Date Filed: 10/14/2021

No. 21-10449

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 Appeal from the United States Bankruptcy Court
for the Northern District of Texas,
No. 19-34054

BRIEF OF *AMICUS CURIAE* TURNAROUND MANAGEMENT ASSOCIATION IN SUPPORT OF APPELLEE

CHAD J. HUSNICK, P.C.
KIRKLAND & ELLIS LLP
300 N. LaSalle
Chicago, IL 60654
(312) 862-2000

PAUL D. CLEMENT
GEORGE W. HICKS, JR.
Counsel of Record
KIRKLAND & ELLIS LLP
1301 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 389-5000
george.hicks@kirkland.com

Counsel for Amicus Curiae

October 13, 2021

CORPORATE DISCLOSURE STATEMENT

The Turnaround Management Association ("TMA") is a nonprofit, tax-exempt organization incorporated in North Carolina. Pursuant to Federal Rule of Appellate Procedure 26.1(a), TMA certifies that it has no parent corporation and issues no stock.

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record certifies that, in addition to the persons listed in the Certificates of Interested Persons in the briefs filed by Appellants and Appellee, 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.

Amicus Curiae
Turnaround Management Association

Attorneys for *Amicus Curiae*
Paul D. Clement
George W. Hicks, Jr.
KIRKLAND & ELLIS LLP
1301 Pennsylvania Avenue, NW
Washington, DC 20004

Chad J. Husnick, P.C.
KIRKLAND & ELLIS LLP
300 N. LaSalle
Chicago, IL 60654

s/*George W. Hicks, Jr.*
George W. Hicks, Jr.
Counsel of Record
KIRKLAND & ELLIS LLP
1301 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 389-5000
george.hicks@kirkland.com
Counsel for Amicus Curiae

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STATEMENT OF INTEREST

The Turnaround Management Association ("TMA") is the premier professional community dedicated to turnaround management and corporate renewal. Established in 1988, TMA today has almost 10,000 members in 54 chapters worldwide, including 34 chapters in North America. Among others, TMA's members include turnaround practitioners, attorneys, accountants, advisors, liquidators, and consultants. TMA's members share a common goal of helping companies increase enterprise value, preserve equity, manage disruption, and drive significantly improved results.

TMA has a strong interest in this appeal, which implicates the validity of exculpation provisions in Chapter 11 plans of reorganization. TMA's members consult, counsel, or participate in reorganizing distressed companies and therefore are routinely included within the scope of exculpation provisions. TMA believes that those exculpation provisions are integral to Chapter 11 plans and vital to successful restructurings. Accordingly, TMA files this brief in support of Appellee Highland Capital Management, L.P. and affirmance.[1]

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[1] TMA files this brief on its own behalf, not on behalf of any of its individual members or their respective firms, whose views may differ from those provided here. No counsel for a party authored this brief in whole or in part. No one other than *amicus curiae*, its members, and its counsel made any monetary contribution intended to fund its preparation and submission. As set forth in TMA's accompanying motion, Appellee has consented to the filing of this brief; Appellants have not.

INTRODUCTION

Chapter 11 proceedings "are not always pretty." ROA.1146. In fact, Chapter 11 proceedings can be extraordinarily messy and distinctly contentious: Numerous parties battle each other to obtain slices of a finite pie, and parties disappointed with their ultimate recoveries under a confirmed Chapter 11 plan have an incentive to seek legal retribution against those who shepherded the debtor through a successful reorganization. Those dynamics present a considerable problem for debtors in complex Chapter 11 cases. On the one hand, they need the assistance of capable and experienced individuals to steer them through complicated circumstances and help obtain confirmation of their plans of reorganization. On the other hand, those same individuals have little incentive to offer their critical services to debtors if they face the prospect of significant liability from disgruntled parties at the end of the process. And if those providers build in the cost of insuring against such potential liability into the price of their services, the estate will be deprived of much-needed resources.

As debtors and courts around the country have recognized, there is a straightforward solution to this problem: an exculpation provision. Under such provisions, a small group of individuals and entities who are integral to a restructuring effort—most often, estate fiduciaries like a debtor's directors, officers, and advisors, along with officially appointed bodies like an unsecured creditors' committee—are shielded from suits alleging that they committed negligence during the course of the

bankruptcy proceeding, although they can still face suits alleging more serious wrongdoing, such as gross negligence. The addition of an exculpation provision to a Chapter 11 plan therefore allows a key group of individuals and entities to participate in a restructuring effort and facilitate a debtor's successful reorganization without fear of facing an onslaught of meritless negligence suits from especially litigious parties. Given their self-evident value, exculpation provisions are commonplace in confirmed Chapter 11 plans in complex bankruptcy cases.

