Date Filed: 10/6/2021

No. 21-10449

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In the Matter of: Highland Capital Management, L.P.,

Debtor.

NEXPOINT ADVISORS, L.P.; HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.; HIGHLAND INCOME FUND; NEXPOINT STRATEGIC OPPORTUNITIES FUND; HIGHLAND GLOBAL ALLOCATION FUND; NEXPOINT CAPITAL, INCORPORATED; JAMES DONDERO; THE DUGABOY INVESTMENT TRUST; GET GOOD TRUST,

APPELLANTS

v.

HIGHLAND CAPITAL MANAGEMENT, L.P.,
APPELLEE

ON DIRECT APPEAL FROM THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF TEXAS
BANKRUPTCY CASE NO. 19-34054-11 (SGJ)

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities, as described in the fourth sentence of Rule 28.2.1, have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Appellee believes oral argument would benefit the Court. The appeal involves issues important to bankruptcy jurisprudence including the validity of plan exculpation provisions for post-petition court-appointed fiduciaries and the jurisdiction of bankruptcy courts to enforce their own orders.

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INTRODUCTION[1]

When Debtor and Appellee Highland Capital Management, L.P. ("Highland" or the "Debtor") sought an order confirming its *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* [ROA.95-164] (the "Plan"), both the Unsecured Creditors' Committee (the "Committee") and creditors holding 99.8% in dollar amount of all unsecured claims supported it. The bankruptcy court referred to that near-unanimous level of support as "nothing short of a miracle," ROA.18-19, and entered a Confirmation Order[2] confirming the Plan. These four consolidated appeals now seek to jettison all that.

Appellants are Highland's co-founder, James Dondero, and eight entities he owns or controls. Those entities – the "Dondero Entities" – are referred to, in groups, as the "Funds," the "Advisors" and the "Trusts."[3] ROA.19-21, CO ¶17.

The Plan contains provisions designed to protect against Dondero's and the Dondero Entities' bad-faith litigation and other actions to harass court-appointed fiduciaries or otherwise impede carrying out the Plan (the "Plan Protections"). The

[1] All capitalized terms used but not defined in this Introduction have the meanings given to them below. Citations to ROA are to the Record on Appeal.

[2] "Confirmation Order" means the *Order Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (ii) Granting Related Relief* [ROA 000004-93, cited as "CO"].

[3] "Funds" refers, collectively, to Highland Income Fund, NexPoint Strategic Opportunities Fund, Highland Global Allocation Fund, and NexPoint Capital, Inc.; "Advisors" means, collectively, NexPoint Advisors, L.P., and Highland Capital Management Fund Advisors, L.P.; and "Trusts" means, collectively, the Dugaboy Investment Trust ("Dugaboy") and the Get Good Trust ("Get Good").

bankruptcy court found that Appellants and other entities owned or controlled by Dondero had brought bad-faith litigation before and could be expected to do so again.

Appellants' challenge three of those Plan Protections. *First*, as is customary, the Plan enjoins post-confirmation actions that would interfere with the "implementation" and "consummation" of the Plan (the "Injunction"). *Second*, the Plan provides limited exculpation for court-appointed officers, directors, and related parties (the "Exculpation") in a manner consistent with this Court's precedent. Indeed, Dondero agreed to the substance of the Exculpation in prior orders. *Third*, the Plan authorizes the bankruptcy court to act as a gatekeeper with respect to litigation brought against certain protected persons to ensure that they are not harassed by non-colorable claims (the "Gatekeeper Provision"). Gatekeeper provisions are not uncommon in chapter 11 cases and are justified by the exceptional circumstances present here.

Dondero and the Dondero Entities have only *de minimis* economic interests in Highland. ROA.20-23, CO ¶¶17-19.[4] Yet they have litigated virtually every issue in the case, often without basis, and have interfered with court-appointed fiduciaries warranting two contempt citations against Dondero.[5] The bankruptcy court aptly

[4] ROA.20-23, CO ¶¶17-19; ROA.1412-13, Analysis of the Dondero Entities' interest in the estate (or lack thereof), Ex. B to *Debtor's Memorandum of Law in Support of Confirmation*.

[5] One of the contempt citations has also been issued against other Dondero-related entities.

observed that Appellants were "not objecting to protect economic interests they have in [Highland] but to be disruptors." ROA 000020-21, CO ¶17. That repeated disruption illustrates why the Plan Protections are necessary and proper.

As the bankruptcy court found, the persons and entities safeguarded by the Plan Protections (a) were aware of Dondero's compulsive litigiousness, (b) required those protections as a condition to accepting management positions, and (c) have relied on the provisions. Further, the Plan Protections are "integral elements of the transactions incorporated into the Plan, and inextricably bound with the other provisions of the Plan." ROA.40-42, CO ¶48. Those factual findings are not challenged on appeal. These appeals thus turn on whether the Plan Protections are legally impermissible *per se*, no matter the circumstances.

They are not. The Plan Protections are narrowly tailored to the circumstances of this case and do not have the sweeping breadth that Appellants ascribe to them. They do not prevent Appellants from filing colorable lawsuits arising from events occurring after the Effective Date, nor do they affect the Advisors' or Funds' rights – or the Reorganized Debtor's obligations – under assumed contracts. Rather, Appellants are merely prevented from taking actions that would unreasonably interfere with the implementation or consummation of the Plan. Appellants' other complaints about the Confirmation Order and Plan are also meritless.

STATEMENT

A. Events Preceding the Bankruptcy.

Highland was a multibillion-dollar global investment adviser registered with the Securities and Exchange Commission. ROA.10-11, CO ¶¶6-7. It was founded in 1993 by James Dondero and Mark Okada (who resigned pre-bankruptcy). *Id.* Highland was privately owned and controlled by Dondero as the owner and sole director of its general partner, Strand Advisors, Inc. ("Strand"). ROA.16, CO ¶13

Highland provides money management and advisory services directly and through more than 2,000 affiliates to several investment vehicles. Among the investments Highland has managed are several collateralized loan obligation vehicles ("CLOs"), managed accounts, and, historically, other entities owned and/or controlled by Dondero. ROA.11, CO ¶7. Highland's income was – and the Reorganized Debtor's income is – primarily derived from management and advisory services and from gains on asset sales. ROA.11, CO ¶8.

The bankruptcy court aptly observed in its Confirmation Order that this is not a "garden variety chapter 11 case." ROA.9-10, CO ¶4. Highland did not descend into chapter 11 for any of the typical reasons. It did not face a payment default to a lender, have problems with vendors or landlords, or suffer a business calamity. ROA.11-12, CO ¶8. "Rather, [Highland] filed for Chapter 11 protection due to a myriad of massive, unrelated, business litigation claims that it faced—many of

which had finally become liquidated (or were about to become liquidated) after a decade or more of contentious litigation in multiple forums all over the world." ROA.11-14, CO ¶¶8-9.

The largest claims against Highland's estate, therefore, are litigation claims. In many cases, the claims arose from Highland's prepetition fraudulent conduct while under Dondero's control.

UBS, for example, asserted over a $1 billion claim based on a judgment against funds managed by Highland, involving allegations of fraudulent transfers intended to frustrate UBS's contractual remedies. Another claim was based on a $190 million arbitration award obtained by a Highland-managed fund for Highland's conversion of assets and fraud. Another $300 million claim was filed by investors in a Highland-managed entity alleging fraud, fraudulent inducement, and racketeering. A $75 million claim was filed by a former Highland affiliate alleging Highland engaged in fraudulent transfers designed to foil the collection of a former employee's claim. Even Highland's smaller creditors (many unpaid law firms and e-discovery vendors) generally hold litigation-related claims. Many of these claims have been settled, but the Dondero Entities have appealed the courts' approval of all but one. *Id.*

B. The Bankruptcy Case, Governance and Claim Settlements.

Highland filed a voluntary chapter 11 petition on October 16, 2019, in the District of Delaware.[6] The Committee included three of Highland's largest litigation adversaries and a large e-discovery vendor. ROA.11-13, CO ¶8.

The Committee and the U.S. Trustee quickly expressed serious concerns about Highland's ability to act as a fiduciary to its estate because of Dondero's history of self-dealing, fraud, and other misconduct. They threatened to seek the appointment of a chapter 11 trustee.[7] To avoid such a drastic step, the Committee, Highland, and Dondero agreed to a settlement (the "Governance Settlement"). The Governance Settlement was approved by order entered January 9, 2020 (the "January 9 Order"). ROA.12407-411.[8]

The Governance Settlement resulted in the appointment of three independent directors at Strand to manage Highland and its reorganization: James P. Seery, Jr., John S. Dubel, and retired Bankruptcy Judge Russell Nelms (the "Independent Directors"). ROA.15-16, CO ¶¶ 12-13. The bankruptcy court praised the Independent Directors as "eminently qualified." ROA.16, CO ¶13. It found at

[6] The case was subsequently transferred to the Northern District of Texas upon motion of the Committee.

[7] The U.S. Trustee moved for the appointment of a chapter 11 trustee (ROA.12950-59). The bankruptcy court denied that motion based on its approval of the Governance Settlement (ROA.12964-65).

[8] *See also* Term Sheet [D.I. 354-1] and ROA.14174-181, *Stipulation* signed by Dondero.

confirmation that "this [Governance Settlement] and the appointment of the independent directors changed the entire trajectory of the case and saved Highland from the appointment of a trustee." *Id*.

The Governance Settlement and January 9 Order also provided for:

- Dondero's resignation from his control positions at Highland and Strand (remaining an unpaid portfolio manager, at the Independent Directors' discretion). ROA.12409 ¶8.
- The implementation of stringent operating protocols (ROA.12392-403) giving the Committee substantial oversight over how Highland managed its assets, subsidiaries, and investment vehicles.
- The grant of standing to the Committee to pursue estate claims against Dondero, insiders of Highland, and other "related entities," including Appellants.
- Dondero's agreement that he "shall not cause any Related Entity to terminate any agreements with [Highland]." ROA.12409, ¶9.

ROA.15, CO ¶12; ROA.12407.

Dondero also agreed to substantially the same gatekeeper and exculpation provisions that were later incorporated into the Plan. The agreed-to provisions (a) limited claims against the Independent Directors and their agents to those alleging willful misconduct or gross negligence and (b) required the bankruptcy court to determine whether any such claims were colorable before they could be asserted. ROA.17-18, CO ¶14.

Specifically, Paragraph 10 of the January 9 Order provides:

> *No entity may commence or pursue a claim or cause of action of any kind against any Independent Director, any Independent Director's agents, or any Independent Director's advisors* relating in any way to the Independent Director's role as an independent director of Strand without the Court (i) first determining after notice that such claim or cause of action represents *a colorable claim of willful misconduct or gross negligence* against Independent Director, any Independent Director's agents, or any Independent Director's advisors and (ii) specifically authorizing such entity to bring such claim. The Court will have sole jurisdiction to adjudicate any such claim for which approval of the Court to commence or pursue has been granted.

ROA.12409, ¶10 (emphasis added). The January 9 Order was not appealed.

On July 16, 2020, the bankruptcy court entered an order (the "July 16 Order") authorizing Seery's appointment as Highland's Chief Executive Officer and Chief Restructuring Officer ("CEO/CRO"). ROA.12619-21. This Order contains substantially the same gatekeeper and exculpation provisions as the January 9 Order (ROA.17-18, CO ¶14) and also was not appealed.

Immediately after their appointment, the Independent Directors began negotiating settlements with Highland's adversaries and other stakeholders. Later negotiations continued with the assistance of two experienced court-appointed mediators. The resulting settlements paved the way to the Plan's near-unanimous approval – something the bankruptcy court described as "nothing short of a miracle." ROA.18-19, CO ¶16.

C. The Negotiation of the Plan and Dondero's Commencement of Litigation.

Highland initially sought a "grand bargain" that would pay creditors and allow Dondero to regain control of Highland and its assets. ROA.20-21, 40-41, ¶¶17, 48. But none of Dondero's proposals during those negotiations was acceptable to the Committee or the Independent Directors.

Dondero did not take this rejection lying down. As the bankruptcy court found, based on a credibility determination not challenged on appeal, Dondero told Seery that if he did not get what he wanted he would "burn the place down." ROA.1592, 2/2/21 Tr. at 105:10-20; ROA.59-60, CO ¶78.

True to his word, Dondero became an implacable opponent of the Independent Directors' efforts to confirm a plan and settle the myriad litigation against Highland. Consequently, the Independent Directors insisted that Dondero resign as an employee of Highland and certain of its affiliates, which he did. Appellants and other Dondero-related entities then embarked on a campaign of destruction:

- objecting to virtually every settlement between Highland and its major creditors,
- appealing nearly every order entered by the bankruptcy court,
- commencing or otherwise causing endless litigation,
- interfering with Highland's management, including the management of the CLOs;
- canceling trades, and
- threatening Highland's employees.

The bankruptcy court referred to these roadblocks and maneuvers as the "Dondero Post-Petition Litigation" and found they were intended to harass Highland. ROA.58-60, CO ¶¶77-78.

Each such effort failed. Several were found frivolous. Indeed, Dondero and his related entities have *twice* been found in contempt of court. *Highland Capital Mgmt., L.P. v. Dondero (In re Highland Capital Mgmt., L.P.)*, 2021 Bankr. LEXIS 1533 (Bankr. N.D. Tex. June 7, 2021); *In re Highland Capital Mgmt., L.P.*, 2021 Bankr. LEXIS 2074 (Bankr. N.D. Tex. Aug. 3, 2021).

Undeterred, Appellants and other Dondero-related entities filed multiple appeals to the district court from the bankruptcy court's orders and even requested a writ of mandamus from this Court.

