent of it
21 is already done. His papers are due tomorrow. He's had our
22 motion since November. So it's been three months, almost,
23 that he's had our papers. There's no harm, no irreparable
24 harm, certainly, in having him, you know, finish that up and
25 serve the papers.

1 The other point I would make there is whatever work he's
2 done and whatever work is yet to be done is not going to be
3 for naught, even if -- even if an appellate court eventually
4 finds that Your Honor erred on the subject matter jurisdiction
5 question, because we'll just end up back in state court having
6 to litigate the same questions of their standing and whether
7 they've satisfied the elements of demand futility to bring a
8 derivative claim the way they have brought in their second
9 amended petition.
10 And so those are the key elements, Your Honor. We agreed
11 back when we saw Your Honor in late November that it made
12 sense to defer briefing and hearing on the motion to dismiss
13 pending Your Honor's ruling on the jurisdictional issue, and
14 it was put off at that point in time. Once Your Honor has
15 made that decision and at least presumptively found subject
16 matter jurisdiction here, it no longer makes sense to put that
17 off until some appellate court -- and keep in mind, we're
18 probably -- if they are unsuccessful in getting the district
19 court to reverse Your Honor, one can pretty much bet, based on
20 the past track record of DAF and other affiliated companies,
21 that there might be a subsequent appeal to the Fifth Circuit,
22 and we'll continue waiting for some court to put the final
23 stake in that argument of theirs.
24 They will have an opportunity at the end of the case to
25 take an appeal and challenge Your Honor's subject matter

1 jurisdiction rulings. The public interest is not served by
2 encouraging interlocutory appeals, piecemeal appeals.
3 I thought it quite ironic that one of Mr. McCleary's
4 arguments about how his client will be prejudiced and incur
5 extra costs and expense is the need to take multiple appeals.
6 Well, you know, I didn't tell them to file a motion for leave
7 to take an interlocutory appeal. They could have saved their
8 fire and done it all at once at the end of the case, with
9 whoever prevails and whoever loses taking the appeal in this
10 case.
11 For all those reasons, Your Honor, I think it's time to go
12 forward with the motion to dismiss, and we ask that the motion
13 to stay to be denied.
14 THE COURT: All right. I was trying to find in the
15 statute -- Courtney, maybe you remember off the top of your
16 head because we emailed about this -- I don't think you can
17 appeal beyond the district court. 14 -- what is it? I don't
18 think you can appeal beyond the district court a bankruptcy
19 court decision to remand or not to remand.
20 MR. KING: Well, you couldn't -- you can't even
21 appeal it to a district court, Your Honor. That's why he's
22 had to move for leave to appeal. But maybe you're right, maybe
23 there is a further restriction.
24 THE COURT: Well, yes, I'm not -- okay, hang on.
25 (Pause.)

1 THE COURT: Yes. I'm talking about the second
2 sentence of 28 U.S.C. § 1452(b): An order entered under this
3 subsection remanding a claim or cause of action or a decision
4 to not remand is not reviewable by appeal or otherwise by the
5 court of appeals under Section 158(b), 1291 or 1292 of this
6 title, or by the Supreme Court of the United States under 1254
7 of this title.
8 So that's something entirely different from an
9 interlocutory order of any kind. Any kind of interlocutory
10 order, you have to get leave of court. But an order granting
11 a motion to remand or denying a motion to remand is entirely
12 unique under that sentence I just read. You can only appeal
13 it to the district court and not any further.
14 MR. KING: You might be right, Your Honor, except I
15 believe what the -- you might be right about this, but I think
16 -- and I apologize for suggesting otherwise. Although, as I
17 read this, this is -- if an order entered under this
18 subsection is not reviewable. Is not reviewable. That's the
19 subsection that deals with remand on equitable grounds.
20 So I think, on permissive abstention grounds, which Your
21 Honor did deny remand on that basis, but their appeal here is
22 not -- their attempt to appeal here is not from Your Honor's
23 decision on the permissive abstention; it's only on the basis
24 of the finding on related to jurisdiction and on the finding
25 on mandatory abstention, as I understand their appeal.

1 THE COURT: Okay. You might --

2 MR. KING: So, --

3 THE COURT: You might be right about that and I might

4 be wrong. This comes up so rarely that I don't think any of

5 us are entitled to call ourselves experts on it. It's rare,

6 in my experience, for sure, and maybe all of ours.