This appeal concerns one such exculpation provision. Here, the Chapter 11 plan of debtor Highland Capital Management, L.P. ("Highland") provides that a handful of estate fiduciaries are not liable for their post-petition bankruptcy-related work unless their conduct amounted to "bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct." ROA.158. The exculpation provision mirrors provisions used in confirmed Chapter 11 plans around the country. It is, by any measure, a garden-variety exculpation provision.

Yet this case is the very opposite of garden-variety, and it underscores the benefit of—indeed, need for—exculpation provisions. Highland's former CEO, who fostered the "culture of constant litigation" that led Highland to file for bankruptcy in the first place, sought to disrupt these Chapter 11 proceedings at every turn, and he ominously threatened to "'burn the place down'" if the bankruptcy court confirmed the Chapter 11 plan at issue in this appeal. ROA.27, 66. It is unquestionable

that, absent some sort of promise of legal protection, the estate fiduciaries who assisted Highland in successfully reorganizing—achieving "nothing short of a miracle," ROA.29—would have refused to assist, leaving Highland, its creditors, the bankruptcy court, and numerous other parties mired in a morass. Accordingly, as the bankruptcy court correctly concluded, if there is *any* Chapter 11 plan where an exculpation provision is warranted, it is this one.

The bankruptcy court likewise correctly concluded that the exculpation provision in Highland's plan is in accord with this Court's precedent—namely, *In re Pacific Lumber Co.*, 584 F.3d 229 (5th Cir. 2009). Far from deeming exculpation provisions categorically impermissible for anyone other than an unsecured creditors' committee, as Appellants insist, *Pacific Lumber* instead indicated that Chapter 11 plans may include such provisions to protect any disinterested party who plays an important role in the bankruptcy case and also when potential litigation could overwhelm the exculpated parties and endanger the reorganization. Those principles clearly suffice to sustain the exculpation provision here. Furthermore, *Pacific Lumber* addressed a provision of the Bankruptcy Code—§524(e)—that concerns *prepetition* liability, but exculpation provisions implicate *postpetition* liability and are directly authorized and governed by §1123(b)(6) and §105(a) of the Code. Because *Pacific Lumber* never addressed those latter two statutes, *Pacific Lumber* leaves ample room for exculpation provisions of the sort here.

Accepting the contrary view—that *Pacific Lumber* largely forecloses exculpation provisions, even garden-variety ones like the provision in this case—would have far-reaching deleterious consequences, not only threatening the viability of restructuring efforts in the Fifth Circuit, but also creating a split with at least two other court of appeals. That result has nothing to recommend it. Instead, the better course is to recognize that exculpation provisions are appropriate in Chapter 11 plans generally and that such a provision is eminently proper in Highland's plan specifically.

ARGUMENT

I. Exculpation Provisions Are Necessary And Commonplace Features Of Reorganization Plans In Complex Chapter 11 Cases.

A. The Bankruptcy Code permits companies to file for bankruptcy under either Chapter 7 or Chapter 11. In a Chapter 7 bankruptcy, a trustee liquidates a company's pre-petition assets and distributes them to creditors. *See* §701 *et seq.*[2] In a Chapter 11 bankruptcy, the objective is different. *See* §1101 *et seq.* The "two recognized policies underlying Chapter 11" are "preserving going concerns and maximizing property available to satisfy creditors." *Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 453 (1999). Consistent with those policies, "[i]n Chapter 11, debtor and creditors try to negotiate a plan that will govern

[2] All statutory references in this brief are to Title 11 of the U.S. Code.

the distribution of valuable assets from the debtor's estate and often keep the business operating as a going concern." *Czyzewski v. Jevic Holding Corp.*, 137 S.Ct. 973, 978 (2017). In the end, obtaining plan confirmation is "the statutory goal of every chapter 11 case." 7 *Collier on Bankruptcy* ¶1129.01 (16th ed. 2021) ("*Collier*").

In a complex Chapter 11 bankruptcy case, however, a debtor frequently cannot achieve that statutory goal on its own; instead, it requires substantial assistance from third parties. Indeed, a debtor's directors, officers, advisors (*e.g.*, attorneys and investment bankers) and other parties—such as the official committees appointed during the bankruptcy case and their associated professionals, *see* §§1102, 1103—are often indispensable to the successful formulation, negotiation, implementation, and consummation of a complex Chapter 11 plan. *Cf. In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000) ("The committee members and the debtor are entitled to retain professional services to assist in the reorganization.").