The bankruptcy court summarized this Dondero Post-Petition Litigation in its Confirmation Order: "During the last several months, Mr. Dondero and the Dondero Related Entities have harassed [Highland], which has resulted in further substantial, costly, and time-consuming litigation for [Highland]." ROA.58-59, CO ¶77. The bankruptcy court also recognized that:

> In the recent past, Mr. Dondero has been subject to a temporary restraining order and preliminary injunction by the Bankruptcy Court for interfering with Mr. Seery's management of [Highland] in specific ways that were supported by evidence. Around the time that this all came to light . . ., Mr. Dondero's company phone . . ., mysteriously went missing. The Bankruptcy Court . . . [has] many reasons . . . to question the good faith of Mr. Dondero and his affiliates in raising objections to confirmation of the Plan.

ROA.23, CO ¶19.

Ultimately, the bankruptcy court found that the Dondero Post-Petition Litigation was a result of (a) Dondero's failing to obtain creditor support for his plan proposal and (b), his threat to "burn down the place" if his plan proposal was not accepted. ROA.59-60, CO ¶78. Appellants do not challenge those factual findings on appeal.[9]

D. Confirmation of the Plan and Appellants' Objections.

Notwithstanding Dondero's litigation campaign and after a two-day evidentiary hearing, the bankruptcy court entered the Confirmation Order approving the Plan. The confirmed Plan is an "asset monetization plan" providing for the orderly wind-down of Highland's estate and the distribution of the proceeds to creditors. ROA.8-9, 34-35, CO ¶¶2, 42.

The Plan accomplishes that monetization through a three-part structure.[10] *Id.* *First*, Highland has been reorganized, and the Reorganized Debtor continues to

[9] In fact, the Confirmation Order paints an incomplete picture of Dondero's litigiousness. His crusade has continued since the Confirmation Order's entry. Appellants and other Dondero-related entities have filed numerous actions in various state and federal courts and have also appealed almost every order entered by the bankruptcy court since February 2021. A chart detailing this litigation is attached hereto as Exhibit A. This Court can take judicial notice of Exhibit A because the "court record[s]" that Exhibit A summarizes "are all publicly available governmental filings and the existence of the documents, and the contents therein, cannot reasonably be questioned." *Basic Capital Mgmt., Inc. v. Dynex Capital, Inc.*, 976 F.3d 585, 589 (5th Cir. 2020) (citing Fed. R. Evid. 201(b)) (internal quotation marks omitted).

[10] The Plan has been "substantially consummated," and, concurrently herewith, Highland has filed its *Motion to Dismiss Appeal as Equitably Moot.*

manage certain investment vehicles and other assets. *Second*, the Plan established a Claimant Trust to manage and monetize the Trust's Assets under Mr. Seery's leadership as Claimant Trustee and the oversight of a Claimant Trust Oversight Board. *Third*, the Plan established a Litigation Sub-Trust, which will pursue Highland's estate claims (including potential claims against Appellants).

The Plan had the overwhelming support of Highland's creditors. Three classes of impaired creditors voted to accept the Plan. ROA.9, 45, CO ¶¶ 5, 53.[11] One class (Class 8 general unsecured claims) was deemed to reject the Plan, even though it was accepted by creditors in that class holding 99.8% in dollar amount of the claims, because a numerical majority voted to reject. ROA.45, CO ¶53.[12]

Appellants' objections to the Plan were the only ones *not* resolved before the confirmation hearing. The bankruptcy court found that each Appellant was "marching pursuant to the orders of Dondero." ROA.23, CO ¶19.

- **The Trusts**: Dugaboy and the Get Good Trust are Dondero's family trust and are indirectly controlled by Dondero. ROA.21-23, CO ¶18.

[11] ROA.886-900, *Certification of Vote Tabulation*; ROA.1475-81, *Supplemental Certification of Vote Tabulation*.

[12] All but one of the rejecting Class 8 ballots were cast by former Highland employees whose claims were contingent on the employees remaining employed by Highland – a condition that could never be satisfied as Highland had publicly announced, before solicitation, that all such employees were being terminated. Those terminated employees subsequently transferred their claims to entities owned or controlled by Dondero which are currently litigating those claims against Highland. ROA.1632-36, 2/2/21 Tr. at 145-149 (Seery testimony). *See also Debtor's Third Omnibus Objection to Certain No Liability Claims* [D.I. 2059] objecting to these claims.

- **The Advisors**: Highland Capital Management Fund Advisors, L.P. ("HCMFA") and NexPoint Advisors, L.P. ("NPA") are registered investment advisors that manage several retail funds. The Advisors acknowledge they are controlled by Dondero. *Id*.

- **The Funds:** Highland Income Fund, NexPoint Strategic Opportunities Fund, Highland Global Allocation Fund, and NexPoint Capital, Inc., are retail funds managed by HCMFA or NPA. Dondero has sole discretion over the Funds, both as their portfolio manager and through his control over the Advisors. *Id.*[13]

The bankruptcy court characterized Appellants' interests in Highland's estate as "remote" and questioned their good faith. ROA.20-23, CO ¶¶17-19. In fact, each Appellant either lacks any claim against the estate[14] or asserts claims (including some purchased *post*-confirmation) that Highland has concluded are not colorable. The bankruptcy court nevertheless carefully considered Appellants' objections to the Plan. *Id.*

Appellants' objections had a common theme. They sought to strip away the Plan Protections that (a) protect Highland's Independent Directors, the Reorganized Debtor, and, as applicable, their pre- and post-Effective Date management from

[13] The Funds and Dondero object to the bankruptcy court's finding that Dondero controls the Funds, even though they are managed by the Advisors, which he does admit controlling and he serves as the portfolio manager for each of the Funds. Fund Br. 31; Dondero Br. 3. This protestation is belied by the evidence presented by the Advisors and Funds' own witness, Jason Post (Advisors' chief compliance officer), other testimony admitted at the confirmation hearing, and an admission by the Funds' own counsel. *See* ROA.2993-2996, Dustin Norris (Ex. VP of Funds and Advisors) Testimony at 35-37; ROA.12248-12249, Letter from R. Charles Miller of K&L Gates, counsel for Advisors and Funds, to Jeffrey Pomerantz of Pachulski Stang Ziehl & Jones, counsel to Highland, dated 12/31/2020, stating "Mr. Dondero is the lead (and in some cases the sole) portfolio manager for certain of the Funds. He is intimately involved in the day to day operations and investment decisions regarding these Funds and in the operation of the Advisors."

[14] *See* n.4 *supra*.

frivolous litigation brought by Appellants and Dondero's other related entities, and (b) afford Highland the breathing space necessary to effectuate its Plan without the distraction and cost of responding to Dondero's efforts to "burn the place down."

The bankruptcy court overruled Appellants' objections. It determined that this Court's precedent as well as the unprecedented litigiousness of Appellants and other related entities justified the Plan Protections. ROA.51-62, CO ¶¶70-81.

Specifically, the bankruptcy court found:

> The Injunction Provision is necessary to implement the provisions in the Plan. Mr. Seery testified that the Claimant Trustee will monetize the Debtor's assets in order to maximize their value. In order to accomplish this goal, the Claimant Trustee needs to be able to pursue this objective without the interference and harassment of Mr. Dondero and his related entities, including the Dondero Related Entities. Mr. Seery also testified that if the Claimant Trust was subject to interference by Mr. Dondero, it would take additional time to monetize the Debtor's assets and those assets could be monetized for less money to the detriment of the Debtor's creditors.

ROA.57, CO ¶75.

Further, the bankruptcy court found, based on Highland's "culture of constant litigation," that the Exculpation and Gatekeeper Provisions were necessary to ensure that certain parties would serve as fiduciaries. ROA.17, CO ¶14. For instance, the court found "credible testimony that none of the independent directors would have taken on the role" but for the safeguards later built into the Plan Protections. *Id.* Having "stepp[ed] into a morass of problems," they were understandably worried

about getting sued no matter how defensible their efforts." *Id.* As the bankruptcy court remarked, "everything always ended in litigation at Highland." *Id.*

The court also ruled that the January 9 and July 16 Orders which had already exculpated the Independent Directors, their agents and advisors, any employees acting at their direction, and the CEO/CRO – were final orders, law of the case, and *res judicata*. ROA.54-56, CO ¶73.

Finally, the court found that the Gatekeeper Provision was supported by the same considerations. It was "necessary and appropriate in light of the history of the continued litigiousness of Mr. Dondero and his related entities." ROA.59-60, CO ¶78. Without a Gatekeeper Provision, the court concluded, continued litigation, in perceived "more hospitable" forums was "likely," and would "impede efforts by the Claimant Trust to monetize assets for the benefit of creditors and result in lower distributions to creditors." *Id.*

The bankruptcy court further found:

> the Gatekeeper Provision is necessary and appropriate in light of the history of the continued litigiousness of Mr. Dondero and his related entities in this Chapter 11 Case and necessary to the effective and efficient administration, implementation and consummation of the Plan and is appropriate pursuant to *Carroll v. Abide (In re Carroll)*, 850 F.3d 811 (5th Cir. 2017). Approval of the Gatekeeper Provision will prevent baseless litigation designed merely to harass the post-confirmation entities charged with monetizing the Debtor's assets for the benefit of its economic constituents, will avoid abuse of the court system and preempt the use of judicial time that properly could be used to consider the meritorious claims of other litigants.

ROA.60-61, CO ¶79.

The bankruptcy court correctly concluded that the Plan Protections are "integral elements" of the Plan, "inextricably bound with the other provisions of the Plan," and "confer material benefit on, and are in the best interests of the Debtor, its Estate, and its creditors." ROA.51, CO ¶70. Each was properly approved.

SUMMARY OF ARGUMENT

The extraordinary circumstances of this case amply justify the Plan Protections, and indeed Appellants do not argue otherwise. They instead insist that the Plan Protections are legally impermissible regardless of how much they are needed. Appellants are wrong.

The Injunction is a typical plan protection. By safeguarding against future collateral attacks or other efforts to impede or frustrate the provisions of the Plan, it gives effect to numerous provisions of the Bankruptcy Code. *See* 11 U.S.C. §§524(a), 1123(b)(6), 1129, 1141(a), 1141(c). Many cases approve such provisions.

Appellants set up straw men to try to attack the Injunction. They assert that it is vague, but the words they purport to find ambiguous are defined terms in the Bankruptcy Code and jurisprudence. They assert it precludes enforcement of certain contracts, but Highland has repeatedly stated on the record that it does not. And the Injunction protects only Highland and its successors and agents, so it has nothing to do with third-party releases.

The Exculpation merely provides a *standard of care* for court-appointed representatives and their agents for their conduct during the bankruptcy case and in connection with the implementation and consummation of the Plan. It is lawful for each of two independent reasons. First, by protecting only disinterested parties who were appointed as an alternative to the appointment of a trustee, it is in step with the kind of exculpation this Court has suggested *is* permissible. Second, the Exculpation was agreed to by Dondero in orders that were never appealed and are now *res judicata* and law of the case.

The Gatekeeper Provision is also lawful. The bankruptcy court has jurisdiction to act as a gatekeeper in support of the Plan post-Effective Date. And, as this Court held in *Villegas v. Schmidt*, 788 F.3d 156, 158-59 (5th Cir. 2015), the bankruptcy court can act as a gatekeeper even if does not have jurisdiction to adjudicate the underlying dispute. The Gatekeeper Provision is also supported by the *Barton* Doctrine. *See Barton v. Barbour*, 104 U.S. 126 (1881).

Appellants' other arguments are insubstantial. By giving junior classes nothing unless and until more senior classes are paid in full, the Plan gives effect to rather than violates the absolute priority rule. Any violation of periodic reporting rules (in a case in which transparency was always extremely high) is neither a statutory nor a logical basis for denying confirmation. And the finding of fact that

Dondero owns or controls the Funds is not appealable standing alone, besides which it is amply supported by the record and nowhere close to being clearly erroneous.

The bankruptcy court committed no error in saving Highland from further harm at the hands of its extraordinarily litigious founder. The Confirmation Order should be affirmed.

ARGUMENT

I. THE BANKRUPTCY COURT PROPERLY ORDERED THE PLAN PROTECTIONS.

Businesses of this size are not often brought down by the compulsion to litigate and win-at-all-cost mentality displayed by Dondero in this and other disputes. Highland's pre-bankruptcy litigation history, the protections established during the case, and the storm of Dondero Post-Petition Litigation provide all the factual support necessary to support the Plan Protections, and all applicable precedent provides the necessary legal support.

Appellants argue the bankruptcy court erred as a matter of law in approving the Plan Protections. Bankruptcy court decisions on direct appeal are reviewed under the same standard of review as appeals from the district court. *Ad Hoc Group of Vitro Noteholders v. Vitro SAB De CV (In re Vitro SAB De CV)*, 701 F.3d 1031, 1042 (5th Cir. 2012). Accordingly, questions of fact are reviewed for clear error and conclusions of law are reviewed *de novo*. *Id.* (citing *In re Martinez*, 564 F.3d 719,

725-26 (5th Cir. 2009)). None of the bankruptcy court's findings of fact regarding the Plan Protections is challenged as clearly erroneous.

A. The Injunction is Lawful.

The Plan enjoins certain Enjoined Parties,[15] including Appellants, from "taking any actions *to interfere with the implementation or consummation of the Plan*," and from taking various actions against the Debtor or the property of the Debtor other than as provided under the Plan. ROA.150-151, Plan, Art. IX.F (emphasis added). Consistent with section 1141(a), the Injunction applies to the Debtor's successors – the Reorganized Debtor, Claimant Trust and Litigation Sub-Trust and their respective property and interests in property – as they are the ones implementing the Plan, making distributions to claimants, and taking title to Highland's assets. Accordingly, as the bankruptcy court correctly ruled, the Injunction does not release any non-debtor third parties. ROA.57, CO ¶75.