7 All right.

8 MR. KING: Regardless, Your Honor, I mean, my point

9 stands, which is, to the extent their complaint is the need to

10 prosecute multiple appeals, they've brought that on

11 themselves. They could have waited and taken an appeal at the

12 end of the proceedings before Your Honor.

13 Thank you.

14 THE COURT: Thank you.

15 All right. Rebuttal, Mr. McCleary?

16 MR. MCCLEARY: Thank you, Your Honor. Specifically

17 with respect to Mr. King's argument that we've done whatever

18 percentage of work we've done on the response and that it

19 won't be wasted, presumably because they would have a motion

20 in state court on these grounds, obviously, you have different

21 law that applies and different research and expenditures that

22 would be required to respond in federal court versus state

23 court. So I make that point.

24 And then if I could also share my screen.

25 THE COURT: Okay.

1 MR. MCCLEARY: Okay. Can the Court see the screen?
2 THE COURT: I can.
3 MR. MCCLEARY: Thank you. In the response that A&M
4 filed, their -- the response really somewhat can be summarized
5 as a, you know, no, they didn't, that DAF purportedly didn't
6 meet our burden considerations. And obviously, we disagree
7 with that.
8 On the likelihood of success prong, A&M relies on two
9 cases on Page 3 and 4 for the proposition that the Fifth
10 Circuit has repeatedly denied leave to appeal orders
11 concerning subject matter jurisdiction. Those cases are
12 distinguishable on their facts, the circumstances, the issues.
13 The *In re Permian* case, which is No. MO:18-CV-00080-DC, at
14 219 WL 13254194, there, the appellants in that case argued
15 there was no subject matter jurisdiction because the board
16 member of the bankrupt entity purportedly did not have
17 authority to file the bankruptcy petition and did not have
18 authority to do so by all the required percentage interests of
19 the company under the company agreement. And they asserted
20 that the discretionary standard under 28 U.S.C. §§ 157 and 158
21 deprived the court unconstitutionally of the automatic right
22 to review the bankruptcy court's order.
23 But the appellees in that case, Your Honor, argued there
24 was no authority holding that the company agreement, with
25 disputed terms and enforceability, was a basis to divest a

1 bankruptcy court of subject matter jurisdiction. And the
2 court there found that 157 and 158 were not unconstitutional
3 simply because they allowed the bankruptcy court to deny a
4 motion to dismiss based on an alleged lack of subject matter
5 jurisdiction without the litigant's automatic right to appeal.
6 So that decision is just simply inapplicable.
7 The second one, the *Spencer* case, 210 WL 11618165, that
8 concerned a debtor, a debtor's motion to modify a
9 reorganization plan. That included a court-approved entry
10 into and performance under what we'll refer to as standby
11 purchase documents that permitted creditors the option to
12 receive cash instead of common stock. And the movant sought
13 review of the interlocutory order so that the threshold
14 questions concerning subject matter jurisdiction and fraud in
15 the initial filing could be considered and determined before
16 rather than after implementation of the plan.
17 Of course, we have a plan that's already implemented here.
18 And there, the court found the movants had simply failed
19 to address in their motion any of the factors governing
20 discretion to grant the motion for leave to appeal. So that's
21 not applicable here.
22 With respect to the likelihood of success element, in
23 A&M's response they cite the *O'Donnell v. Harris County* case
24 for an argument that a motion for stay should not be used to
25 relitigate matters regarding a motion for remand and the

1 hypothetical future action against Seery. We assert, Your
2 Honor, that is a misplaced argument in that what we have done
3 is demonstrate the likelihood of success. We're not
4 relitigating the underlying motion to remand.
5 So *O'Donnell* is taken out of context. There, there was a
6 motion to stay an order of preliminary injunction against
7 Harris County and policymakers from using bail on a secured
8 instead of unsecured basis to detain misdemeanor defendants
9 who were too poor to pay their financial -- their financial
10 condition. And the defendants argued for the very first time
11 there in their motion for stay that the relief the plaintiffs
12 sought and that the court had ordered was unavailable under
13 Section 1983 because the plaintiffs must first exhaust state
14 law remedies.
15 And there, the court simply observed that a motion to stay
16 shouldn't be used to relitigate matters or submit new evidence
17 or raise arguments that could have and should have been raised
18 before the judgment issue.
19 So that's not what is happening here, so that case is
20 inapplicable.
21 With respect to the irreparable harm element, Your Honor,
22 A&M in their response argues that we're only complaining about
23 ordinary and necessary costs, but they ignore that we're
24 raising avoidable costs and expenses for which we have no
25 right to recover. They're ignoring the decision we briefed

