

CASE NO. 21-90011

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT****In re: 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 Inc., James Dondero, The Dugaboy Investment Trust And Get Good Trust,****Petitioners****v.****Highland Capital Management, L.P.****Respondent**

**ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT FOR THE
NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION
BANKRUPTCY CASE NO. 19-34054-11 (SGJ)****APPEALS PENDING AS CIVIL ACTION NOS. 3:21-CV-00546-L, 3:21-CV-00539-N, 3:21-
CV-00538-N AND 3:21-CV-00550-N****IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION**

**RESPONDENT'S RESPONSE TO APPELLANTS' PETITION FOR DIRECT APPEAL
UNDER 28 U.S.C. § 158(d)**

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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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**RESPONDENT’S RESPONSE TO APPELLANTS’ PETITION FOR
DIRECT APPEAL UNDER 28 U.S.C. § 158(d)**

Respondent Highland Capital Management, L.P. (the “Debtor” or “Respondent”) respectfully submits the following response (the “Response”) to the *Petitions for Direct Appeal under 28 U.S.C. § 158(d)* (the “Petitions”) filed by Petitioners (i) Highland Income Fund, NexPoint Strategic Opportunities Fund, Highland Global Allocation Fund and NexPoint Capital, Inc. (collectively, the “Funds”); (ii) James Dondero (“Dondero”); and (iii) The Dugaboy Investment Trust and Get Good Trust (the “Trusts,” and with the Funds and Dondero, the “Petitioners”):

INTRODUCTION

1. On February 22, 2021, the United States Bankruptcy Court for the Northern District of Texas (the “Bankruptcy Court”) entered the *Order Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (ii) Granting Related Relief* [Bankr. Docket No. 1943] (the “Confirmation Order”). Petitioners timely appealed from the Confirmation Order.

2. In brief, the Plan¹ provides for the restructuring of the ownership of the Debtor and the creation of a Claimant Trust that will monetize the Debtor’s

¹ The term “Plan” means the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* [Bankr. Docket No. 1808] (as amended, the “Plan”). The confirmed Plan included certain amendments filed on February 1, 2021. See *Debtor’s Notice of Filing of Plan Supplement to the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)*, Bankr. Docket No. 1875, Ex. B (the “Plan Amendments”). All

assets and distribute the proceeds to the Debtor's stakeholders in accordance with the Plan. The beneficiaries of the Claimant Trust will be the Debtor's unsecured creditors who will direct and control management of the Claimant Trust through their designated Claimant Trustee and the Claimant Trust Oversight Board, which currently includes four of the Debtor's largest creditors (three of whom currently sit on the Committee)² and an independent member unaffiliated with the Debtor with experience in the liquidation of assets of the type owned by the Debtor.

3. On March 16, 2021, the Debtor and the Petitioners (along with the Advisors)³ jointly filed the *Joint Motion for Certification of Appeals of Confirmation Order for Direct Appeal to the Fifth Circuit* [Bankr. Docket No. 2033] (the "Joint Motion"). The sole basis for the direct appeal set forth in the Joint Motion was the parties' agreement that "a direct appeal may materially advance the progress of the case or proceeding in which the appeal is taken, within the meaning and operation of 28 U.S.C. § 158(d)(2)(A)(iii)." This is because it is virtually certain that whichever parties lost at the District Court would appeal any

capitalized terms used herein that are not otherwise defined, have the meaning ascribed to them in the Plan.

² On April 16, 2021, Acis – one of the Debtor's largest creditors – filed its *Notice of Transfer of Claim Other Than for Security* [D.I. 2212] and transferred its claim to ACMLP Claim, LLC. Acis subsequently resigned as a member of the Committee. The transfer of Acis's claims will also affect the composition of the Claimant Trust Oversight Board as Acis is expected to resign its seat on the Claimant Trust Oversight Board.

³ NexPoint Advisors, L.P. and Highland Capital Management Fund Advisors, L.P. (the "Advisors") are the initial parties to this appeal, which was joined by Dondero and the Trusts. The Funds filed a separate petition for direct appeal of the Confirmation Order (Case No. 21-90014) which was consolidated with this appeal on April 20, 2021.

adverse ruling to the Fifth Circuit. Prompt resolution of the appeals will eliminate the uncertainty surrounding the implementation of the Plan.

4. On March 16, 2021, the Bankruptcy Court entered the *Order Certifying Appeals of the Confirmation Order for Direct Appeal to the United States Court of Appeals for the Fifth Circuit* [Bankr. Docket No. 2034].