Instead, it safeguards against future collateral attacks or other efforts to impede or frustrate the Plan's provisions. The Injunction is supported by sections 1123(a)(5), 1123(b)(6), 1141(a), 1141(c), and 1142 of the Bankruptcy Code. Sections 1123(b)(6) and 1129 require a plan to describe how it will treat claims and interests, and section 1141(c) provides that all property "dealt with by the plan"

[15] "Enjoined Parties" are essentially holders of Claims and Equity Interests and others who participated in the case with respect to their Claims and Equity Interests. ROA.108, Plan Def. 56.

(here, all of Highland's property) will be "free and clear of all claims and interests." Section 1141(a) states that the terms of a confirmed plan are *binding* on creditors and interest holders, consonant with the discharge provided by section 524(a).

The Trusts argue the Injunction cannot be justified by sections 1141 or 524 because section 1141(d)(3) denies a discharge to a debtor that is liquidating and not engaging in any business post-confirmation. That is not the case here. The bankruptcy court found, based on uncontroverted evidence, that Highland would continue to engage in some business, within the meaning of section 1141(d)(3)(B), for two to three years after consummation of the Plan. ROA.49-50, CO ¶65. This factual finding, based on Mr. Seery's testimony, is not clearly erroneous. ROA.1594-97, 2/2/21 Tr. at 107-110 (Seery testimony). A gradual monetization of assets over multiple years does not qualify as a "liquidation," nor does it mean the reorganized debtor is not engaged in business. *See Financial Sec. Assur. v. T-H New Orleans Lt. P'shp. (In re T-H New Orleans Lt. P'shp.)*, 116 F.3d 790, 804 n.15 (5th Cir. 1997) (conducting business for two years after confirmation before asset can be sold satisfies §1141(d)(3)(B)); *In re Enron Corp.*, 2004 Bankr. LEXIS 2549, *215-17 (Bankr. S.D.N.Y. July 15, 2004) (discharge appropriate because of need for post-effective date operation of retained complex assets to maximize value in liquidating those assets).

Injunctions against actions to frustrate the consummation and implementation of a reorganization plan are commonplace.[16] The Injunction prevents litigation that would force Highland and its successors to take actions different from what the Plan requires. Such an injunction prevents disgruntled parties from seeking new fora for old disputes to undermine a confirmed plan.[17] Here, the bankruptcy court correctly found that an injunction was necessary to allow Highland to monetize its assets and maximize creditor recoveries "without the interference and harassment of Mr. Dondero and his related entities." ROA.57, CO ¶75.

Appellants' arguments against the Injunction are meritless. The Advisors complain that the terms "implementation" and "consummation" are overbroad and vague, such that the Injunction *could* mean that Appellants cannot cause the removal of Highland as portfolio manager even if Highland mismanages those portfolios. Advisors Br. 32. Likewise, the Funds complain that the Injunction provides Highland and its successors and agents "advance get-out-of-jail-free cards for future

[16] *See, e.g., LeMaster v. Ditech Fin. LLC*, 801 F. App'x 452, 453 (8th Cir. 2020) (plan included a permanent injunction of claims that "interfere with the implementation or consummation of the Plan."); *In re Fieldwood Energy LLC*, 2021 Bankr. LEXIS 1829, at *191-92 (Bankr. S.D. Tex. June 25, 2021) (enjoining all holders of claims or interests or parties in interest "from taking any action to interfere with the implementation or consummation of the Plan."); *In re Tarrant Cty. Senior Living Ctr., Inc*., 2019 Bankr. LEXIS 3863, at *140-41 (Bankr. N.D. Tex. Dec. 20, 2019) (same).

[17] *See In re Ditech Holding Corp*., 2021 Bankr. LEXIS 2274 (Bankr. S.D.N.Y. Aug. 20, 2021); *In re City of Detroit*, 614 B.R. 255 (Bankr. E.D. Mich. 2020).

negligence and ordinary breaches of contract" such that the Funds "are not even free to exercise their contractual rights." Funds Br. 2-3.

That tortured construction of common words is specious. The terms "implementation" and "consummation" have well-understood meanings under the Bankruptcy Code and in bankruptcy jurisprudence. Section 1123(a)(5) mandates that "a plan *shall* . . . provide adequate means for the plan's *implementation*" (emphasis added) and contains a non-exclusive list of what that could include. In compliance with section 1123(a)(5), Article IV of the Plan describes the "Means for Implementation of Plan" and details how the Plan will be implemented, including the creation of the two trusts, the new corporate governance structure, the transfer of assets into the Reorganized Debtor, and the management and operation of those assets. ROA.124-136; ROA.34-35, CO ¶42.

The word "consummation" is also found in the Bankruptcy Code and this Court has discussed its meaning. For example, the "substantial consummation" of a plan is defined in section 1101(2) of the Bankruptcy Code. This Court has issued opinions discussing consummation in various contexts.[18] Thus the terms "implementation" and "consummation," as used in the Injunction, are neither vague

[18] *See, e.g., Manges v. Seattle-First National Bank (In re Manges)*, 29 F.3d 1034 (5th Cir. 1994) (context of equitable mootness); *United States Brass Corp. v. Travelers Ins. Group, Inc. (In re United States Brass Corp.)*, 301 F.3d 296, 304 (5th Cir. 2002) (post-effective date jurisdiction of bankruptcy court to enter orders in aid of consummation of a confirmed plan).

nor ambiguous; they have an ordinary meaning under bankruptcy law and in common bankruptcy practice.

Further, at the confirmation hearing, Highland addressed Appellants' precise complaint that the Injunction somehow impairs their alleged future contractual rights by confirming on the record that by using the terms "implementation" and "consummation" the Injunction was not intended to affect any parties' rights under the referenced CLO contracts. ROA.1934-35, 2/3/21 Tr. at 152-53.[19]

In fact, Appellants, have separately agreed, since confirmation, not to terminate the CLO agreements with Highland – making it even more perplexing why they contend (mistakenly) *the Injunction* has this supposedly nefarious effect.[20] It is *Appellants' own settlement agreement* – not anything in the Plan or Confirmation Order – that limits their alleged rights to terminate Highland as CLO manager.

B. The Exculpation Provision is Lawful.

The Plan exculpates Highland and its successors, the Independent Directors, Strand (on a limited basis), employees, and bankruptcy professionals[21] from liability for conduct not amounting to bad faith, fraud, gross negligence, criminal

[19] Highland repeated this assurance at the hearing before the bankruptcy court in connection with Appellants' stay motions. *See* 3/19/21 Tr. at 24:12-17, 25:1-5 [D.I. 2073].

[20] Settlement Agreement, Ex. 1 to *Declaration of John A. Morris in Support of Debtor's Motion for Entry of an Order Approving Settlement Pursuant to Bankruptcy Rule 9019 and Authorizing Actions Consistent Therewith* [D.I. 2589, 2590-1]. This settlement was approved by the bankruptcy court on September 13, 2021 [D.I. 2829].

[21] *See* Plan definition of "Exculpated Parties," which expressly excludes Appellants. ROA.109, Plan Def. 62.

misconduct, or willful misconduct. Contrary to the Funds' contention, the Exculpation Provision, like the Injunction discussed above, has no effect on contractual rights, including any right the Funds might have to terminate Highland "for cause" as a portfolio manager. Nor is it a release of any known claims by any person. Rather, the Exculpation establishes a *standard of care* for court-appointed representatives and their agents for their conduct during the case and in implementing the Plan. That standard is consistent with the duty-of-care and duty-of-loyalty standards of the business judgment rule applied in corporate law. The bankruptcy court correctly held that the Exculpation is "appropriate under the unique circumstances of this litigious Chapter 11 case." ROA.54, CO ¶72.

The establishment of such a standard is particularly appropriate where, as here, independent directors are appointed in a large complex commercial case involving allegations of fraud, mismanagement, breaches of fiduciary duty, or other conflicts between a debtor and its creditors.[22] Apropos to this case, one court noted recently in approving the exculpation of directors for all post-petition conduct that "[e]ach of the covered parties played a significant role during these cases and engaged in conduct potentially subject to second guessing or hindsight-driven criticism." *In re Astria Health*, 623 B.R. 793, 799 (Bankr. E.D. Wash. 2021).

[22] *See* Regina Kelbon and Michael DeBaecke, *Appointment of Independent Directors on the Eve of Bankruptcy: Why the Growing Trend*, paper prepared for the Penn. Bar Institute 19th Annual Bankruptcy Institute, June 27, 2014, at pp. 17-23, available at https://perma.cc/S26K-3U8N

Appellants inaccurately use the terms "exculpation" and "non-debtor third party release" in their Briefs interchangeably. A non-debtor third party release provides for the "relinquishment of claims held by the debtor or third parties against certain non-debtor parties;" exculpation provisions "establish the standard of care that will trigger liability in future litigation by a non-releasing party against an exculpated party for acts arising out of a debtor's restructuring." *In re Murray Metallurgical Coal Holdings, LLC*, 623 B.R. 444, 500-501 (Bankr. S.D. Ohio 2021) (citing *In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000)). Ironically, it is releases of non-debtor insiders such as Dondero that typically are contested, not exculpation of court-appointed fiduciaries.

Appellants contend that, to the extent the Exculpation Provision protects parties other than Highland and its successors, it violates this Circuit's supposed *per se* prohibition of nonconsensual third-party releases of non-debtors regardless of facts and circumstances. The bankruptcy court disagreed and concluded that the Exculpation is permissible and, in any event, that the exculpations already provided to the Independent Directors and CEO/CRO and their agents by the January 9 and July 16 Orders were final, never appealed, law of the case and *res judicata*. ROA.53-56, CO ¶¶72-74. Those conclusions were correct.

1. The Plan Exculpation Is Legally Permissible on These Facts.

The Exculpation is not barred by *Bank of N.Y. Tr. Co., NA v. Official Unsecured Creditors' Comm. (In re Pac. Lumber Co.),* 584 F.3d 229 (5th Cir. 2009) ("*Pacific Lumber*"). *Pacific Lumber* did not define "the outer limits of exculpation, release and injunction provisions in plans of reorganization," as the Funds claim. Funds Br. 17. Rather, it addressed only a specific confirmed plan's exculpation of the non-debtor plan proponents and the unsecured creditors committee and its members. 854 F.3d at 251.[23]

In *Pacific Lumber*, the Court determined that releasing the non-debtor plan proponents was *not necessary* to the plan's success, concluding the proponents had merely "purchased" their exculpation for their self-interested participation in the reorganization. 584 F.3d at 252. The Court emphasized that *the record did not show* that the debtor or its estate would be "jointly liable" on claims asserted against the plan proponents, or that the "costs of defending against suits" against the plan proponents would "swamp either these parties or the consummated reorganization." *Id.* There was no reason to believe releasing the plan proponents had *anything* to do with the plan's success or was justified by the plan proponents' relationship to the debtor or its estate.

[23] As the appellants "did not brief" why the debtors' successors and their respective officers and directors "should not be released," the Court declined to "analyze their position." *Id.* at 252 n.26.

By contrast, this Court approved the plan's non-debtor release of the creditors' committee and its members. 584 F.3d at 253. It reasoned that committee members were "disinterested volunteers," and entitled to exculpation from negligence claims because "'[i]f members of the committee can be sued by persons unhappy with the committee's performance during the case or unhappy with the outcome of the case, it will be extremely difficult to find members to serve on an official committee.'" *Id.* (citations omitted). The Court interpreted the powers of creditors' committees listed in 11 U.S.C. § 1103(c), as implying a "qualified immunity" for the committee's performance of its work that was consistent with the scope of the exculpation. 584 F.2d at 253.

Two principles emerge from *Pacific Lumber*: First, this Court looks at whether a non-debtor release is justified by any resulting benefit to the estate or plan. The *Pacific Lumber* plan proponents' release did not, this Court concluded, because those non-debtors and the debtor had no joint liability, and there was no reason to believe the exculpated claims would swamp efforts to implement the plan. Second, even though section 524(e) limits discharge to the debtor only, other sections of the Bankruptcy Code and certain policy considerations support limiting the liability of at least some non-debtors who perform duties in support of the debtor or its bankruptcy case.

Those two principles combine here to support the Plan's exculpation of the Exculpated Parties. The bankruptcy court found, based on uncontroverted evidence, that the pattern of litigation and intimidation of the Exculpated Parties by Dondero and his related entities was likely to continue, that those actions would "impede efforts" to monetize Highland's assets for the benefit of creditors and that, because of various contractual indemnification obligations, litigation against any of the Exculpated Parties would be litigation against Highland. ROA.59-61, CO ¶¶78-79. Thus, the exact findings this Court found lacking in *Pacific Lumber* were made here.[24]

All the reasons the Court upheld the exculpation of committee members in *Pacific Lumber* apply in this case. The Exculpated Parties are disinterested. Furthermore, they are all either court-appointed or court-approved fiduciaries or their agents. The role of the CEO/CRO and the Independent Directors in this case is the opposite of that of the *Pacific Lumber* non-debtor plan proponents who purchased plan releases. Here, they were appointed by the bankruptcy court to act

[24] Similarly, in *Feld v. Zale Corp.*, 62 F.2d 746 (5th Cir. 1995), this Court rejected the release of a non-debtor insurance company as part of a settlement resolving claims against certain of the debtor's insured former directors. The release was not part of the separately confirmed reorganization plan, and the bankruptcy court made no findings that releasing the insurance company was necessary to the plan's success. *Id.* at 750-51. In those circumstances, the Court held that the non-debtor insurance company should not be insulated from third-party liability "without any countervailing justification of debtor protection." *Id.* at 760; *see also In re Vitro*, 701 F.3d at 1067-69 (rejecting the non-consensual discharge of dozens of guarantors of debtor's notes).

as directors of Highland's general partner, Strand, and as an officer of Highland. Thus, they are more akin to a committee than an incumbent board of directors.[25]

Importantly, this Court expressed concern in *Pacific Lumber* that it will be difficult to find persons willing to serve on committees if they are exposed to lawsuits from unhappy creditors. 584 F.3d at 253. Here, the Independent Directors and CEO/CRO are highly skilled professionals whose participation was and is necessary to the Plan's success. The bankruptcy court specifically found that they required and relied on this protection in agreeing to serve. It will be difficult to fill positions like theirs in future bankruptcy cases if they do not receive protection from unhappy parties. ROA.55-56, CO ¶74(a). And, as the bankruptcy court also found, this case is unlike *Pacific Lumber* because here the defense costs without such protection can be expected to "swamp either these parties or the consummated reorganization." ROA.56-57, CO ¶74(b).