1 and have discussed in this hearing, Your Honor, on the *FTC v.*
2 *Educare Services* for the proposition that monetary injuries
3 are irreparable when they arise in the absence of an available
4 remedy by which the movant could later recover monetary
5 damages. And then argues that the Fifth Circuit has denied a
6 stay even when the plaintiff showed irreparable harm would
7 occur, citing *In re Permian Producers Drilling*.
8 Your Honor, that's -- while that's correct, however, *In re*
9 *Permian Producers* also found that there was a complete failure
10 to show a likelihood of success on the merits. So, again,
11 that's distinguishable and inapplicable here.
12 With respect to the balance of harms, A&M argues in their
13 response only that A&M is entitled to have its motion to
14 dismiss decided, they offer no argument that they're injured
15 in any way by the request to stay, and the balance of harm
16 strongly favors DAF, we submit, Your Honor, given the costs
17 and expenses that are unrecoverable that we're faced with and
18 the multiple appeals that are presented here. And also the
19 waste of litigation efforts when there's no subject matter
20 jurisdiction.
21 And then with respect to the public interest factor, A&M
22 argues the *Trend Intermodal* case, a case that relies or cited
23 a case outside of the Fifth Circuit. But in fact, that
24 doesn't mean *Trend* is not valid authority. It's a Fifth
25 Circuit case, or a case within the Fifth Circuit, that stands

1 for the proposition that we cited.
2 So, Your Honor, we do request the Court stay the adversary
3 proceeding in its entirety until the issue of this Court's
4 subject matter jurisdiction can be fully and finally resolved
5 on the interlocutory appeal, and we certainly rely on the
6 arguments we've asserted in our -- also in our motion for stay
7 and in our motion for leave for -- to file interlocutory
8 appeal.
9 Thank you, Your Honor.
10 THE COURT: Okay. Thank you.
11 All right. Well, as you would imagine, we've thoroughly
12 read your papers and even gone back and reread the Court's
13 very lengthy memorandum opinion and order denying motion for
14 remand. And based on that, as well as the arguments today,
15 the Court is going to deny the motion for stay pending
16 interlocutory appeal.
17 The underlying adversary proceeding before the bankruptcy
18 court is, of course, an action that was pending in Texas state
19 court. Defendant Alvarez & Marsal removed it to this Court.
20 Plaintiff Charitable DAF filed a motion to remand it promptly
21 to the Texas state court. As we know, DAF argued primarily
22 that this Court lacks bankruptcy subject matter jurisdiction.
23 The Court, in denying the motion to remand, determined that
24 the adversary proceeding is at least related to the bankruptcy
25 case of Highland Capital Management.

1 Now, Bankruptcy Rule 8007 governs in this context of the
2 DAF's motion seeking a stay while it pursues an interlocutory
3 appeal to the district court.
4 When asked to consider a motion for stay of litigation,
5 this Court, as with any trial court, must determine four
6 factors, which have been eloquently argued here today. And
7 the Court notes that it is the Movant who has the burden to
8 establish the four factors.
9 And those four factors are, number one, whether the stay
10 applicant has made a strong showing of likelihood to succeed
11 on the merits. And as noted in argument, a likelihood of
12 success on the merits also can be met if the movant presents a
13 substantial case on the merits when a serious legal question
14 is involved and shows that the balance of equities weighs in
15 favor of the stay. That's the *Trend* case that was cited
16 multiple times today. That case said, "A serious legal
17 question has far-reaching effects or is a matter of public
18 concern that goes well beyond the interests of the parties."
19 This Court does not believe DAF met its burden on that. I
20 do not believe DAF has established a substantial case on the
21 merits on a serious legal question. Of course, the question
22 of subject matter jurisdiction is important, but it's a legal
23 question that every federal court must confront. It's not
24 something at all novel.
25 I want to emphasize once again what I said earlier today a