5. Petitioners filed the Petitions⁴ pursuant to Federal Rule of Bankruptcy Procedure 8006(d) (the “Bankruptcy Rules”). In the Petition, Petitioners assert that in addition to the “materially advance” prong of 28 U.S.C. § 158(d)(2)(A)(iii), the appeal should proceed directly to the Fifth Circuit pursuant to sections 158(d)(2)(A)(i) and (ii) as well.

6. The Debtor agrees the Petitioners’ appeal of the Confirmation Order should proceed directly to this Court based upon the “materially advance” prong. The Debtor files this Response because it disagrees with the other bases Petitioners cite for why there should be a direct appeal. Specifically, the Confirmation Order does not involve a question of law as to which there is no controlling decision in

⁴ In the Petitions, Dondero joins the arguments asserted by the Advisors in their Petition and the Trusts join the arguments of Dondero, the Advisors and the Funds in their respective Petitions. The Debtor reasserts the arguments set forth in its *Response to the Advisors’ Petition for Permission to Appeal (Direct Appeal from Bankruptcy Court, 28 U.S.C. § 158(d))* filed on April 9, 2021.

this Circuit.⁵ Nor does the appeal of the Confirmation Order involve a question of law requiring resolution of conflicting decisions.⁶

DIRECT APPEAL IS NOT JUSTIFIED UNDER
28 U.S.C. § 158(d)(2)(A)(i) or (ii)

7. Petitioners argue that the Bankruptcy Court’s approval of the Plan Injunction, Exculpation and Gatekeeper Provisions (the “Plan Protections”) is contrary to established Fifth Circuit precedent, specifically *Bank of New York Trust Co., N.A. v. Official Unsecured Creditors’ Comm. (In re Pacific Lumber Co.)*, 584 F.3d 229 (5th Cir. 2009) (“*Pacific Lumber*”), and decisions by other courts within the Fifth Circuit interpreting *Pacific Lumber*, creating a conflict between courts within the Circuit. Petitioners further argue that the Bankruptcy Court’s interpretation of *Pacific Lumber* raises a question of law for which there is no controlling Supreme Court or Fifth Circuit authority. For the reasons discussed below, the Debtor disagrees with Petitioners’ characterization of the Bankruptcy Court’s rulings and none of those rulings justify a direct appeal under 28 U.S.C. Section 158 (d)(2)(A)(i) or (ii).

A. Exculpation Provision

8. Petitioners allege the Exculpation Provision is inconsistent with this Court’s opinions in *Pacific Lumber* and *Republic Supply Co. v. Shoaf*, 815 F.2d

⁵ 28 U.S.C. § 158(d)(2)(A)(i).

⁶ 28 U.S.C. § 158(d)(2)(A)(ii).

1046 (5th Cir. 1987)⁷ and contrary to interpretations of *Pacific Lumber* by other courts within the Circuit,⁸ thereby creating a conflict within the Circuit. Petitioners arguments are simplistic because the facts of those cases differ significantly from the facts of the case at bar and, most importantly, Petitioners ignore the *actual factual and legal bases* for the Bankruptcy Court's approval of the Plan Protections.

9. Petitioners conveniently ignore the Bankruptcy Court's finding that Petitioners' attack on the Exculpation Provision was an impermissible collateral attack on the Bankruptcy Court's January 9 and July 16 Orders⁹ which exculpated the vast majority of the parties covered by the Exculpation Provision, were never appealed and are the law of the case.¹⁰ As found by the Bankruptcy Court and

⁷ In *Pacific Lumber*, the Fifth Circuit recognized the viability of *Shoaf* even in the context of third-party releases. 584 F.3d at 252 n.27.

⁸ Petitioners cite to *Dropbox, Inc. v. Thru, Inc. (In re Thru, Inc.)*, 2018 U.S. Dist. LEXIS 179769 (N.D. Tex. October 19, 2018), *aff'd.*, *In re Thru, Inc.*, 2019 U.S. App. LEXIS 32405 (5th Cir. Oct. 28, 2019); *In re Patriot Place, Ltd.*, 486 B.R. 773 (Bankr. W.D. Tex. 2013); and *In re Pilgrim's Pride Corp.*, 2010 Bankr. LEXIS 72 (Bankr. N.D. Tex. January 14, 2010). None of these cases deal with post-petition court-appointed officers and directors who had received exculpation at the time of their appointment.

