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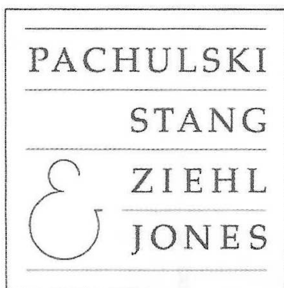

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January 10, 2022

Via CM/ECF

Mr. Lyle W. Cayce
Clerk of Court
United States Court of Appeals for the Fifth Circuit
F. Edward Hebert Building
600 S. Maestri Place
New Orleans, LA 70130-3408

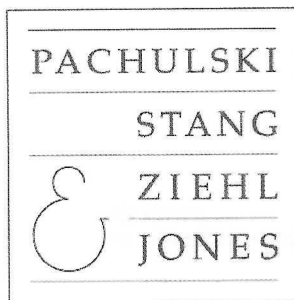
Re: In re: Highland Capital Management, L.P., No. 21-10449

Dear Mr. Cayce:

We represent Appellee-Debtor Highland Capital Management, L.P. ("Highland") and write in response to certain Appellants' January 5, 2022 letter regarding the recent opinion in *In re Purdue Pharma, L.P.*, 2021 U.S. Dist. LEXIS 242236 (S.D.N.Y. Dec. 16, 2021).

Purdue is not relevant to this appeal. The *Purdue* court held that a bankruptcy court did not have statutory authority to enter a §524(g)-type channeling injunction (i) granting a broad release of tort claimants' and states' direct claims against the Sackler family—Purdue's owners/managers—relating to their pre-petition conduct in exchange for their agreement to fund the plan trust and (ii) limiting such claimants' recovery on such claims to the trust.

Highland's Plan contains neither a third-party release nor a channeling injunction. *Purdue* thus does not address the kind of plan protections at issue here. *Purdue* does not involve a bankruptcy court's authority to exculpate estate fiduciaries for post-petition negligence. Appellants continue to conflate third-party releases of pre-petition liability (at issue in *Purdue*) with the limited exculpation of post-petition estate fiduciaries for any negligent performance of their services during the bankruptcy case (at issue



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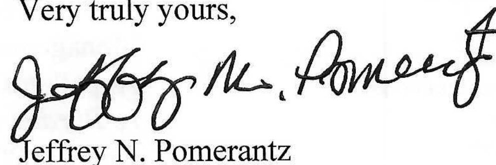
here). The Ninth Circuit has acknowledged a bankruptcy court's authority to grant the latter, even while generally prohibiting the former. *See, e.g., Blixseth v. Credit Suisse*, 961 F.3d 1074, 1085 (9th Cir. 2020). And this Court has precluded non-debtors from purchasing releases by funding a plan, even while approving releases covering post-petition case-related conduct by creditors' committees (a type of post-petition estate fiduciary). *See In re Pac. Lumber*, 584 F.3d 229, 251-52 (5th Cir. 2009).

Nor does *Purdue* address a bankruptcy court's authority to approve gatekeeper provisions designed to preclude frivolous post-confirmation litigation that would undermine a reorganization or otherwise interfere with a confirmed plan's terms. The gatekeeper provision is neither a release nor a channeling injunction. It permits any claims to be pursued against the Protected Parties in a court of competent jurisdiction after a ruling from the bankruptcy court that the claims are colorable. This plan protection is supported by the *Barton* doctrine and the bankruptcy court's uncontested findings supportive of vexatious litigant protections.

Very truly yours,



Jeffrey N. Pomerantz

JNP:JE

cc: All Counsel via CM/ECF