At the same time, debtors face a conundrum, as convincing these persons to lend critical assistance to reorganization efforts is no "easy" task. ROA.27. That is because Chapter 11 proceedings are "highly litigious," to put it mildly. *Blixseth v. Credit Suisse*, 961 F.3d 1074, 1084 (9th Cir. 2020). In Chapter 11 proceedings, "stakeholders all too often blame others for failures to get the recoveries they desire; seek vengeance against other parties; or simply wish to second guess the decision

makers in the chapter 11 case." *In re Alpha Nat. Res., Inc.*, 556 B.R. 249, 261 (Bankr. E.D. Va. 2016); *see also In re Chemtura Corp.*, 439 B.R. 561, 610 (Bankr. S.D.N.Y. 2010). Or as the Ninth Circuit recently summarized (in a more colorful fashion), parties "battle each other tirelessly" in Chapter 11 proceedings, and "oxe[n] … are gored" as a result. *Blixseth*, 961 F.3d at 1084. The very nature of Chapter 11 and its notion of "shared sacrifice" among those with competing interests in the debtor's limited assets means that not all stakeholders will be content with the result and, therefore, may look for opportunities to extract additional recoveries from other sources, whether warranted or not. Nor would the Bankruptcy Code's underlying purposes be served if necessary advisors simply priced the inevitability of post-petition litigation into the costs of their services, as that would leave an even smaller pie to be divided among creditors.

Fortunately, the Bankruptcy Code has long provided flexibility for debtors and bankruptcy courts alike "to ensure that capable, skilled individuals are willing to assist in the reorganization efforts in chapter 11 cases" despite their contentiousness and the risks of post-petition litigation and liability. *In re Murray Metallurgical Coal Holdings, LLC*, 623 B.R. 444, 501 (Bankr. S.D. Ohio 2021). Section 1123(b)(6) of the Code provides that "a plan may … include any other appropriate provision not inconsistent with the applicable provisions of [Chapter 11]." §1123(b)(6). Relatedly, §105(a) of the Code empowers a bankruptcy court to "issue

any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Code]." §105(a). In turn, courts regularly invoke these two statutory provisions to approve Chapter 11 plans containing exculpation provisions. *See, e.g.*, *Blixseth*, 961 F.3d at 1084; *In re Airadigm Commc'ns, Inc.*, 519 F.3d 640, 657-58 (7th Cir. 2008); *Murray*, 623 B.R. at 500.[3]

The mechanics of exculpation provisions are straightforward. In general, exculpation provisions state that certain parties who played a critical role in the bankruptcy case—such as estate fiduciaries like a debtor's directors, officers, and advisors, as well as committee members and their associated professionals—will not face liability for allegedly negligent actions taken during the case. But they make likewise clear that those persons can still face liability for serious wrongdoing, such as gross negligence, willful misconduct, or fraud. *See, e.g.*, *In re Retail Grp., Inc.*, 2021 WL 962553, at *19 (Bankr. E.D. Va. Mar. 9, 2021) (describing an exculpation provision that carves out claims for "gross negligence, willful misconduct, and actual

[3] Exculpation provisions are also a natural outgrowth of §1129(a)(3) of the Bankruptcy Code, which requires a bankruptcy court to find that "[t]he plan has been proposed in good faith and not by any means forbidden by law." §1129(a)(3). Once a bankruptcy court has determined that §1129(a)(3) is satisfied, it is appropriate to set a standard of care that protects parties involved in formulating a plan from future collateral attacks related to actions taken in good faith. *Cf. In re Erickson Inc.*, 2017 WL 1091877, at *7 (Bankr. N.D. Tex. Mar. 22, 2017); *In re Vitro Asset Corp.*, 2013 WL 6044453, at *7 (Bankr. N.D. Tex. Nov. 14, 2013).

fraud" as "customary"); Am. Bankr. Inst., *Commission to Study the Reform of Chapter 11* 251 (2014) ("ABI Report") (explaining that "[a] typical exculpatory clause may protect the debtor's directors, officers, employees, advisors, and professionals").[4]

Exculpation provisions thus strike a necessary and appropriate balance in Chapter 11 proceedings. On the one hand, exculpation provisions allow persons and entities who are critical to a successful restructuring "to engage in the give-and-take of the bankruptcy proceeding without fear of subsequent litigation over any potentially negligent actions in those proceedings." *Blixseth*, 961 F.3d at 1084. On the other hand, exculpation provisions do not let those parties completely off the hook; by establishing the same "standard of liability" that applies whenever persons who have a "fiduciary duty" are involved, exculpation provisions typically permit suits for gross negligence, willful misconduct, or fraud. *PWS*, 228 F.3d at 246. As a result, exculpation provisions "provide[] a degree of finality to the [e]xculpated [p]arties and 'assure[] them they will not be second-guessed and hounded by" easy-

[4] To be sure, numerous courts approve exculpation provisions that apply to parties beyond estate fiduciaries. *See, e.g.*, *Blixseth*, 961 F.3d at 1085 n.8; *Retail Grp.*, 2021 WL 962553, at *19; *Murray*, 623 B.R. at 502. This case, however, concerns an exculpation provision that applies only to estate fiduciaries.