1 couple of times: This Court's main reason for concluding
2 there was at least related to subject matter bankruptcy
3 jurisdiction was this Court believes the claims may be
4 estopped or precluded by prior bankruptcy court litigation and
5 prior bankruptcy court orders. I don't believe this is a
6 novel proposition. I believe bankruptcy courts frequently
7 have to look at their subject matter jurisdiction post-
8 confirmation. I've done it countless times in regard to the
9 *Highland* case.
10 So, certainly it's an important question. Certainly, it's
11 the first question that any trial court has to ask in any
12 litigation. But I don't think the subject matter jurisdiction
13 question here is what courts have in mind on the topic of is
14 there a substantial case on the merits on a serious legal
15 question.
16 As I said earlier, I may or may not find dismissal is
17 appropriate based on some sort of preclusion argument. And I
18 think -- I've not studied Alvarez & Marsal's motion to dismiss
19 yet because it's still a few weeks away -- I think there are
20 other arguments they've made. But this is about relatedness
21 to the bankruptcy case. And yes, we're in a post-confirmation
22 time period where subject matter jurisdiction is narrowed.
23 But any time a court, a bankruptcy court or any trial court,
24 feels like it is pressed to interpret and maybe enforce its
25 prior orders or find preclusion because of its prior

1 litigation, there's going to be subject matter jurisdiction.
2 So I don't find Factor #1 is met here.
3 With regard to Factor #2, likewise, the Court does not
4 believe Movant has met its burden in establishing that it will
5 be irreparably harmed absent a stay. The argument, of course,
6 is wasted litigation expense and efforts if it has to go
7 forward in this action prior to a ruling on the interlocutory
8 appeal. I think that argument rings hollow for numerous
9 reasons.
10 One, as pointed out, the motion to dismiss was filed in
11 November. We looked it up during the hearing. November 15th.
12 So DAF has had almost three months to draft a response. And I
13 agree with the notion that the litigation expenses that are
14 going to be incurred more lie at the feet of DAF for deciding
15 to pursue an interlocutory appeal when this issue could
16 certainly be raised perhaps after a ruling on the motion to
17 dismiss or another appropriate time. I don't think --
18 MR. MCCLEARY: Your Honor?
19 THE COURT: I don't think this is an extraordinary-
20 enough situation where litigation expenses and efforts are
21 enough to amount to irreparable harm absent a stay.
22 Third, the Court must look at whether issuance of a stay
23 will substantially injure the other parties interested in the
24 proceeding. Sort of a balance of harm, as the courts say. I
25 don't think Movant DAF has met its burden of showing some sort

1 of injury. Again, it all boils down to the litigation
2 expense, and I don't think that meets the burden of proof
3 here.
4 Last, the public interest. I don't think Movant has met
5 the public interest standard here.
6 And for all of these reasons, the motion for stay is
7 denied.
8 All right. Anything else?
9 MR. MCCLEARY: Yes, Your Honor. I just wanted to let
10 the Court know you'd asked who Mark Patrick's predecessor was,
11 --
12 THE COURT: It was Grant Scott.
13 MR. MCCLEARY: -- and that was Grant Scott.
14 THE COURT: I know. I have a longer history in this
15 *Highland* case and adversaries than anyone else, I fear. Grant
16 Scott. He was Mr. Dondero's best friend growing up, college
17 roommate, best man at his wedding. You know, what more. And
18 he ultimately was replaced by Mr. Patrick, I believe in 2021,
19 was Mr. Patrick's testimony on the witness stand.
20 And I have heard testimony that Mr. Dondero was the
21 investment manager for DAF, and it was funded with Highland
22 money, and there's lots of overlap. Whether people think it
23 establishes privity will maybe be litigated and appealed one
24 day. But I've heard enough in my many years to at least know
25 there are strong ties between CLO Holdco, Charitable DAF,