In permitting exculpation in appropriate circumstances, this Court's *Pacific Lumber* decision is in step with the law in other circuits, which permit exculpation even though they do *not* permit nonconsensual non-debtor releases. For instance, the Ninth Circuit has historically applied the same *per se* prohibition on third-party

[25] Additionally, the Independent Directors were appointed as a compromise to the appointment of a trustee, and essentially served in that analogous fiduciary capacity. It is well established that trustees have qualified immunity for acts taken within the scope of their appointment. *Boullion v. McClanahan*, 639 F.2d 213, 214 (5th Cir. 1981). *See* ROA.16-18, 55-56, CO ¶¶13, 14, 74(a).

releases, and likewise "interpreted [section 524(e)] generally to prohibit a bankruptcy court from discharging the debt of a non-debtor." *Blixseth v. Suisse*, 961 F.3d 1074, 1082 (9th Cir. 2020) (citing *In re Lowenschuss*, 67 F.3d 1394, 1402 (9th Cir. 1995)). But the Ninth Circuit nevertheless has held that an exculpation substantially the same as the Exculpation was *not* a prohibited third-party release but rather an appropriate provision setting the standard of care for conduct during a bankruptcy case including "the formulation, negotiation, implementation, confirmation or consummation of this Plan." *Blixseth*, 961 F.3d at 1078-79. Distinguishing its prior decisions, the Ninth Circuit approved the exculpation, even though it extended to a non-fiduciary.

The court observed that, "[b]y its terms, § 524(e) prevents a bankruptcy court from extinguishing claims of creditors against non-debtors over the very debt discharged through the bankruptcy proceedings." *Id.* at 1082. But, it noted, there "is a distinction between claims for the underlying debt and other claims, such as those relating specifically to the bankruptcy proceedings." *Id*. at 1083.

The Ninth Circuit distinguished its prior decisions as involving "sweeping non-debtor releases from creditors' claims on the debts discharged in the bankruptcy, not releases of participants in the plan development and approval process for actions taken during those processes." *Id*. at 1083-84. By contrast,

> the Exculpation Clause here deals only with the highly litigious nature of Chapter 11 bankruptcy proceedings. As one of the bankruptcy attorneys in this case stated during the bankruptcy court's hearing on the Exculpation Clause, in bankruptcy proceedings lawyers "battle each other tirelessly.... oxes [sic] are gored."

961 F.3d at 1084 (citation omitted).

The Ninth Circuit also explained why exculpation (which is permissible) is quite different from the non-debtor release that this Court invalidated in *Pacific Lumber*:

> Rather than provide an unauthorized "fresh start" to a non-debtor, the Clause does nothing more than allow the settling parties—including Credit Suisse, the Debtors' largest creditor—to engage in the give-and-take of the bankruptcy proceeding without fear of subsequent litigation over any potentially negligent actions in those proceedings.

961 F.3d at 1084 (citing *Pacific Lumber*, 584 F.3d at 251–53). The court held that "[u]nder sections 105(a) and 1123 'the bankruptcy court here had the authority to approve an exculpation clause intended to trim subsequent litigation over acts taken during the bankruptcy proceedings and so render the Plan viable.'" *Id.*; *see also In re PWS Holding Corp.*, 228 F.3d at 246 (an exculpation provision "is apparently a commonplace provision in Chapter 11 plans," does not affect the liability of these parties, but rather states the standard of liability under the Code, and did not implicate section 524(e)); *In re Astria Health*, 623 B.R. at 799 ("An exculpation provision may sweep broadly and cover the entire period after the filing of a bankruptcy petition insofar as one function of such a provision is to calibrate 'the

standard of care in [the] bankruptcy proceeding which would preempt the assertion of any state law claims which seek to impose a different standard of care.'"); *In re Aegean Marine Petroleum Network, Inc.*, 599 B.R. 717, 720-21 (Bankr. S.D.N.Y 2019) ("[A] proper exculpation provision is a protection not only of court-supervised fiduciaries, but also of court-supervised and court-approved transactions."); *In re Ditech Holding Corp.*, 2021 Bankr. LEXIS 2274 at *25 (exculpatory provisions are proper to protect those authorized by bankruptcy courts to carry out the bankruptcy process, even after the effective date of a plan.)

Highland's professionals are likewise entitled to exculpation. *See Baron v. Sherman (In re Ondova Ltd. Co.),* 914 F.3d 990 (5th Cir. 2019) (protecting counsel for trustee from suit when acting pursuant to direction of its client within the scope of its employment). The Bankruptcy Code does not distinguish between counsel for a trustee and counsel for a debtor-in-possession. Both are subject to court approval of their retention, serve as counsel to estate fiduciaries, and are subject to having their actions and compensation reviewed and approved by the bankruptcy court.[26] Employees, as agents of the Independent Directors, are also appropriately included in the Exculpation, as they were in the January 9 Order's exculpation. Highland

[26] Additionally, under Texas law, attorneys are immune from civil liability to non-clients for actions taken in connection with representing a client in litigation. *See Cantey Hanger, LLP v. Byrd,* 467 S.W.3d 477, 481 (Tex. 2015); *see also Troice v. Proskauer Rose, L.L.P.*, 816 F.3d 341 (5th Cir. 2016) (dismissing securities fraud litigation brought by third parties against counsel for certain companies related to Ponzi scheme perpetrator Allen Stanford)..

will be unable to operate without its skilled employees, all of whom are under the direction of the Debtor's officers and directors, and threats against them will impede the implementation of the Plan. So too is Strand; as Highland's general partner it is a fiduciary of Highland and was run by fiduciaries (the Independent Directors),[27] so it should be protected to the same extent as Highland and the Independent Directors for the same reasons. As to both employees and Strand, the Exculpation applies solely with respect to actions from and after the date of the post-petition appointment of the Independent Directors, through the Effective Date of the Plan.

2. The Exculpation is *Res Judicata* and Law of the Case.

The January 9 and July 16 Orders exculpated the Independent Directors, their agents and advisors, and the CEO/CRO. Neither of these orders was appealed and the bankruptcy court correctly held that such final orders are the law of the case and *res judicata*, and so continue in effect. ROA.53-55 CO ¶¶72-73.

Appellants had actual notice of the proceedings resulting in the January 9 and July 16 Orders. Appellants neither objected to, nor appealed from, either of them. In fact, Dondero negotiated and agreed to the January 9 Order to avoid the appointment of a chapter 11 trustee. A bankruptcy court order cannot, after it becomes final, be collaterally attacked by parties to the case or those in privity with

[27] *See In re Houston Regional Sports Network, L.P.*, 505 B.R. 468, 481-82 (Bankr. S.D. Tex. 2014) (directors of a non-debtor general partner owe fiduciary duties to the estate of a debtor limited partnership).

them, even on grounds that it exceeded the bankruptcy court's jurisdiction. *Travelers Indemnity Co. v. Bailey*, 557 U.S. 137, 152 (2009); *see also United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 271 (2010). This Circuit has consistently followed that dictate. *See Okla. State Treasurer v. Linn Operating, Inc. (In re Linn Energy, L.L.C.)*, 927 F.3d 862, 866-867 (5th Cir. 2019); *Republic Supply Co. v. Shoaf*, 815 F.2d 1046 (5th Cir. 1987).

The bankruptcy court concluded it had jurisdiction to enter the January 9 and July 16 Orders and they are now *res judicata* and law of the case. Appellants' criticisms of that conclusion are unavailing.

It makes no difference that certain Appellants were not themselves parties to the proceedings resulting in the prior exculpation orders (Funds Br. 26).[28] *Res judicata* applies to non-parties who are in privity with the parties to a prior order. *E.g.*, *Eubanks v. FDIC*, 977 F.2d 166, 170 (5th Cir. 1992). Whether the party to an order was a non-party's virtual representative for purposes of determining a claim or issue "is [a question] of fact for the trial court." *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir. 1975).

The bankruptcy court's finding that Dondero Entities are controlled by Dondero was not clearly erroneous. The record is replete with supporting evidence,

[28] The July 16 Order was served on the Funds and Advisors [D.I. 881] through counsel who appeared in the bankruptcy case the day before that Order's entry [D.I. 835], giving them ample time to file an appeal.

including the Advisors' admission that they are controlled by Dondero and manage the Funds, and Funds' counsel's admission the Funds are controlled and operated by Dondero, their portfolio manager who runs their day-to-day operations.[29] Therefore, they are bound by their privity with Dondero.

Appellants' main authority in opposition to these common-sense points—*D-1 Enterprises, Inc. v. Commercial State Bank*, 864 F.2d 36 (5th Cir. 1989)—addresses a different issue. That case dealt with whether a set of claims "were barred by '*res judicata*' because they should have been raised earlier in the course of the bankruptcy," *id.* at 38—that is, it dealt with whether *res judicata* barred a set of *claims*. Here, the dispute is whether the orders at issue—which undoubtedly did resolve the particular claims Appellants want to bring—can bind Appellants even though they were not parties. The question, in other words, is whether *res judicata* bars a given set of *persons* from reopening already-decided claims. Those are two separate subjects. *Compare, e.g.*, Restatement (Second) of Judgments §24 (addressing which claims are included in a final judgment) *with id.* §§39, 41 (laying out when a person is held to be closely related enough to a party that the judgment binding the party also binds the person).

Besides, *D-1 Enterprises* comes nowhere close to saying what Appellants assert it does. Appellants cite it for the anodyne proposition that bankruptcy cases

[29] *See* fn.13, *supra*.

often comprise a series of "self-contained episodes that resolve particular disputes at particular times." 864 F.2d at 39. It is an enormous leap from that uncontroversial statement to an argument that claims and issues resolved in one aspect of a bankruptcy case are always open to re-litigation in another aspect. This Court in *D-1 Enterprises* merely explained that a party's *failure* to raise a claim or issue in one aspect of a case might not preclude it from later raising that issue for the first time. Nothing in *D-1 Enterprises* undermines the preclusive effect of orders that explicitly decide a given issue.

There is also no merit to Appellants' suggestion that the January 9 and July 16 Orders "cannot constitute law of the case" as to "subsequently arising obligations and liabilities owed to the Funds or claims held by the Funds." Funds Br. 28. Appellants' theory appears to be that the bankruptcy court could not have meant to exculpate the Independent Directors and CEO/CRO for their future conduct, or to address claims against them that had yet to arise. But that is *exactly* the intent of these (and any other) exculpation provisions that are approved as a condition of retention of certain professionals and executives: they establish a standard of care for the individuals' actions at the outset, when they start in their roles. That such an exculpation, once granted, would be the law of the case is especially appropriate here, where the Independent Directors and CEO/CRO would not have accepted their

appointments without those protections, as the court below expressly found. ROA.55-56, CO ¶74(a).

Appellants are simply wrong that the prior exculpation can be appealed now even if "the Bankruptcy Court put in place that decision in 2020." Funds Br. 28-29. This Court has held that an exculpation for fraud in a confirmation order became effective when not appealed, even if it was broader than what was provided in the plan, and whether it comported with the law. *Mesdag v. Nancy Sue Davis Tr. (In re Davis Offshore, L.P.)*, 644 F.3d 259, 269 (5th Cir. 2011). The January 9 and July 16 Orders were final orders, and any notice of appeal from them had to be filed within 14 days of their entry. Fed. R. Bankr. P. 8002(a).

C. The Gatekeeper Provision is Lawful.

The Gatekeeper Provision is neither a release nor an injunction. Rather, it requires any Enjoined Party that believes it has *any* claims against a Protected Party[30] "that arose or arises from or is related to the Chapter 11 Case, the negotiation of the Plan, the administration of the Plan or property to be distributed under the Plan, the wind down of the business of the Debtor or Reorganized Debtor, the administration of the Claimant Trust or the Litigation Sub-Trust, or the transactions in furtherance of the foregoing" to first seek leave from the bankruptcy court to pursue such alleged

[30] *See* Plan definition of "Protected Parties." ROA.113, Plan Def. 105.

claims and present evidence as to why it believes it has a colorable claim[31] against the Protected Party. ROA.150-51, Plan, Art. IX.F. If the claim is colorable and the bankruptcy court has jurisdiction, it may adjudicate the claim. If the claim is colorable and the bankruptcy court does not have jurisdiction, the claim may be pursued in any court of appropriate jurisdiction. By its nature and by its terms, the Gatekeeper Provision has no effect on legitimate contract rights or on anyone's ability to pursue colorable claims.