to-plead negligence suits "following the conclusion of the bankruptcy case." *Murray*, 623 B.R. at 501.[5]

B. Precisely because exculpation provisions do not provide "blanket immunity" to covered parties, *Airadigm*, 519 F.3d at 657, it bears emphasizing that they are materially different from certain other types of provisions that may be found in Chapter 11 plans—*viz.*, "release provisions," with which exculpation provisions are often confused, *see* ROA.1144 (admonishing Appellants for "gloss[ing] over … relevant distinctions" between release and exculpation provisions). There are two basic forms of release provisions: (1) a "debtor release," under which a debtor "extinguish[es] its own claims, which are property of the estate," ROA.1144; *see* §1123(b)(3)(A), and (2) a "non-debtor release" (also known as a "third party release"), which "involves the release of claims held by nondebtor third parties against other nondebtor third parties," ROA.1147; *see* §1123(b)(6); §105(a). Regardless

[5] Exculpation provisions in the bankruptcy context mirror longstanding rules of liability in the corporate context. Under the common-law "business judgment rule," for example, corporate directors and officers are "generally insulate[d] … from negligence liability" and held liable only when their conduct amounts at least to "gross negligence." 3A *Fletcher Cyclopedia of Corporations* §1031 (2021); *see also id.* §1036 (explaining that business judgment rule "absolves" corporate management "for all but gross negligence"). Moreover, state corporate codes often contain provisions that eliminate liability for corporate management for claims of negligence. *See, e.g.*, 8 Del. C. §102(b)(7); *In re Cornerstone Therapeutics Inc, S'holder Litig.*, 115 A.3d 1173, 1185 (Del. 2015) ("The purpose of Section 102(b)(7) was to 'free[] up directors to take business risks without worrying about negligence lawsuits.'").

whether a particular release provision is styled as a debtor release or a non-debtor release, however, both kinds of releases ultimately "*eliminat[e]*" a covered party's liability "*altogether*," *PWS*, 228 F.3d at 247 (emphasis added), and "there is often no limitation on the scope and time of the claims released," ROA.1147.

In stark contrast, exculpation provisions are far more circumscribed: They merely "set[] forth the applicable standard of liability" in future litigation, *PWS*, 228 F.3d at 247—namely, by demanding that "the challenged conduct … at least rise to the level of gross negligence," *Murray*, 623 B.R. at 501—and they generally apply only to "actions that occurred during the bankruptcy proceeding, not before," *Blixseth*, 961 F.3d at 1081; *see also* ROA.1145 ("[E]xculpation provisions [are] something much narrower in scope and time than a full-fledged release. An exculpation provision is more like a shield for a certain subset of key actors in the case for their acts during and in connection with the case, which acts may have been merely negligent.").

In light of the undeniable importance of exculpation provisions and their targeted nature, they are "commonplace" in complex Chapter 11 plans today. *Blixseth*, 961 F.3d at 1085 (quoting *PWS*, 228 F.3d at 245). Indeed, bankruptcy courts in jurisdictions nationwide routinely approve complex Chapter 11 plans containing

such provisions.[6] And the American Bankruptcy Institute—the largest multi-disciplinary, non-partisan organization dedicated to research and education on matters related to insolvency—has expressly recommended that such provisions be allowed. *See* ABI Report 250 ("A debtor or plan proponent should be permitted to include an exculpatory clause in the chapter 11 plan that covers parties participating in the chapter 11 case and identified in the chapter 11 plan, including estate representatives, subject to customary exclusions consistent with public policy, that provides for exculpation with respect to acts or omissions during the case and prior to the effective date of the plan, including in connection with the negotiation, drafting, and solicitation of the plan.").

C. Like the plans in many other complex Chapter 11 cases, the plan of reorganization in this complex Chapter 11 case includes an exculpation provision. The

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[6] *See, e.g.,* Dkt.717, *In re UTGR, Inc.*, No. 09-12418 (Bankr. D. R.I. June 24, 2010); *In re Bally Total Fitness of Greater N.Y., Inc.*, 2007 WL 2779438, at *8 (Bankr. S.D.N.Y. Sept. 17, 2007); Dkt.744, *In re Bluestem Brands, Inc.*, No. 20-10566 (Bankr. D. Del. Aug. 21, 2020); Dkt.162, *In re Longview Power, LLC*, No. 20-10951 (Bankr. D. Del. May 22, 2020); Dkt.3038, *In re Alpha Nat. Res., Inc.*, No. 15-33896 (Bankr. E.D. Va. July 12, 2016); Dkt.2915, *In re Chesapeake Energy Corp.*, No. 20-33233 (Bankr. S.D. Tex. Jan. 16, 2021); Dkt.290, *In re Ventilex USA Inc.*, No. 10-16642 (Bankr. S.D. Ohio Aug. 31, 2011); *In re Berwick Black Cattle Co.*, 394 B.R. 448, 459 (Bankr. C.D. Ill. 2008); Dkt.1557, *In re Specialty Retail Shops Holdings Corp.*, No. 19-80064 (Bankr. D. Neb. June 11, 2019); *In re S. Edge LLC*, 478 B.R. 403, 414-16 (D. Nev. 2012); Dkt.595, *In re PetroShare Corp.*, No. 19-17633 (Bankr. D. Colo. May 22, 2020); *In re Friedman's, Inc.*, 356 B.R. 758, 761-63 (Bankr. S.D. Ga. Nov. 23, 2005).

