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

In re:	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	)	Case No. 19-34054-sgj11
Reorganized Debtor.	)	

HIGHLAND CAPITAL MANAGEMENT, L.P.'S REPLY TO HCRE'S POST-TRIAL BRIEF [DOCKET NO. 3641]

Highland Capital Management, L.P., the reorganized debtor in the above-captioned Bankruptcy Case, by and through its undersigned counsel, hereby files this reply to the *Response to Debtor's* [sic] *Post-Hearing Brief* [Docket No. 3641] filed by HCRE (the "Response").[2]

[1] Highland's last four digits of its taxpayer identification number are (8357). The headquarters and service address for Highland is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

[2] Capitalized terms not defined herein shall have the meanings ascribed to them in *Highland Capital Management, L.P.'s Post-Trial Brief Addressing HCRE's Executory Contract Defense* [Docket No. 3635] ("Brief").

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REPLY

1. HCRE relegates to a footnote its sole argument that the Amended Agreement is an executory contract—while also disingenuously suggesting that the issue "is not before the Court."[3] But it is. HCRE put it there and it must be determined. During the Trial, HCRE's counsel argued, among other things, that:

> ***I think this is a rejected executory contract. That's why we asked the Court to take a look at it.*** During the examination of Mr. Cournoyer and Mr. Klos, I pointed out some of the provisions in the agreement that require things of Highland. . . . They have an affirmative obligation under [section 1.8]. . . . Highland has affirmative obligations in both [sections 1.8 and 7.4]. Your Honor, they have not assumed this contract. I think they have rejected it.

Morris Dec., Ex. A at 181:15-182:11 (emphasis added).[4]

2. Based on this argument, HCRE asserted that "all [Highland] ha[s] left is an economic interest . . . they're not a member anymore." *Id*. at 182:14-17. But HCRE's assertion can ***only*** be right if the Amended Agreement is an "executory" contract. 11 U.S.C. §365(a). Highland has established that it is not, and nothing in HCRE's Response requires a different result.[5]

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[3] Response at 4, n.10. This is not the first time that HCRE has advanced arguments only to later contend—after Highland invested time, money, and effort rebutting and refuting them—that they should not be determined. For example, HCRE asserted in its pleading that the SEM organizational documents "improperly allocate[] the ownership percentages of the members thereof due to mutual mistake, lack of consideration and/or failure of consideration. As such, ***[HCRE] has a claim to reform, rescind and/or modify the Agreement***." Highland Ex. 2 ¶5 (emphasis added). Yet, at trial, after Highland rebutted and refuted those claims (*see, e.g.*, Morris Dec. Ex. A at 21:15-22:3, 28:9-31:11; 193:22-196:4), HCRE's counsel disingenuously contended that the Court could not resolve them. *Id*. at 179:23-181:2 ("They want you to make findings that we can't raise any of these other issues, rescissions, stays, et cetera, going forward. That's not proper relief on a proof of claim"). As the Court fairly observed, it is Mr. Dondero's persistent strategy of trying to avoid rulings and preserve claims that caused Highland to oppose HCRE's motion to withdraw its claim. *Id*. at 176:13-178:2.

[4] HCRE's counsel also argued that Highland had an "obligation" to vote in section 4.3 and a "negative obligation" under section 7.2. *Id*.

[5] With one exception, HCRE does not challenge the Countryman definition of "executory contract" or Highland's factual assertions establishing that Highland is a passive investor in SEM with no obligations under the Amended Agreement, the breach of which would excuse HCRE's performance. The exception is HCRE's contention that the "LLC Agreement may be executory as there are continuing obligations on" Highland under Article 1.8. Response at 4, n.10. As Highland established, that contention is wrong, but even if it wasn't, those obligations would be so "remote

3. While not relevant to any issue before the Court, HCRE also attempts to justify the filing of its Proof of Claim to avoid a "bad faith" finding, but its pleading only makes a problematic situation worse.

4. Specifically, HCRE now contends that it filed its Proof of Claim because of supposed "concerns" that Highland (a) "would interfere with the operations of" SEM, and (b) "*could*" assume the Amended Agreement. Response at 5 (emphasis in original).[6] But ***HCRE's Proof of Claim had nothing to do with those contrived "concerns."*** Rather, HCRE's Proof of Claim and subsequent pleading sought to divest Highland of "all or a portion" of Highland's equity interest in SEM on the basis that the SEM corporate documents "improperly allocate[] the ownership percentages of the members thereof due to mutual mistake, lack of consideration and/or failure of consideration. As such, ***[HCRE] has a claim to reform, rescind and/or modify the Agreement***." Highland Ex. 2 ¶5 (emphasis added); Highland Ex. 8 (Proof of Claim 146).

5. In sum, there is no evidentiary support for HCRE's Proof of Claim or for the claims asserted in its pleading, and those documents never addressed HCRE's recently fabricated "concerns" (which themselves lack any evidentiary or legal basis).

6. The balance of HCRE's Response is a nonsensical litany of feigned grievances[7] that have no bearing on any matter before the Court.

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and hypothetical" that they would not turn the Amended Agreement into an "executory contract," a fact HCRE simply ignores. Brief ¶¶14-22.

[6] There is ***no*** evidentiary support for these factual contentions. HCRE offered ***no*** evidence establishing that Highland ever threatened or attempted to interfere with SEM's operations (let alone succeeded in doing so), nor did HCRE ever explain how or why Highland would have done so. Further, even if the Amended Agreement was an executory contract (and it is not), using a proof of claim to impede Highland's right as a debtor-in-possession to assume that contract is not warranted by existing law, and HCRE offers no non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law in order to do so.

[7] For example, HCRE complains that (a) Highland's Brief was "reviewed and signed by 6 lawyers" even though (i) there is no evidence of who performed what services, if any, and (ii) the same lawyers' names have appeared on virtually every paper filed with the Court since at least confirmation; (b) there are "206 pages of attachments," and Highland is supposedly trying to "reopen the evidence," even though the sole exhibit offered in support of Highland's

CONCLUSION

Based on the foregoing, the Court should find as a matter of law and fact that the Amended Agreement is not an executory contract and reject the Defense.

Dated: December 7, 2022.

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arguments is the Trial transcript; and (c) Highland filed a 12-page, double-spaced Brief (including caption, conclusion, and signature block) rather than an informal 3-page single-spaced letter.