The bankruptcy court found the gatekeeper function was "critical to the effective and efficient administration, implementation, and consummation of the Plan." ROA.56-57, CO ¶76. It relied on (a) the evidence of Highland's pre-petition litigation history, (b) the "substantial, costly, and time-consuming" Dondero Post-Petition Litigation, and (c) the likelihood that Dondero and his related entities would commence vexatious post-confirmation litigation in other jurisdictions he "perceives will be more hospitable to his claims." ROA.58-61, CO ¶¶77-79. The bankruptcy court made a further factual finding that the threat of continued litigation "will impede efforts by the Claimant Trust to monetize assets for the benefit of creditors and result in lower distributions." ROA.59-60, ¶78.

[31] Bankruptcy courts are often asked to determine if a claim is colorable. *See, e.g., Louisiana World Exposition v. Federal Ins. Co.*, 858 F.2d 233 (5th Cir. 1988) (court must determine that claim is colorable before authorizing a committee to sue in the stead of the debtor)

Appellants contend that the Gatekeeper Provision effects a non-debtor release. It does not. No claims are released at all – *any* colorable claim may be asserted. Appellants' argument that the provision has the "potential to wipe out" their claims against the Protected Parties (Funds Br. 30) is unfounded. The provision only prevents non-colorable, frivolous claims from being filed. And if the bankruptcy court determines a claim is not colorable, nothing prevents an appeal of that determination.

Appellants also complain that complying with the Gatekeeper Provision will prevent them from "act[ing] quickly" to assert any rights they have against the Debtor's successors and other Protected Parties. Funds Br. 30. The bankruptcy court correctly determined that any such downside was worth the benefits afforded by this plan protection. In any event, the bankruptcy court is more than capable of acting quickly when necessary and Bankruptcy Rule 8013(d) provides specific mechanisms to ask the court to prevent irreparable harm.

The Gatekeeper Provision is well within the bankruptcy court's authority to protect the implementation of its orders and prevent vexatious litigation to the detriment of the Plan.[32] The Gatekeeper Provision is a legitimate exercise of the bankruptcy court's powers under sections 105, 1123(b)(6) and 1141(a)-(c) of the

[32] *Travelers Indemnity Co.*, 557 U.S. at 151(bankruptcy courts always have jurisdiction to interpret and enforce their own orders, including confirmation orders).

Bankruptcy Code. Though not found in every plan, gatekeeper provisions are an appropriate tool[33] well within the bankruptcy court's jurisdiction and appropriate in a case the bankruptcy court repeatedly said was "not garden variety."

Nor is the Gatekeeper Provision an impermissible extension of the post-confirmation jurisdiction of the bankruptcy court. Post-confirmation jurisdiction continues to exist for matters pertaining to the "execution of the plan." *Bank of La. v. Craig's Stores of Texas, Inc. (In re Craig's Stores of Tex., Inc.),* 266 F.3d 388, 390 (5th Cir. 2001); *see also In re United States Brass Corp.*, 301 F.3d at 305 (holding bankruptcy court had jurisdiction to determine whether arbitration could be used to liquidate claims post-effective date).

Other jurisdictional factors are also implicated in this case. Many courts have determined that post-confirmation jurisdiction is appropriately broader where the plan is effectuating an orderly liquidation rather than a true reorganization. *See, e.g.*, *Boston Regional Med. Ctr., Inc. v. Reynolds (In re Boston Regional Med. Ctr., Inc.),*

[33] Gatekeeper provisions are used to provide a single clearing court to determine whether a claim is colorable or appropriate under the applicable facts of the main case. For example, in the *Madoff* cases, the bankruptcy court serves as the gatekeeper for determining whether claims of certain creditors against certain Madoff feeder funds are direct claims (claims that may be brought by the creditor) or derivative claims (claims that either can be brought only by the Madoff post-confirmation liquidating trust or have already been settled by the trust.) *See, e.g., Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 546 B.R. 284 (Bankr. S.D.N.Y. 2016). In the *General Motors* case, the bankruptcy court served as the gatekeeper to determine if defective ignition-switch claims could be asserted in litigation against New GM or only as a claim against Old GM. *See, e.g., In re Motors Liquidation Co.*, 541 B.R. 104 (Bankr. S.D.N.Y. 2015); *In re Motors Liquidation Co.*, 568 B.R. 217 (Bankr. S.D.N.Y. 2017).

410 F.3d 100, 107 (1st Cir. 2005); *TXMS Real Estate Invs., Inc. v. Senior Care Ctrs., LLC (In re Senior Care Ctrs., LLC)*, 2020 Bankr. LEXIS 3205 (Bankr. N.D. Tex. Nov. 12, 2020).

Another jurisdictional factor implicated in this case is the significant indemnification rights of each of the Protected Parties. The bankruptcy court expressly discussed the indemnification protections of the CEO/CRO and Independent Directors. ROA.60-61, CO ¶79. Similar indemnification protections are in the applicable trust documents for the benefit of the Litigation Trustee, the Claimant Trustee and the Trust Oversight Committee and its members.[34] This Court has recognized post-confirmation bankruptcy court jurisdiction where a lawsuit against a third party will implicate indemnification rights that affect the administration of the bankruptcy case. *EOP-Colonnade of Dallas Ltd. P'ship v. Faulkner (In re Stonebridge Techs., Inc.)*, 430 F.3d 260, 266-67 (5th Cir. 2005); *see also In re Farmland Industries, Inc.*, 567 F.3d 1010, 1020 (8th Cir. 2010) (bankruptcy court had "related to" jurisdiction over a claim against the post-effective date liquidating trustee because the estate was paying legal fees of the non-debtor defendants under the estate's indemnification obligations).

[34] *See* ROA.1151, Claimant Trust Agmt. §8.2; ROA.1213, Litigation Sub-Trust Agmt. §8.2; ROA.1299-300, Reorganized Limited Partnership Agmt. §10(b), (c).

The gatekeeper function here will certainly affect the parties' post-confirmation rights and responsibilities and compliance with or completion of the Plan. Accordingly, the bankruptcy court has post-confirmation jurisdiction to administer and enforce the Plan and the Gatekeeper Provision is part of those powers.[35]

The bankruptcy court also determined the Gatekeeper Provision was "within the spirit of" the *Barton* Doctrine as well as "consistent with the notion of a prefiling injunction to deter vexatious litigants." ROA.61, CO ¶80. The *Barton* Doctrine provides that "as a general rule, before a suit may be brought against a trustee, leave of the appointing court (*i.e.*, the bankruptcy court) must be obtained." *Baron v. Sherman (In re Ondova Ltd. Co.)*, 2017 Bankr. LEXIS 325, *29 (Bankr. N.D. Tex. Feb. 1, 2017), *report and recommendation adopted*, 2018 U.S. Dist. LEXIS 13439 (N.D. Tex., Jan. 26, 2018), *aff'd*, 2019 U.S. App. LEXIS 3493 (5th Cir. Feb. 4, 2019).

Although *Barton* originated as a protection for federal receivers, courts have applied equivalent protection to various court-appointed and court-approved

[35] Appellants' reliance on *In re CJ Holding Co.*, 597 B.R. 597 (S.D. Tex. 2019) is wholly misplaced. In fact, the case *supports* the *res judicata* effect of the January 9 and July 16 Orders. In *CJ Holding* the court determined the bankruptcy court *had* jurisdiction to enforce a third-party release in a confirmation order for the benefit of a non-debtor subsidiary against the litigant who neither filed a proof of claim nor objected to confirmation notwithstanding his notice of the bar date and confirmation procedures. The case has nothing to with the court's authority to act as a gatekeeper for matters pertaining to the administration of a confirmed plan, but it does affirm the jurisdiction of a bankruptcy court to issue orders in aid of its own orders.

fiduciaries and their agents in bankruptcy cases. Protected parties have included trustees,[36] debtors-in-possession,[37] a debtor's officers and directors,[38] the debtor's general partner,[39] employees,[40] attorneys retained by debtors and trustees,[41] a post-confirmation plan administrator, consumer claims representative and their respective agents,[42] and non-court-appointed agents who are retained by the trustee for purposes relating to the administration of the estate.[43]

Barton Doctrine protection continues post-confirmation and sometimes even after a case is closed. *Helmer*, 2012 U.S. Dist. LEXIS 151262 at *15 (citing *Carter*, 220 F.3d at 1252-53)*; Beck v. Fort James Corp. (In re Crown Vantage, Inc.)*, 421

[36] *Id.*

[37] *Helmer v. Pogue*, 212 U.S. Dist. LEXIS 151262 (N.D. Ala. Oct. 22, 2012) (debtor-in-possession).

[38] *Carter v. Rodgers*, 220 F.3d 1249, 1252 and n.4 (11th Cir. 2000) (trustee or other bankruptcy-court-appointed officer, finding no distinction between a "bankruptcy-court-appointed officer" and officers who are "approved" by the court.); *Hallock v. Key Fed. Sav. Bank (In re Silver Oak Homes)*, 167 B.R. 389 (Bankr. D. Md. 1994) (president of debtor).

[39] *Gordon v. Nick*, 1998 U.S. App. LEXIS 21519 (4th Cir. 1998) (managing partner).

[40] *Lawrence v. Goldberg*, 573 F.3d 1265, 1270 (11th Cir. 2009) (trustee and parties assisting the trustee in carrying out official duties).

[41] *Lowenbraun v. Canary* (*In re Lowenbraun*), 453 F.3d 314, 321 (6th Cir. 2006) (trustee's counsel); *Tufts v. Hay*, 977 F.3d 1204, 1209-10 (11th Cir. 2020), (court-approved counsel who function as the equivalent of court appointed officers are entitled to protection under *Barton*, but doctrine inapplicable because parties acknowledged suit would not have any effect on administration of the estate because suit involved misrepresentations of one lawyer to the other and would not implicate indemnification by debtor whose case had been dismissed).

[42] *In re Ditech Holding Corp*., 2021 Bankr. LEXIS 2274 at *30.

[43] *Wells Fargo Fin. Leasing, Inc. v. Jones*, 2015 WL 1393257, at *3-*5 (W.D. Ky. Mar. 25, 2015) (person acting as agent of trustee; *Ariel Preferred Retail Group, LLC v. CWCapital Asset Mgmt.*, 883 F. Supp. 2d 797, 817 (E.D. Mo. 2012) (property management company engaged by receiver).

F.3d 963, 972-73 (9th Cir. 2005) (doctrine applies to trustee of post-confirmation liquidating trust); *In re Ditech Holding Corp*., 2021 Bankr. LEXIS 2274 (applies to post-confirmation state court litigation against plan administrator for prepetition claim); *Muratore v. Darr*, 375 F.3d 140, 147 (1st Cir. 2004) (doctrine applies even after bankruptcy case closed).

The Court has expressly recognized the continuing viability of the *Barton* Doctrine, notwithstanding the possibility that the bankruptcy court could not render a final judgment on the underlying action. *Villegas*, 788 F.3d at 158-59 (litigant must still seek authority from the bankruptcy court that appointed the trustee before filing suit even if the bankruptcy court might not be able to render a final judgment on the suit itself.) Because the *Barton* Doctrine is jurisdictional only as to the ability of the prospective plaintiff to file the lawsuit, *Baron*, 2017 Bankr. LEXIS 325, at *29, it does not implicate the limitations on the jurisdiction of a bankruptcy court *as to the actual underlying lawsuit* after the effective date.

The statutory exception to the Barton Doctrine also does not apply. Section 959(a) provides that "Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, *with respect to any of their acts or transactions in carrying on business connected with such property*." 28 U.S.C. §959(a).

As an initial matter, whether a party requires leave of court to sue will ordinarily be based on the particulars of the lawsuit. *See, e.g., Kashani v. Fulton (In re Kashani)*, 190 B.R. 875 (9th Cir. BAP 1995) (debtor not only needed leave of bankruptcy court to sue trustee but court did not err in requiring debtor to submit draft complaint or some basis for court to determine whether it could assert a *prima facie* case for breach of fiduciary duty and negligence in seeking to sue the trustee). Thus, Appellants' argument that the Gatekeeper Provision is automatically impermissible because some hypothetical lawsuit might be an exception to it is illogical. The exception cannot eliminate the rule.

Additionally, section 959(a) applies only to acts and transactions in furtherance of pursuing the business, not cases implicating the administration of the bankruptcy case or the plan. *See, e.g., In re Crown Vantage, Inc.*, 421 F.3d at 971-72 (959(a) does not apply to actions in pursuit of "the mere continuous administration of property under order of the court"); *Muratore*, 375 F.3d at 144 (959(a) is intended to permit actions redressing torts committed in furtherance of the debtor's business, such as the common situation of a negligence claim in a slip and fall case where a bankruptcy trustee, for example, conducted a retail store); *In re CDC Corp*., 610 Fed. Appx 918 (11th Cir. 2015) (959 exception was not applicable to "actions taken to further the administering of the bankruptcy estate" citing *Lebovits v. Scheffel*, 101 F3d. 272 (2d Cir. 1996)); *Carter*, 220 F.3d at 1253-54

(section 959(a) does not apply to suits against trustees for administering or liquidating the bankruptcy estate, and a case for breach of fiduciary duty stemming from official bankruptcy duties is a "run of the mill Barton case").