exculpation provision here provides that a limited set of parties who played an essential role in Highland's restructuring—including Highland, certain Highland employees and officers, Highland's general partner, the independent directors, the Unsecured Creditors' Committee and its members, and the professionals retained by Highland and the Unsecured Creditors' Committee—are not liable for specified bankruptcy-related "conduct occurring on or after the Petition Date," unless that conduct "constitute[s] bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct." ROA.119, 157-58. As that language indicates, the exculpation provision is virtually indistinguishable from the exculpation provisions that courts around the country have approved for years. If anything, the exculpation provision here—which is explicitly limited to estate fiduciaries—is even more straightforward than other such provisions in other Chapter 11 plans, which frequently provide protection to parties beyond just estate fiduciaries. *See, e.g.*, *Murray*, 623 B.R. at 502 (explaining that "limit[ing]" exculpation provisions to estate fiduciaries alone "has not gained acceptance" broadly); *see also* n.4, *supra*.[7]

[7] Appellants protest that the exculpation provision here applies to certain actions taken "after the confirmation of the Plan"—*e.g.*, actions taken in relation to the plan's consummation and implementation. Advisors.Br.27-28; *see* Funds.Br.20-21. But "[i]t is settled that exculpat[ion] provisions are proper to protect those authorized by bankruptcy courts to carry out the bankruptcy process, even after the effective date of [the] plan." *In re Ditech Holding Corp.*, 2021 WL 3716398, at *9 (Bankr. S.D.N.Y. Aug. 20, 2021); *see also, e.g.*, *Blixseth*, 961 F.3d at 1078-79 (ap-

Given that the exculpation provision here is unremarkable, it would pass muster even in the garden-variety Chapter 11 case. But as the bankruptcy court repeatedly stressed, this case is "not garden variety for so many reasons." ROA.21; *see also* ROA.19, 24, 28, 29, 1126, 1128-29, 1133-34, 1138, 1139. Indeed, this case is the poster child for why exculpation provisions are beneficial if not critical in complex Chapter 11 cases.

More precisely, this case involved a debtor that had to file for bankruptcy in 2019 specifically because it had made the ill-advised decision (under the stewardship of then-CEO James Dondero) to engage in "serial litigat[ion]" for "a decade or more … in multiple forums all over the world." ROA.22. And that "culture of constant litigation" persisted after the petition date, too, with Dondero still at the helm. ROA.27. Ultimately, to avoid the appointment of a trustee, Dondero agreed to relinquish control of Highland and to step aside as an officer and director. But as the bankruptcy court explained, "it was not … easy to get … highly qualified persons to serve as independent board members." ROA.27. "Naturally," the bankruptcy court noted, "they were worried about getting sued no matter how defensible their efforts—given the litigation culture that enveloped Highland historically." ROA.27.

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proving exculpation provision that extended to the "implementation" and "consummation" of the plan); *PWS*, 228 F.3d at 246 (approving exculpation provision that extended to "the consummation of the Plan or the Administration of the Plan").

Hence, "none" of the three independent directors who ultimately agreed to serve "would have taken on the role of independent director without … exculpation for mere negligence claims." ROA.27.

It is fortunate not only that those independent directors agreed to assist in this reorganization effort, but also that an exculpation provision was included in the confirmed reorganization plan. As the bankruptcy court explained, the independent directors "completely changed the trajectory" of this case and helped to achieve an outcome that is "nothing short of a miracle." ROA.27-29. Meanwhile, Dondero—whom the bankruptcy court "ha[d] good reason to believe" wanted to accomplish nothing more than to "disrupt[]" this Chapter 11 proceeding—threatened to "'burn the place down'" if he did not get his way. ROA.31, 66; *see also* ROA.1161 ("Dondero has shown no hesitancy to litigate with former employees in the past, to the *nth* degree, and there is every reason to believe he would again in the future, if able."). Thus, as the bankruptcy court aptly explained, "[i]f ever" a Chapter 11 plan needed to include an exculpation provision, "it is this one." ROA.66.

In sum, and as all of the foregoing underscores, exculpation provisions are crucial components of Chapter 11 plans—as this case vividly illustrates—which readily explains why bankruptcy courts so often invoke their authority under the Bankruptcy Code to approve such provisions.