1 Hunter Mountain, Mr. Dondero, and that's why this Court has
2 concerns. Okay?
3 MR. MCCLEARY: Well, Your Honor, obviously,
4 respectfully, the record will speak for itself. I haven't
5 been involved as long as the Court, but I don't recall that
6 Mr. Dondero was an investment manager for the DAF, certainly
7 at any times if at all relevant to this matter. I just want
8 to note that, that I'm certainly not agreeing with the
9 characterizations of his role in this.
10 THE COURT: Okay.
11 MR. MCCLEARY: And just --
12 THE COURT: And if you want to know, among places I
13 heard that was at a hearing where Charitable DAF, your client,
14 then represented by a different law firm, the Sbaiti law firm,
15 post-confirmation sued Highland in the district court, and
16 they filed a motion for leave to add Seery, and then the
17 district court *sua sponte* referred it to down to me, thinking
18 it all sounded bankruptcy-related.
19 The argument there was in connection with the HarbourVest
20 settlement that happened during the bankruptcy case, where the
21 HarbourVest proof of claim, $300 million proof of claim, was
22 settled in a 9019 settlement agreement, same sort of mechanism
23 as we're talking about with regard to the Redeemer Committee
24 settlement. Later, Charitable DAF sues in connection with,
25 guess what, breach of fiduciary duty and numerous other torts

1 for Highland's acts and non-acts and nondisclosures and Mr.
2 Seery's in connection with that settlement. Okay? Sounds all
3 very similar. Again, with my long history, I can't help but
4 think of same theory, different proof of claim, different
5 defendant. And in that case, Judge Jane Boyle *sua sponte* sent
6 it down to me, thinking there was bankruptcy subject matter
7 jurisdiction.
8 So, anyway, perhaps I should have said that earlier. But,
9 you know, --
10 MR. MCCLEARY: Your Honor?
11 THE COURT: -- the motion to dismiss was a different
12 animal. And you can look it up to see what happened there.
13 But, again, --
14 MR. MCCLEARY: Those are different parties, different
15 claims, of course, Your Honor.
16 THE COURT: No.
17 MR. MCCLEARY: And different --
18 THE COURT: It was Charitable DAF. It was Charitable
19 DAF --
20 MR. MCCLEARY: Well, --
21 THE COURT: -- as the plaintiff. But it was a
22 different settlement --
23 MR. MCCLEARY: But --
24 THE COURT: -- and a different set of defendants.
25 But it was the same, --

1 MR. MCCLEARY: But, Your Honor, --
2 THE COURT: -- same theory: Gosh, doesn't this all
3 relate to a settlement the bankruptcy court approved? Okay?
4 I'm just telling you this because, again, I think I used the
5 term *déjà vu* all over again in the order denying the motion
6 for remand. At least from my perspective, I feel like I am
7 ruling on the same thing again and again. Okay?
8 MR. MCCLEARY: Your Honor, when I said different
9 parties, I meant that Mr. Seery is not a party to our state
10 court action, of course, in this case. And they are different
11 claims. So that's what I was referring to.
12 The Court also had mentioned that the motion to dismiss
13 was filed in November of last year. But, of course, your
14 opinion, the memorandum opinion denying the motion to remand,
15 it was just issued on January 14th. So I'll just make that
16 note. We were obviously hopeful that we wouldn't have to
17 respond to the motion to dismiss.
18 THE COURT: Okay. Well, understood. All right. And
19 I apologize if my tone sounds just a little bit annoyed, but
20 again, look through the record. Look through the record of
21 the bankruptcy case. Look through all the case confirmation.
22 Adversaries. And we're kind of seeing the same things get
23 litigated with different parties, sometimes different
24 settlements. But in finding that there's bankruptcy subject
25 --

1 MR. MCCLEARY: We respectfully submit --
2 THE COURT: In finding that there's bankruptcy
3 subject matter jurisdiction, I feel like we have been down
4 this road in an extremely analogous situation, with your same
5 client, different law firm, the Sbaiti law firm.
6 MR. MCCLEARY: Well, we'd respectfully submit that
7 those other matters and issues are outside the instant
8 allegations in this lawsuit. But understand the Court has
9 ruled. And we appreciate your time.
10 THE COURT: All right. I will look for a short form
11 of order denying the motion, and I'll get it signed as soon as
12 I see it in my queue. And I'll see you on February 27th,
13 unless the district court rules in such a way that I can't.
14 All right. We're adjourned.
15 THE CLERK: All rise.
16 MR. KING: Thank you, Your Honor.
17 MR. MCCLEARY: Thank you, Your Honor.
18 (Proceedings concluded at 4:02 p.m.)
19 --oOo--
20 CERTIFICATE
21 I certify that the foregoing is a correct transcript from
22 the electronic sound recording of the proceedings in the
above-entitled matter.
23 **/s/ Kathy Rehling** **02/19/2025**
24 ______________________________________ ________________
25 Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

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