Lastly, the bankruptcy court determined that given the proclivity of Appellants and the other Dondero-related entities to litigate every issue and Dondero's threats against Highland, the Independent Directors, the CEO/CRO and even employees, the Gatekeeper Provision was consistent with the type of pre-filing injunctions used against vexatious litigants. The facts of this case are as egregious as those of cases in which this Court and others have approved such injunctions.[44]

II. THE BANKRUPTCY COURT CORRECTLY DECIDED APPELLANTS' REMAINING ISSUES.

A. The Plan Does Not Violate the Absolute Priority Rule.

The Advisors claim the Plan violates the absolute priority rule because Classes 8 and 9 are "not paid in full under the Plan on the Effective Date, while junior creditors of equity interests in Classes 10 and 11 receive property under the Plan in the nature of contingent trust interests." Advisors Br. 22. This argument is particularly disingenuous. First, the Advisors' standing to assert such claims arises from disputed employee claims they acquired *after* confirmation and the original

[44] *In re Carroll*, 850 F.3d at 811; *Baum v. Blue Moon Ventures, LLC*, 513 F.3d 181 (5th Cir. 2008); *Cromer v. Kraft Foods N. Am., Inc*., 390 F.3d 812 (4th Cir. 2004); *Safir v. United States Lines, Inc.*, 792 F.2d 19 (2d Cir. 1986).

holders of those claims did not object to confirmation of the Plan on that basis. Moreover, the holders of Class 10 and 11 Interests – the parties who are purportedly receiving unfairly favorable treatment – are all entities affiliated with Dondero.

To support their argument, Advisors misstate the requirements of section 1129(b)(2)(B). The statute provides that each claimant in a dissenting class must receive on account of its claim "property of a value, as of the effective date of the plan, equal to the allowed amount of such claim". 11 U.S.C. §1129(b)(2)(B)(i). The statute *does not* require payment in full on the effective date.

Advisors misapply the law too. Under the Plan, Classes 10 (Class B/C Limited Partnership Interests) and 11 (Class A Limited Partnership Interests) receive Contingent Liquidating Trust Interests that vest *only* if *all* Class 8 (General Unsecured Claims) and Class 9 (Subordinated Claims) creditors are paid in full with interest. Thus, the only rights that equity holders receive are contingent – *the contingency being that all senior creditors are first paid in full*.

The Plan is compliant with the absolute priority rule because it ensures that higher classes will be paid in full before lower classes receive any recovery. The absolute priority rule is embodied in the "fair and equitable" requirement of section 1129(b)(2). The statute provides that no class can receive property unless senior classes are paid in full, and *also* specifies that no creditor can receive more than 100% of its claim. *In re Idearc, Inc.*, 423 B.R. 138, 170 (Bankr. N.D. Tex. 2009)

(corollary of absolute priority rule is that senior classes cannot receive more than 100% recovery); *In re MCorp Fin., Inc.*, 137 B.R. 219, 235 (Bankr. S.D. Tex. 1992) (same), *appeal dismissed and remanded*, 139 B.R. 820 (S.D. Tex. 1992).

The Plan satisfies both requirements by giving equity holders Contingent Claimant Trust Interests that are entirely contingent on senior creditors being paid first. This does not violate the absolute priority rule; it simply accounts for the scenario in which the Litigation Sub-Trust recovers so much that proceeds remain to pay the lower classes after the more senior creditors are paid in full.[45] The Plan extinguishes all equity interests (consisting primarily of limited and general partnership interests held by Dondero-related entities). No equity holder retains any ownership or control over the Reorganized Debtor, the Claimant Trust, or the Litigation Sub-Trust.

In re Introgen Therapeutics, 429 B.R. 570, 585 (Bankr. W.D. Tex. 2010), is on point. In *Introgen*, the court addressed whether a debtor's liquidating plan violated the absolute priority rule by allowing equity to receive cash distributions after all creditors had been paid in full. The court held that the right to receive a contingent interest in a trust, "when the contingency is 'payment in full of all senior classes,'" does not violate the absolute priority rule. *Id.; see also In re CRB*

[45] If the Plan did *not* have such a provision, then Appellants likely would have lodged a Plan objection stating the plan was not fair and equitable because it potentially allows senior creditors to receive more than 100% to Appellants' detriment.

Partners, LLC, 2013 Bankr. LEXIS 800, at *39-41 (Bankr. W.D. Tex. Mar. 4, 2013) (citing *Introgen*).

Appellants are wrong that *Introgen* contravenes Supreme Court precedent. They misinterpret *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988), and *Bank of America National Trust & Savings Association v. 203 N. LaSalle Partnership*, 526 U.S. 434 (1999). In *Ahlers*, the Supreme Court rejected an argument that the owner of a debtor farm should be able to retain its interest in the farm without paying senior creditors in full because that interest had no value. The Supreme Court concluded that the determining factor is not whether property has value but *whether equity is retaining value that rightfully should go to senior creditors*. *Ahlers*, 485 U.S. at 208. The Plan is entirely faithful to that rule. Equity holders receive nothing that senior creditors are entitled to receive.

In *LaSalle*, the Supreme Court ruled the right to bid on the debtor's equity was a property right that implicated the absolute priority rule. The context of the *LaSalle* ruling was that market forces, not court estimates, should determine if equity interests have value. That issue is not implicated here; the Debtor's equity interests have been canceled, so they are not being sold or retained. Although the Contingent Claimant Trust Interests are a "property right," they will not vest—and equity holders will not *receive or retain* any value—until unsecured creditors are paid in

full. "That type of interest is "not just valueless . . . it simply does not exist." *Introgen*, 429 B.R. at 585.

B. The Plan Was Not Rendered Unconfirmable by Noncompliance with Rule 2015.3.

The Advisors contend the Plan was not confirmable because its proponent, Highland, did not comply with the "applicable provisions" of the Bankruptcy Code. 11 U.S.C. §1129(a)(2). Specifically, Highland neglected to file periodic reports required by Bankruptcy Rule 2015.3(a).

A debtor's periodic reporting requirements are not among the "applicable provisions" covered by section 1129(a)(2). The principal purpose of section 1129(a)(2) is to assure that the plan proponent has complied with the disclosure requirements of section 1125. *See, e.g., In re PWS Holding Corp.*, 228 F.3d at 248; *Kane v. Johns-Manville Corp*., 843 F.2d 636, 648-49 (2d Cir. 1988); *In re Cypresswood Land Partners I*, 409 B.R. 396, 423-24 (Bankr. S.D. Tex. 2009); *In re Seatco, Inc.*, 257 B.R. 469, 479 (N.D. Tex. 2001).

Appellants' view that "*applicable*" provisions means "*all*" provisions of the Bankruptcy Code for purposes of confirming a plan is an "overly broad" reading. *Seatco*, 257 B.R. at 479. Under Appellants' view, any missed report or deadline, and any other way a debtor might fall short of full compliance with every bankruptcy rule, would render *any* plan the debtor *ever* proposes unconfirmable. That cannot

be what section 1129(a)(2) means.[46] Appellants cite no case in which a debtor was denied plan confirmation based solely on a failure to file Rule 2015.3 reports.[47] Even if that were a "plain reading" of the statute (rather than a readily resolved ambiguity concerning what is "applicable"), it would fall within the absurdity doctrine, as a "preposterous" result that "no reasonable person could intend." *Texas Brine Co. v. Am. Arbitration Ass'n*, 955 F.3d 482, 486 (5th Cir. 2020).

Additionally, Rule 2015.3(d) provides that a court may, for cause and after notice and a hearing, vary the reporting requirement established in Rule 2015.3. The operating protocols entered as part of the Governance Settlement served this function and provided the information and protections concerning Highland's operations, subsidiaries, and affiliates that would have been provided by the Rule 2015.3 reports. Highland complied with the operating protocols and neither the

[46] *Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters., Ltd. II (In re Briscoe Enters., Ltd. II)*, 994 F.2d 1160 (5th Cir. 1993) (in reversing the district court and reinstating the bankruptcy court's ruling in favor of confirmation, this Court implicitly agreed with the bankruptcy court which stated: "The Court recognizes the 'well established principle that relief under bankruptcy laws is not to be withheld because of technicalities.'") (quotation from bankruptcy court opinion cited in *In re Briscoe Enters., Ltd. II*, 138 B.R. 795, 816 (N.D. Tex. 1992)).

[47] *Mandel v. White Nile Software, Inc. (In re Mandel)*, 2021 U.S. App. LEXIS 24489 (5th Cir. Aug. 17, 2021) (*per curiam*), on which Advisors rely, is entirely inapposite. It addressed the denial of discharge (not plan confirmation), under different Code provisions, where the court found "numerous inaccuracies and omissions" in debtor's financial reports reflecting "false statements" that were "material and made with fraudulent intent." *Id.* at *16-19. Other cases cited by Appellants involve wholesale violations of Bankruptcy Code requirements.

Committee, the U.S. Trustee nor the Appellants raised any issues before the confirmation hearing.[48]

C. The Bankruptcy Court's Finding that Dondero Owns or Controls the Funds Is Not Appealable and Is Supported by the Evidence.

The Funds and Dondero ask this Court to excise two passages from the Confirmation Order in which the bankruptcy court found the Funds are owned or controlled by Dondero and lack independence from him. But "federal appellate courts" do "not review lower courts' opinions, but their judgments." *Jennings v. Stephens*, 574 U.S. 271, 277 (2015) (cites omitted). The Funds' request to strike a finding of fact, without any corresponding reversal or *vacatur* of any part of the Confirmation Order, is not a proper request an appeal.

Furthermore, the bankruptcy court's finding is not clearly erroneous. Dondero and the Funds contend that the bankruptcy court's finding depended only on a lack of contrary testimony by the Funds' independent directors, who never appeared in the case. That is false. Rather, the bankruptcy court explicitly relied on testimony about Dondero's control of the Funds by Dustin Norris, an Executive Vice President of the Funds. ROA.22-23, CO ¶18; *see also* ROA.2993-2996 (Norris testimony). Jason Post, the Funds' Chief Compliance Officer, provided similar

[48] Appellants neither raised this issue during the case nor in their filed objections to confirmation. It was raised for the first time orally at the confirmation hearing.

testimony, ROA.1838-1845, and the Funds' counsel admitted Dondero's day-to-day control of the Funds in correspondence to Highland's counsel, ROA.12248-12249.

CONCLUSION

The bankruptcy court's Confirmation Order should be affirmed.

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Dated: October 6, 2021

CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2021, the foregoing Brief of Appellee was electronically filed using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

/s/Zachery Z. Annable
Attorney for Appellee

EXHIBIT A

SUMMARY OF DONDERO AND RELATED ENTITY LITIGATION

EXHIBIT A
SUMMARY OF DONDERO AND RELATED ENTITY LITIGATION*

In re Highland Capital Management, L.P., Case No. 19-34054-sgj11 (Bankr. N.D. Tex.)

9/23/20	***Debtor's Motion for Entry of an Order Approving Settlement with (a) Acis Capital Management, L.P. and Acis Capital Management GP LLC (Claim No. 23), (b) Joshua N. Terry and Jennifer G. Terry (Claim No. 156), and (c) Acis Capital Management, L.P. (Claim No. 159) and Authorizing Actions Consistent Therewith*** **[D.I. 1087]**				
	Objectors:	Dondero [D.I. 1121]	Acis filed a claim for at least $75 million. Acis claim was the result of an involuntary bankruptcy initiated when the Debtor refused to pay an arbitration award and instead transferred assets to become judgment proof. Debtor settled claim for an allowed Class 8 claim of $23 million and approximately $1 million in cash payments. Dondero objected to the settlement alleging that it was unreasonable and constituted vote buying.	The Acis Settlement Motion was approved and Dondero's objection was overruled [D.I. 1302].	Dondero appealed [D.I. 1347]. The appeal has been briefed and the decision is pending.
11/18/20	***Motion of the Debtor Pursuant to 11 U.S.C. §§ 105(a) and 363(b) for Authority to Enter into Sub-Servicer Agreements*** **[D.I. 1424]**				
	Objectors:	Dondero [D.I. 1447]	The Debtor filed a motion seeking to retain a sub-servicer to assist in its reorganization consistent with the proposed plan. Dondero alleged that the sub-servicer was not needed; was too expensive; and would not be subject to Bankruptcy Court jurisdiction [D.I. 1447].	Dondero withdrew his objection [D.I. 1460] after forcing the Debtor to incur costs responding [D.I. 1459]	N/A
11/19/20	***James Dondero's Motion for Entry of an Order Requiring Notice and Hearing for Future Estate Transactions Occurring Outside of the Ordinary Course*** **[D.I. 1439]**				
	Movant:	Dondero	Dondero alleged the Debtor sold significant assets in violation of 11 U.S.C. § 363 and without providing Dondero a chance to bid. Dondero requested an emergency hearing on this motion [D.I. 1443]. Dondero filed this motion despite having agreed to the Protocols governing such sales.	Dondero withdrew this motion [D.I. 1622] after the Debtor and the Committee were forced to incur costs responding and preparing for trial [D.I. 1546, 1551].	N/A
12/8/20	***Motion for Order Imposing Temporary Restrictions on Debtor's Ability, as Portfolio Manager, to Initiate Sales by Non-Debtor CLO Vehicles*** **[D.I. 1522]**				
	Movants:	Advisors Funds	Movants argued that the Debtor should be precluded from causing the CLOs to sell assets without Movants' consent. Movants provided no support for this position which directly contradicted the terms of the CLO Agreements; and was filed notwithstanding the Protocols which governed such sales. Movants requested an emergency hearing on this motion [D.I. 1523].	The motion was denied [D.I. 1605] and was characterized as "frivolous."	N/A

*** The following is by way of summary only and does not include discovery disputes or similar matters. Nothing herein shall be deemed or considered a waiver of any rights or an admission of fact. The Debtor reserves all rights that it may have whether in law or in equity.**