II. The Exculpation Provision At Issue In This Appeal Is Consistent With This Court's Precedent.

A. The garden-variety exculpation provision at issue here is consistent not merely with the overwhelming weight of authority nationwide, but also with this Court's precedent. As the bankruptcy court correctly recognized, one of this Court's leading decisions on exculpation provisions is *Pacific Lumber*. *See* ROA.65-66, 1151-61. And as the bankruptcy court also correctly recognized, the exculpation provision here comfortably "fit[s] within" *Pacific Lumber*. ROA.1163.

Pacific Lumber concerned Chapter 11 proceedings involving six debtors. *See* 584 F.3d at 236. After a year elapsed without progress on a plan of reorganization, the bankruptcy court allowed parties other than the debtors—including a secured creditor (Mendocino Redwood Company ("MRC")) and a third-party competitor (Marathon Structured Finance ("Marathon"))—to submit proposed plans of their own. *See id.* Among other things, the plan from MRC/Marathon "proposed to dissolve all six entities … and create two new entities, Townco and Newco." *Id.* at 237. Moreover, the proposed MRC/Marathon plan also included an exculpation provision, which "release[d] MRC, Marathon, Newco, Townco, and the Unsecured Creditors' Committee (and their personnel) from liability—other than for willfulness and gross negligence—related to proposing, implementing, and administering the plan." *Id.* at 251. The bankruptcy court ultimately confirmed the MRC/Marathon plan, including its exculpation provision. *See id.* at 239.

On appeal, certain parties challenged the plan's legality. *See id.* at 236-37. As relevant here, those challengers contended, in their eighth and final argument on appeal, that the plan included an "unauthorized" exculpation provision. *Id.* at 239. But in their briefing, the challengers "d[id] not brief why Newco and Townco (or their officers and directors) should not be released," and so this Court "d[id] not analyze their position" with respect to those particular parties—*i.e.*, two of the five primary exculpated parties. *Id.* at 252 n.26.[8]

As such, the challenge to the exculpation provision focused on its validity only as to the unsecured creditors' committee, MRC, and Marathon. With respect to the unsecured creditors' committee, which the Court described as the "only disinterested" party involved in the restructuring effort, the Court upheld the exculpation provision and emphasized that this outcome was dictated by practicalities: "If 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.* at 253. The Court

[8] The limited briefing on this issue may have also contributed to evident confusion regarding the provision at issue. In addressing the provision, the Court repeatedly referred to "non-debtor releases," *see Pac. Lumber*, 584 F.3d at 252-53, and the challengers directed the Court to cases upholding non-debtor releases, *see id.* at 252 (citing *SEC v. Drexel Burnham Lambert Grp.*, 960 F.2d 285 (2d Cir. 1992), and *In re A.H. Robins*, 880 F.2d 694 (4th Cir. 1989)). As explained, however, non-debtor releases are materially different from exculpation provisions. *See* pp.10-11, *supra*.

also observed that "[t]he scope of protection, which does not insulate them from willfulness and gross negligence, is adequate." *Id.*

As for MRC and Marathon, the Court "struck" the exculpation provision. *Id.* In so doing, the Court explained that, on the particular facts before it, "[a]ny costs the released parties might incur defending against suits alleging such negligence are unlikely to swamp either these parties or the consummated reorganization." *Id.* at 252. In addition, the Court referenced §524(e) of the Bankruptcy Code—which provides that "discharge of a debt of the debtor does not affect the liability of any other entity on … such debt"—and explained that §524(e) "is not intended to serve th[e] purpose" of "absolv[ing] the released parties from any negligent conduct that occurred during the course of the bankruptcy." *Id.* at 251-53.

B. As the bankruptcy court in this case rightly understood, aside from approving the use of exculpation provisions with respect to one party (the unsecured creditors' committee), *Pacific Lumber* "squarely addressed" only "the propriety of two plan proponents" who sought to "obtain[] nonconsensual exculpation in the plan." ROA.1153. Contrary to the argument that Appellants here have pressed, *Pacific Lumber* simply does not "categorically reject[] the permissibility" of exculpation provisions except as applied to an unsecured creditors' committee. ROA.1151. Quite the opposite, *Pacific Lumber* rightly "leave[s] open the door" to exculpation provisions in numerous other circumstances. ROA.1157.

For instance, *Pacific Lumber*'s "rationale … for permit[ting] exculpations to Creditors' Committees and their members … was clearly policy based" and "leaves the door open to … permitting exculpations to other parties in a particular Chapter 11 case," provided that they are "disinterested[]"and play a sufficiently "importan[t] … role" in the case. ROA.1157-58. Further, *Pacific Lumber* strongly indicated "that an exculpation might be permissible if there is a showing that 'costs that the released parties might incur defending against suits alleging such negligence are likely to swamp either the [e]xculpated [p]arties or the reorganization.'" ROA.1160.