12/23/20	***Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 150, 153, 154) and Authorizing Actions Consistent Therewith* [D.I. 1625]**				
	Objectors:	Dondero [D.I. 1697] Trusts [D.I. 1706] CLOH [D.I. 1707]	The HarbourVest Entities asserted claims in excess of $300 million in connection with an investment in a fund indirectly managed by the Debtor for, among other things, fraud and fraudulent inducement, concealment, and misrepresentation. Debtor settled for an allowed Class 8 claim of $45 million and an allowed Class 9 claim of $35 million. Dondero and the Trusts alleged that the settlement was unreasonable; was a windfall to the HarbourVest Entities; and constituted vote buying. CLOH argued that the settlement could not be effectuated under the operative documents.	CLOH withdrew its objection at the hearing. The settlement was approved and the remaining objections were overruled [D.I. 1788].	The Trusts appealed [D.I. 1870], and the appeal has been briefed. CLOH recently filed a complaint alleging, among other things, that the settlement was a breach of fiduciary duty and a RICO violation.
1/14/21	***Motion to Appoint Examiner Pursuant to 11 U.S.C. § 1104(c)* [D.I. 1752]**				
	Movants:	Trusts Dondero [D.I. 1756]	Movants sought the appointment of an examiner 14 months after the Petition Date and commencement of Plan solicitation to assess the legitimacy of the claims against the various Dondero Entities and to avoid litigation. Movants requested an emergency hearing on this motion [D.I. 1748].	The motion was denied [D.I. 1960].	N/A
1/20/21	***James Dondero's Objection to Debtor's Proposed Assumption of Executory Contracts and Cure Amounts Proposed in Connection Therewith* [D.I. 1784]**				
	Objector:	Dondero	Dondero objected to the Debtor's proposed assumption of the limited partnership agreement governing the Debtor and MSCF [D.I. 1719].	Dondero withdrew his objection [D.I. 1876] after forcing the Debtor to incur the expense of responding (which included a statement that the Debtor limited partnership agreement was not being assumed).	N/A

1/22/20	***Objections to Fifth Amended Plan of Reorganization* [D.I. 1472]**				
	Objectors:[1] Dondero [D.I. 1661] Trusts [D.I. 1667] Advisors & Funds[2] [D.I. 1670] Senior Employees [D.I. 1669] HCRE [D.I. 1673] CLOH [D.I. 1675] NexBank Entities [D.I. 1676]		All objections to the Plan were consensually resolved prior to the confirmation hearing except for the objections of the Dondero Entities and the U.S. Trustee. The U.S. Trustee did not press its objection at confirmation.	All objections were overruled and the Confirmation Order was entered. The Confirmation Order specifically found that Mr. Dondero would "burn the place down" if his case resolution plan was not accepted.	Dondero, the Trusts, the Advisors, and the Funds appealed [D.I. 1957, 1966, 1970, 1972]. The appeal is being briefed.
1/24/21	***Application for Allowance of Administrative Expense Claim* [D.I. 1826]**				
	Movants:	Advisors	The Advisors seek an administrative expense claim for approximately $14 million they allege they overpaid to the Debtor during the bankruptcy case under the Shared Services Agreement. Notably, the Advisors have not paid $14 million to the Debtor during the bankruptcy.	This matter is currently being litigated.	N/A
2/3/21	***NexBank's Application for Allowance of Administrative Expense Claim* [D.I. 1888]**				
	Movant:	NexBank	NexBank seeks an administrative expense claim for reimbursement of $2.5 million paid to the Debtor under its Shared Services Agreement and investment advisory agreement. NexBank alleges that it did not receive the services.	This matter is currently being litigated.	N/A

[1] In addition to the Dondero Entities' objections, the following objections were filed: State Taxing Authorities [D.I. 1662]; Former Employees [D.I. 1666]; IRS [D.I. 1668]; US Trustee [D.I. 1671]; Daugherty [D.I. 1678]. These objections were either resolved prior to confirmation or not pressed at confirmation.

[2] In addition to the Funds, this objection was joined by: Highland Fixed Income Fund, Highland Funds I and its series, Highland Funds II and its series, Highland Healthcare Opportunities Fund, Highland Merger Arbitrate Fund, Highland Opportunistic Credit Fund, Highland Small-Cap Equity Fund, Highland Socially Responsible Equity Fund, Highland Total Return Fund, Highland/iBoxx Senior Loan ETF, NexPoint Real Estate Strategies Fund, NexPoint Real Estate Finance Inc., NexPoint Real Estate Capital, LLC, NexPoint Residential Trust, Inc., NexPoint Hospitality Trust, NexPoint Real Estate Partners, LLC, NexPoint Multifamily Capital Trust, Inc., VineBrook Homes Trust, Inc., NexPoint Real Estate Advisors, L.P., NexPoint Real Estate Advisors II, L.P., NexPoint Real Estate Advisors III, L.P., NexPoint Real Estate Advisors IV, L.P., NexPoint Real Estate Advisors V, L.P., NexPoint Real Estate Advisors VI, L.P., NexPoint Real Estate Advisors VII, L.P., and NexPoint Real Estate Advisors VIII, L.P. [D.I. 1677].

2/8/21 ***James Dondero Motion for Status Conference*** **[D.I. 1914]**

Movant:	Dondero	Dondero requested a chambers conference to convince the Court to delay confirmation of the Plan to allow for continued negotiation of the "pot plan."	The request was denied [D.I. 1929] after the Debtor and Committee informally objected.	N/A.

2/28/21 ***Motions for Stay Pending Appeal***

Movants:		The only parties requesting a stay pending appeal were the Dondero Entities. They alleged a number of potential harms to the Dondero Entities if a stay was not granted and offered to post a $1 million bond.	Relief was denied [D.I. 2084, 2095] and a number of the Movants' arguments were found to be frivolous.	Movants sought a stay pending appeal from this Court.
Dondero [D.I. 1973]	Advisors [D.I. 1955]			
Funds [D.I. 1967]	Trusts [D.I. 1971]			

3/18/21 ***James Dondero, Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., The Dugaboy Investment Trust, The Get Good Trust, and NexPoint Real Estate Partners, LLC, f/k/a HCRE Partners, LLC, a Delaware Limited Liability Company's Motion to Recuse Pursuant to 28 U.S.C. § 455*** **[D.I. 2060]**

Movants:	Dondero Advisors Trusts HCRE	Dondero argued that Judge Jernigan should recuse herself as her rulings against him and his related entities were evidence of her bias.	Judge Jernigan denied the motion without briefing from any other party on March 23, 2021 [D.I. 2083].	The Movants appealed [D.I. 2149]. The opening brief and the Debtor's response have been filed.

4/15/21 ***Debtor's Motion for Entry of an Order Approving Settlement with UBS Securities LLC and UBS AG London Branch and Authorizing Actions Consistent Therewith*** **[D.I. 2199]**

Movants:	Debtor	UBS Securities LLC and UBS AG London Branch (collectively, "UBS") asserted claims against the Debtor in excess of $1 billion arising from two Debtor-managed funds' breach of contract in 2008. The settlement resolved ten plus years of litigation but had to be renegotiated when the Debtor discovered that the Dondero-controlled Debtor had caused the funds to transfer cash and securities with a face amount of over $300 million to a Cayman-based Dondero controlled entity in 2017, presumably to thwart UBS's ability to collect on its judgment.	The only parties to object were Dondero [D.I. 2295] and Dugaboy [D.I. 2268, 2293]. The Debtor filed an omnibus reply on May 14, 2021 [D.I. 2308]. UBS also filed a reply [D.I. 2310]. The UBS settlement was approved on May 24, 2021 [D.I. 2389].	The objectors appealed the settlement.

4/23/21 ***Debtor's Motion for an Order Requiring the Violators to Show Cause Why They Should Not Be Held in Civil Contempt for Violating Two Court Orders*** **[D.I. 2247]**

Movants:	Debtor	Debtor filed a motion seeking an order to show cause as to why Dondero, CLOH, DAF, and their counsel should not be held in contempt of court for willingly violating two final Bankruptcy Court orders. The Bankruptcy Court entered an order to show cause on April 29, 2021 [D.I. 2255] and set an in-person hearing for June 8, 2021.	Dondero, CLOH, the DAF, Mark Patrick (allegedly the person in control of the DAF), and their counsel filed responses to the order to show cause on May 14, 2021 [D.I. 2309, 2312, 2313]. The Debtor filed its reply on May 21, 2021 [D.I. 2350]. On August 4, 2021, the Court found each of Dondero, CLOH, the DAF, Patrick, and Sbaiti & Co. in contempt of court [D.I. 2660]	Dondero has appealed [D.I. 2712]

4/23/21 ***Motion for Modification of Order Authorizing Appointment of James P. Seery, Jr. Due to Lack of Subject Matter Jurisdiction*** **[D.I. 2242]**

Movants:	Debtor	DAF and CLOH filed a motion asking the Bankruptcy Court to modify the July 16, 2020, order appointing Seery as the Debtor's CEO/CRO alleging the Bankruptcy Court lacked subject matter jurisdiction.	On May 14, 2021, the Debtor filed a response [D.I. 2311] stating that DAF and CLOH's motion was a collateral attack and barred by res judicata, among other things. The Committee joined in the Debtor's response [D.I. 2315]. DAF and CLOH filed their reply on May 21, 2021 [D.I. 2347]. The Motion was denied on June 25, 2021 [D.I. 2506]	DAF and CLOH have appealed. [D.I. 2513] but are seeking to stay the appeal and the filing of their opening brief.

4/20/21 ***Debtor's Motion for Entry of an Order (i) Authorizing the Debtor to (a) Enter into Exit Financing Agreement in Aid of Confirmed Chapter 11 Plan and (b) Incur and Pay Related Fees and Expenses and (ii) Granting Related Relief*** **[D.I. 2229]**

Movants:	Debtor	The Debtor filed a motion seeking authority to enter into an exit financing facility. The facility was required, in part, to fund the increased costs to the estate from Dondero's litigiousness. Dugaboy filed two objections to the motion alleging, among other things, that there was no basis for the financing [D.I. 2403; 2467]	The motion was granted on June 30 [D.I. 2503]	N/A

4/29/21 ***Motion to Compel Compliance with Bankruptcy Rule 2015.3*** **[D.I. 2256]**

Movants:	Trusts	The Trusts filed a motion on negative notice seeking to compel the Debtor to file certain reports under Rule 2015.3 [D.I. 2256]. The Debtor opposed that motion on May 20, 2021 [D.I. 2341], which was joined by the Committee [D.I. 2343]. The Trusts filed their reply on June 8, 2021 [D.I. 2424]	A hearing was held on June 10, 2021 [D.I. 2442] and the motion was adjourned. The motion was denied as moot on September 7, 2021 [D.I. 2812]	The Trusts appealed [D.I. 2840]

6/25/21 ***Debtor's Motion for Entry of an Order (i) Authorizing the (a) Creation of an Indemnity Subtrust and (b) entry into an Indemnity Trust Agreement and (ii) Granting Related Relief*** **[D.I. 2491]**

Movants:	Debtor	The Debtor filed a motion seeking authority to create an indemnity trust to secure the Reorganized Debtor, Claimant Trust, and Litigation Trust's indemnification obligations [D.I. 2491]. Dondero, HCMFA, NPA, and Dugaboy objected [D.I. 2563] arguing that it constituted an improper plan modification. The Debtor and the Committee filed replies in support [D.I. 2576, 2577]	A hearing was held and the Debtor's motion was granted [D.I. 2599].	Dondero, HCMFA, NPA, and Dugaboy appealed [D.I. 2673]

8/3/21 ***James Dondero's First Amended Motion for Entry of an Order (i) Compelling Mediation and (ii) Granting Related Relief*** **[D.I. 2657]**

Movants:	Dondero	Dondero filed a motion to compel mediation nearly six months after confirmation of the Debtor's plan [D.I. 2657]. The Debtor filed a response setting forth certain conditions for the appointment of a mediator [D.I. 2756].	Dondero withdrew his motion to compel mediation after reviewing the Debtor's conditions [D.I. 2763]	N/A

Highland Capital Management, L.P. v. James D. Dondero, Adv. Proc. No. 20-03190-sgj (Bankr. N.D. Tex.)

12/7/20 ***Plaintiff Highland Capital Management, L.P.'s Emergency Motion for a Temporary Restraining Order and Preliminary Injunction against Mr. James Dondero*** **[D.I. 2]**

Movant:	Debtor	The Debtor commenced an adversary proceeding seeking an injunction against Dondero. Dondero actively interfered with the management of the estate. Seery had instructed Debtor employees to sell certain securities on behalf of the CLOs. Dondero disagreed with Seery's direction and intervened to prevent these sales from being executed. Dondero also threatened Seery via text message and sent threatening emails to other Debtor employees.	A TRO was entered on December 10 [D.I. 10], which prohibited Dondero from, among other things, interfering with the Debtor's estate and communicating with Debtor employees unless it related to the Shared Services Agreements. A preliminary injunction was entered on January 12 after an exhaustive evidentiary hearing [D.I. 59]. This matter was resolved consensually by order entered	Dondero appealed to the District Court, which declined to hear the interlocutory appeal. Dondero is seeking a writ of mandamus from the Fifth Circuit. The writ of mandamus was withdrawn as part of the settlement.

				May 18, 2021 [D.I. 182], which enjoined Dondero from certain conduct until the close of the Bankruptcy Case.	
1/7/21	***Plaintiff's Motion for an Order Requiring Mr. James Dondero to Show Cause Why He Should Not Be Held in Civil Contempt for Violating the TRO* [D.I. 48]**				
	Movant: Debtor	In late December, the Debtor discovered that Dondero had violated the TRO in multiple ways, including by destroying his cell phone, his text messages, and conspiring with the Debtor's then general counsel and assistant general counsel[3] to coordinate offensive litigation against the Debtor. The hearing on this matter was delayed and there was litigation on evidentiary issues, among other things. An extensive evidentiary hearing was held on March 22.		The Court entered an order finding Mr. Dondero in contempt of court on June 7, 2021 [D.I. 190]	Mr. Dondero has appealed [D.I. 212]

[3] As a result of this conduct, among other things, the Debtor terminated its general counsel and assistant general counsel for cause on January 5, 2021.

***Highland Capital Management, L.P. v. Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., Highland Income Fund, NexPoint Strategic Opportunities Fund, NexPoint Capital, Inc., and CLO Holdco, Ltd.,* Adv. Proc. No. 21-03000-sgj (Bankr. N.D. Tex.)**

1/6/21 ***Plaintiff's Emergency Motion for a Temporary Restraining Order and Preliminary Injunction Against Certain Entities Owned and/or Controlled by Mr. James Dondero* [D.I. 2]**

Movant:	Debtor	In late December, the Debtor received a number of threatening letters from the Funds, the Advisors, and CLOH regarding the Debtor's management of the CLOs. These letters reiterated the arguments made by these parties in their motion filed on December 8, which the Court concluded were "frivolous." The relief requested by the Debtor was necessary to prevent the Funds, Advisors, and CLOH's improper interference in the Debtor's management of its estate.	The parties agreed to the entry of a temporary restraining order on January 13 [D.I. 20]. A hearing on a preliminary injunction began on January 26 and was continued to May 7. The TRO was further extended with the parties' consent [D.I. 64]. The Debtor reached an agreement with CLOH and dismissed CLOH from the adversary proceeding. The Debtor has reached an agreement in principle with the Funds and Advisors that settled this matter, and filed its 9019 motion.	N/A

***Highland Capital Management, L.P. v. Highland Capital Management Fund Advisors, L.P. and NexPoint Advisors, L.P.,* Adv. Proc. No. 21-03010-sgj (Bankr. N.D. Tex.)**

2/17/21 ***Debtor's Emergency Motion for a Mandatory Injunction Requiring the Advisors to Adopt and Implement a Plan for the Transition of Services by February 28, 2021* [D.I. 2]**

Movant:	Debtor	The Debtor's Plan called for a substantial reduction in its work force. As part of this process, the Debtor terminated the Shared Services Agreements and began negotiating a transition plan with the Advisors that would enable them to continue providing services to the retail funds they managed without interruption. The Debtor was led to believe that without the Debtor's assistance the Advisors would not be able to provide services to their retail funds, and, although the Debtor had proceed appropriately, the Debtor was concerned it would be brought into any action brought by the SEC against the Advisors if they could not service the funds.	At a daylong hearing, the Advisors testified that they had a transition plan in place. An order was entered on February 24 [D.I. 25] making factual findings and ruling that the injunction was moot. The parties recently entered into a stipulation regarding discovery for the remaining breach of contract claim. This action was consolidated with the Advisors'	N/A

		The Debtor brought this action to force the Advisors to formulate a transition plan and to avoid exposure to the SEC, among others.	admin claim since both matters arise from Shared Services Agreements.	

***Highland Capital Management, L.P. v. James Dondero*, Adv. Proc. No. 21-03003-sgj (Bankr. N.D. Tex.)**

1/22/21 ***Complaint for (i) Breach of Contract and (ii) Turnover of Property of the Debtor's Estate* [D.I. 1]**

Movant:	Debtor	Dondero borrowed $8.825 million from Debtor pursuant to a demand note. Dondero did not pay when the note was called and the Debtor was forced to file an adversary. Dondero subsequently amended his answer to add a series of affirmative defenses, including that the notes had been forgiven because of an undocumented oral agreement with Dondero's sister.	The parties are currently conducting discovery and engaging in motion practice. The parties entered into a global revised scheduling agreement for all five notes litigations.	N/A

4/15/21 ***James Dondero's Motion and Memorandum of Law in Support to Withdraw the Reference* [D.I. 21]**

Movant:	Dondero	Three months after the complaint was filed Dondero filed a motion to withdraw the bankruptcy reference and a motion to stay the adversary pending resolution of his motion [D.I. 22].	A hearing was held on May 25, 2021, and a stay was granted until mid-July 2021. The Court transmitted a report and recommendation on July 7 [D.I. 69]. Dondero filed a limited objection to the R&R.	N/A

***Highland Capital Management, L.P. v. Highland Capital Management Fund Advisors, L.P.*, Adv. Proc. No. 21-03004-sgj (Bankr. N.D. Tex.)**

1/22/21 ***Complaint for (i) Breach of Contract and (ii) Turnover of Property of the Debtor's Estate* [D.I. 1]**

Movant:	Debtor	HCMFA borrowed $7.4 million from Debtor pursuant to a demand note. Dondero did not pay when the note was called and the Debtor was forced to file an adversary. HCMFA subsequently amended its answer to add a series of affirmative defenses, including that the notes had been forgiven because of an undocumented oral agreement between Dondero and his sister.	The parties are currently conducting discovery and engaging in motion practice. The parties entered into a global revised scheduling agreement for all five notes litigations.	N/A

4/13/21 ***Defendants Motion to Withdraw the Reference*** **[D.I. 20]**

Movant:	HCMFA	Three months after the complaint was filed HCMFA filed a motion to withdraw the bankruptcy reference.	A hearing was held on May 25, 2021. The Court transmitted a R&R on July 9 [D.I. 52]. HCMFA filed a limited objection to the R&R.	N/A

Highland Capital Management, L.P. v. NexPoint Advisors, L.P., **Adv. Proc. No. 21-03005-sgj (Bankr. N.D. Tex.)**

1/22/21 ***Complaint for (i) Breach of Contract and (ii) Turnover of Property of the Debtor's Estate*** **[D.I. 1]**

Movant:	Debtor	NPA borrowed approximately $30.75 million under an installment note. NPA did not pay the note when and the Debtor was forced to file an adversary. NPA subsequently amended its answer to add a series of affirmative defenses, including that the notes had been forgiven because of an undocumented oral agreement between Dondero and his sister.	The parties are currently conducting discovery and engaging in motion practice. The parties entered into a global revised scheduling agreement for all five notes litigations.	N/A

4/13/21 ***Defendants Motion to Withdraw the Reference*** **[D.I. 19]**

Movant:	NPA	Three months after the complaint was filed HCMFA filed a motion to withdraw the bankruptcy reference.	A hearing was held on May 25, 2021. The Court transmitted a R&R on July 9 [D.I. 42]. NPA filed a limited objection to the R&R. The District Court adopted the R&R. [D. Ct. D.I. 10].	N/A

***Highland Capital Management, L.P. v. Highland Capital Management Services, Inc.*, Adv. Proc. No. 21-03006-sgj (Bankr. N.D. Tex.)**

1/22/21 ***Complaint for (i) Breach of Contract and (ii) Turnover of Property of the Debtor's Estate* [D.I. 1]**

Movant:	Debtor	Highland Capital Management Services, Inc. ("HCMS"), borrowed $900,000 in demand notes and approximately $20.5 million in installment notes. HCMS did not pay the notes when due and the Debtor was forced to file an adversary. HCMS subsequently amended its answer to add a series of affirmative defenses, including that the notes had been forgiven because of an undocumented oral agreement between Dondero and his sister.	The parties are currently conducting discovery and engaging in motion practice. The parties entered into a global revised scheduling agreement for all five notes litigations.	N/A

6/3/21 ***Defendants Motion to Withdraw the Reference* [D.I. 19]**

Movant	HCMS	Five months after the complaint was filed HCMS filed a motion to withdraw the reference.	A hearing was held on July 8, 2021. The Court issued its R&R on July 15, 2021 [D. I. 52]. HCMS filed a limited objection to the R&R. the District Court adopted the R&R. [D. Ct. Docket No. 5]. HCMS filed a Motion for Reconsideration of the District Court's Order adopting R&R [D. Ct. Docket No. 8].	

***Highland Capital Management, L.P. v. HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC)*, Adv. Proc. No. 21-03007-sgj (Bankr. N.D. Tex.)**

1/22/21 ***Complaint for (i) Breach of Contract and (ii) Turnover of Property of the Debtor's Estate* [D.I. 1]**

Movant:	Debtor	HCRE borrowed $4.25 million in demand notes and approximately $6.05 million in installment notes. HCRE did not pay the notes when due and the Debtor was forced to file an adversary. HCRE subsequently amended its answer to add a series of affirmative defenses, including that the notes had been forgiven because of an undocumented oral agreement between Dondero and his sister.	The parties are currently conducting discovery and engaging in motion practice. The parties entered into a global revised scheduling agreement for all five notes litigations.	N/A

6/3/21 ***Defendants Motion to Withdraw the Reference* [D.I. 20]**

Movant	HCMS	Five months after the complaint was filed HCMS filed a motion to withdraw the reference.	A hearing was held on July 8, 2021. The Court issued its R&R on July 15, 2021 [D.I. 47]. HCRE filed a limited objection to the R&R [D. Ct. Docket No. 5].	

***Charitable DAF Fund, L.P., and CLO Holdco, Ltd., v. Highland Capital Management, L.P., Highland HCF Advisor, Ltd., and Highland CLO Funding, Ltd.*, Case No. 21-cv-00842-B (N.D. Tex. April 12, 2021)**

4/12/21 ***Original Complaint***

Movants:	DAF CLOH	Movants allege that the Debtor and Seery violated SEC rules, breached fiduciary duties, engaged in self-dealing, and violated RICO in connection with its settlement with the HarbourVest Entities. The Movants brought this complaint despite CLOH having objected to the HarbourVest settlement; never raised this issue; and withdrawn its objection. The Debtor believes the complaint is frivolous and represents a collateral attack on the order approving the HarbourVest settlement. The Debtor will take all appropriate actions.	On May 19, the Debtor filed a motion to enforce the order of reference seeking to have the case referred to the Bankruptcy Court [D.I. 22]. On May 27, 2019, the Debtor filed a motion to dismiss the complaint [D.I. 26]. Briefing was completed for both motions. After briefing was completed, CLOH and the DAF filed a motion seeking to stay the proceeding pending resolution of the appeal of the confirmation order [D.I. 55] and the Debtor filed a responsive brief.	the Court entered an order enforcing the reference on September 20, 2021 [D.I. 64],a and this matter is proceeding in the Bankruptcy Court.

4/19/21 ***Plaintiff's Motion for Leave to File First Amended Complaint in the District Court***

Movants:	DAF CLOH	Movants filed a motion seeking leave from this Court to add Seery as a defendant and to seek, in this Court, a reconsideration of two final Bankruptcy Court orders.	This Court denied the motion but with leave to refile.	N/A

***PCMG Trading Partners XXIII, L.P. v. Highland Capital Management, L.P.*, Case No. 21-cv-01169-N (N.D. Tex. May 21, 2021)**

4/12/21 ***Original Complaint***

Movants:	PCMG Trading Partners XXIII, L.P.	Movants allege that the Debtor violated SEC rules and breached fiduciary duties by causing one of its managed investment vehicles to sell certain assets. The Movant is an entity owned and controlled by Dondero, which had less than a 0.05% interest in the investment vehicle at issue and is no longer an investor. The Debtor believes the complaint is frivolous. The Debtor will take all appropriate actions.	The Complaint was recently filed and the Debtor has not yet been served. Although the Complaint was not served, the movant filed a motion to stay on August 26, 2021 pending the appeal of the confirmation order [D.I. 6].	N/A

***The Dugaboy Investment Trust v. Highland Capital Management, L.P.*, Case No. 21-cv-01479-S (N.D. Tex. June 23, 2021)**

6/23/21 ***Original Complaint***

Movants:	Dugaboy	Dugaboy alleges that the Debtor violated SEC rules and breached fiduciary duties by causing one of its managed investment vehicles to sell certain assets. Dugaboy is Dondero's family trust with less than a 2% interest in the vehicle. Dugaboy's allegations in the complaint are duplicative of allegations it made in proofs of claim filed in the Bankruptcy Court.	The Complaint was withdrawn after the Debtor informed the Bankruptcy Court of the filing.	N/A

***The Charitable DAF Fund, LP v. Highland Capital Management, L.P.*, Case No. 21-cv-01710-N (N.D. Tex. July 22, 2021)**

7/22/21 ***Original Complaint***

Movants:	Dugaboy	DAF alleges that the Debtor violated SEC rules and breached fiduciary duties by causing one of its managed investment vehicles to sell certain assets. DAF's allegations in the complaint are duplicative of allegations Dugaboy made in proofs of claim filed in the Bankruptcy Court and in its complaint filed in the Northern District of Texas.	The Complaint was recently filed and the Debtor has not yet been served. Although the Complaint was not served, the movant filed a motion to stay on August 26, 2021 pending the appeal of the confirmation order [D.I. 6].	N/A

***In re James Dondero, Petitioner,* Cause No. DC-21-09534 (Tex. July 22, 2021)**

7/22/21 ***Original Complaint***

Movants:	Dondero	Dondero seeks pre-suit discovery from Farallon Capital, a purchaser of certain claims in this case, and the Crusader Fund. Dondero alleges that Farallon breached certain U.S. Trustee requirements when it purchased those claims. Dondero also alleges that Farallon purchased those claims because of its relationship to Mr. Seery and that Mr. Seery was leveraging his relationship with Farallon to ensure that he remains in control of the Debtor.	Farallon and the Crusader Fund removed this action to the Bankruptcy Court [D.I. 1]. Dondero moved to remand [D.I. 4], which is being opposed.	This matter is currently being litigated.