Finally, although §524(e) may not "serve th[e] purpose" of authorizing an exculpation provision, *Pac. Lumber*, 538 F.3d at 253, that truism simply reflects the reality that §524(e) has nothing to do with exculpation provisions. Section 524(e) governs "*prepetition* liability" (*i.e.*, the "debt" that gave rise to the bankruptcy case), while exculpation provisions govern "*postpetition* liability" (*i.e.*, the actions of certain key parties during the course of the bankruptcy case) and are governed by §1123(b)(6) and §105(a). ROA.1158 (emphasis added); *see* pp.7-8, *supra*. Needless to say, *Pacific Lumber* could not have "categorically reject[ed]" the validity of exculpation provisions without so much as even considering the Bankruptcy Code provisions that are directly on-point. *See Thomas v. Tex. Dep't of Crim. Just.*, 297 F.3d 361, 370 n.11 (5th Cir. 2002) ("When an issue is not argued or is ignored in a decision, such decision is not precedent to be followed in a subsequent case in which the

issue arises."); *cf. De Leon v. Abbott*, 791 F.3d 619, 625 n.1 (5th Cir. 2015) (noting that "we are not bound by dicta, even of our own court" (brackets omitted)).[9]

In keeping with this view, bankruptcy courts within the Fifth Circuit have widely recognized that, even after *Pacific Lumber*, exculpation provisions applicable to parties other than an unsecured creditors' committee are obviously permissible. *See, e.g.*, Dkt.1139, *In re Valaris plc*, No. 20-34114 (Bankr. S.D. Tex. Mar. 3, 2021); Dkt.61, *In re Belk, Inc.*, No. 21-30630 (Bankr. S.D. Tex. Feb. 24, 2021); Dkt.1093, *In re BJ Servs., LLC*, No. 20-33627 (Bankr. S.D. Tex. Nov. 6, 2020); Dkt.2190, *In re J.C. Penney Co.*, No. 20-20182 (Bankr. S.D. Tex. Dec. 16, 2020); *In re Erickson Inc.*, 2017 WL 1091877, at *7. As one prominent bankruptcy judge within the Fifth Circuit explained only a few months ago, exculpation provisions that are "appropriately tailored to protect the Exculpated Parties from inappropriate litigation arising from their participation in the Chapter 11 Cases and the Debtors' restructuring and

[9] *Pacific Lumber* referenced five prior Fifth Circuit decisions in its section addressing the exculpation provision at issue there. *See In re Hilal*, 534 F.3d 498 (5th Cir. 2008); *In re Coho Res., Inc.*, 345 F.3d 338 (5th Cir. 2003); *Hall v. Nat'l Gypsum Co.*, 105 F.3d 225 (5th Cir. 1997); *In re Edgeworth*, 993 F.2d 51 (5th Cir. 1993); *In re Zale Corp.*, 62 F.3d 746 (5th Cir. 1995). But four of those five cases did not even address exculpation provisions. And the only one that did, *Hilal*, explained that a plan may exculpate a "trustee" provided that he remains susceptible to claims of "gross negligence." 534 F.3d at 501. *Hilal* also noted that the exculpation provision at issue there exculpated the trustee's "professionals," but it did not address the validity of that aspect of the provision because the appellant did not challenge it. *See id.* at 501 n.2

are consistent with the Bankruptcy Code and applicable law"—*i.e.*, *Pacific Lumber*. Confirmation Order at 20, *In re Diamond Offshore Drilling, Inc.*, No. 20-32307 (Bankr. S.D. Tex. Apr. 8, 2021), Dkt.1231-1. And in a separate case, that same judge also explained that §524(e) simply is not "implicated at all" when it comes to exculpation provisions. Confirmation Hrg. Tr. at 57, *In re S. Foods Grp., LLC*, No. 19-36313 (Bankr. S.D. Tex. Mar. 18, 2021), Dkt.3572.

C. *Pacific Lumber* thus is no impediment to the exculpation provision here, which, as noted, is materially identical to exculpation provisions regularly approved in lower courts within this circuit and other circuits. Indeed, embracing the position that *Pacific Lumber* renders exculpation provisions generally verboten—even garden-variety ones like the provision here—would have seriously destabilizing consequences. As an initial matter, numerous Chapter 11 plans in cases filed within the Fifth Circuit would be in jeopardy if this Court read *Pacific Lumber* as imposing such a restriction. Worse still, going forward, a prohibition on such exculpation provisions would make it virtually impossible "to ensure that capable, skilled individuals are willing to assist in the reorganization efforts in chapter 11 cases." *Murray*, 623 B.R. at 501. After all, "who would want to work in such a messy, contentious situation, only to be sued for alleged negligence for less-than-perfect end results?" ROA.1146; *see also* 3 *Norton Bankr. L. & Prac.* §49:1 (3d ed. 2021) (explaining that it is the "rare case in which the debtor has enough assets to pay all creditors in full").

The inevitable result of having fewer "capable, skilled individuals … willing to assist in … reorganization efforts" will be fewer successful Chapter 11 reorganizations—which preserve value, save jobs, and provide other welfare-maximizing benefits—and more conversions to Chapter 7 liquidation. Moreover, to the extent that some professionals remain willing to provide much-needed services, they would price the inevitability of post-petition litigation into the cost of those services, leaving an even smaller pie to be divided among creditors.

Additionally, interpreting *Pacific Lumber*—and especially its discussion of §524(e)—to broadly foreclose garden-variety exculpation provisions would generate a clear circuit split. Just last year in *Blixseth*, for example, the Ninth Circuit concluded that "§524(e) does not bar a narrow exculpation clause … that is … focused on actions of various participants in the [p]lan approval process and relating only to that process." 961 F.3d at 1082. In so holding, the Ninth Circuit highlighted the fundamental "distinction between claims for the underlying debt"—which §524(e) addresses—and claims "relating specifically to the bankruptcy proceedings"—which an exculpation provision governed by §1123(b)(6) and §105(a) addresses. *Id.* at 1083. Nor is the Ninth Circuit alone in that view. In *PWS*, the Third Circuit likewise concluded that a "commonplace" exculpation provision "does not come within the meaning of §524(e)" because such a provision "does not affect the liability of [exculpated] parties, but rather states the standard of liability under the

[Bankruptcy] Code." 228 F.3d at 245. This Court is "always chary to create a circuit split," especially "in the context of bankruptcy, where uniformity is sufficiently important that our Constitution authorizes Congress to establish uniform laws on the subject." *In re Ultra Petroleum Corp.*, 943 F.3d 758, 763-64 (5th Cir. 2019); *see also In re Westmoreland Coal Co.*, 968 F.3d 526, 532 (5th Cir. 2020) ("Our usual reluctance to create circuit splits is even more pronounced in bankruptcy cases where the need for uniformity is a constitutional command."). For all of the reasons provided above, there is no sound reason to do so here.

Once *Pacific Lumber* is properly understood, it cannot seriously be disputed that the exculpation provision here is consistent with that decision. First, as the bankruptcy court explained, the independent directors are "disinterested[]" parties just like an unsecured creditors' committee and its members, and they undoubtedly served an "importan[t]" role in this bankruptcy case—indeed, they "changed the entire trajectory of the case and saved [Highland] from the appointment of a trustee." ROA.26, 1161. Second, as the court also explained, "if ever there were a risk" that the "costs that the [exculpated] parties might incur defending against suits alleging such negligence are likely to swamp either the [e]xculpated [p]arties or the reorganization," "it is this one," since "everything always end[s] in litigation" when "Dondero and his controlled entities" are involved. ROA.1136, 1160. Finally, while §524(e) may not authorize the exculpation provision here, the two more relevant

statutes—§1123(b)(6) and §105(a)—plainly do so. As a result, there is simply no question that "the exculpation provision complies with applicable law" and that this Court should reject Appellants' contrary position. ROA.65 (capitalization altered).[10]

CONCLUSION

This Court should affirm the bankruptcy court's order confirming Highland's Chapter 11 plan.

Respectfully submitted,

s/George W. Hicks, Jr.

CHAD J. HUSNICK, P.C.
KIRKLAND & ELLIS LLP
300 N. LaSalle
Chicago, IL 60654
(312) 862-2000

PAUL D. CLEMENT
GEORGE W. HICKS, JR.
Counsel of Record
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave, NW
Washington, DC 20004
(202) 389-5000
george.hicks@kirkland.com

Counsel for Amicus Curiae

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[10] Although this brief does not address the injunction and gatekeeper provisions in Highland's plan, those provisions are also legally valid for the reasons provided by the bankruptcy court below and in Highland's brief.

CERTIFICATE OF SERVICE

I certify that, on October 13, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit via the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/George, W. Hicks, Jr.
George W. Hicks, Jr.

CERTIFICATE OF COMPLIANCE

I certify that:

1) This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 5,768 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fifth Circuit Rule 32.2.

2) This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Fifth Circuit Rule 32.1 and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared by a proportionally spaced typeface using Microsoft Word in 14-point font.

3) Any required privacy redactions have been made pursuant to Fifth Circuit Rule 25.2.13, the electronic submission is an exact copy of the paper submission, and the brief has been scanned for viruses using Windows Defender and is free of viruses.

October 13, 2021

s/*George W. Hicks, Jr.*
George W. Hicks, Jr.