⁹ See *Order Approving Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* entered January 9, 2020 [Bankr. Docket No. 339] (the "January 9 Order") and *Order Approving Debtor's Motion under Bankruptcy Code Sections 105(a) and 363(b) for Authorization to Retain James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer and Foreign Representative Nunc Pro Tunc to March 15, 2020* entered July 16, 2020 [Bankr. Docket No. 854] (the "July 16 Order").

¹⁰ Dondero, through two of his controlled affiliates – the Charitable DAF Fund, L.P. and CLO Holdco, Ltd. (the "Dondero-Related Plaintiffs") – recently filed an action in the District Court for the Northern District of Texas seeking, among other things, to challenge the Bankruptcy Court's authority to enter the January 9 and July 16 Orders. *Plaintiffs' Motion for Leave to File*

acknowledged by Petitioners, based upon the Committee's lack of confidence in the Debtor's ability to act as a fiduciary because of its long history of self-dealing, fraud and other misconduct, the Committee, the Debtor and Dondero¹¹ agreed to a settlement (the "Governance Settlement") that avoided the appointment of a chapter 11 trustee and:

- created an independent board of directors at Strand consisting of James P. Seery, Jr., John S. Dubel, and retired bankruptcy judge Russell Nelms (collectively, the "Independent Directors");
- removed Mr. Dondero from his control positions at the Debtor and Strand;
- imposed a number of stringent operating protocols [Bankr. Docket No. 466] (as amended, the "Protocols") that gave the Committee substantial oversight over how the Debtor managed its assets, subsidiaries, and investment vehicles;
- granted standing to the Committee to pursue certain Estate claims and causes of action against Mr. Dondero, Mr. Okada, other insiders of the Debtor, and other "Related Entities" (as defined in the Protocols);

First Amended Complaint, Case No. 3:21-cv-00842-B (N.D. Tex. Apr. 19, 2021). The Dondero-Related Plaintiffs' motion was denied without prejudice. Subsequently, the Debtor filed *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*, Case No. 19-34054-sgj-11 (Bankr. N.D. Tex. Apr. 23, 2021) [D.I. 2235], seeking sanctions for the Dondero-Related Plaintiffs' willful violation of the January 9 and July 16 Orders. Hours after the filing of the Debtor's motion for contempt, the Dondero-Related Plaintiffs filed an action in the Bankruptcy Court seeking reconsideration of the July 16 Order. [D.I. 2242].

Dondero expressly consented to the entry of the January 9 Order and did not oppose the entry of the July 16 Order. The Dondero-Related Plaintiffs' actions are untimely, an impermissible collateral attack on the Bankruptcy Court's orders, and highlight Dondero's disrespect for the judicial process and the lengths to which he will go to impede the Debtor.

¹¹ Petitioners acknowledge Dondero consented to the entry of the January 9 Order. Dondero Petition, p. 2; Funds Petition, p. 4.

- prohibited Mr. Dondero from causing any “Related Entity” to terminate an agreement with the Debtor; and
- installed the Bankruptcy Court as a “gatekeeper” with respect to any litigation commenced against the Independent Directors and exculpated the Independent Directors by limiting claims to willful misconduct and gross negligence.¹²

Confirmation Order, ¶¶ 12-13.

10. These facts were critical to the Bankruptcy Court’s approval of the Plan Protections in accordance with both *Pacific Lumber* and other applicable Fifth Circuit precedent. *Pacific Lumber* and *Republic Supply* expressly prevented the Bankruptcy Court, under the doctrine of *res judicata*, from revisiting exculpation for the Independent Directors, the CEO/CRO, and their respective agents, advisors and employees, all of whom were exculpated for potential negligence claims in the January 9 Order or the July 16 Order. July 9 Order ¶ 10; July 16 Order ¶ 5. This Court has made clear that if a party fails to object to or appeal from a final order – even one that grants a third-party release – the order becomes the law of the case and is not subject to collateral attack. *Republic Supply*.¹³

¹² The July 16 Order contained a “gatekeeper” provision substantially the same as that included in the January 9 Order. July 16 Order, ¶ 14.

¹³ See also *Miller v. Meinhard-Commercial Corp.*, 462 F.2d 358, 360 (5th Cir. 1972) (regardless of relief sought, it is a collateral attack if it must in some fashion overrule a previous judgment); see also *In re Moye*, 437 Fed. Appx. 338, 341 (5th Cir. 2011) (“Under the law-of-the-case doctrine, a court follows its prior final decisions in the case as the law of that case, except for a few narrow exceptions.”) (internal quotations omitted); *In re Provenza*, 316 B.R. 177, 220 (Bankr. E.D. La 2003) (“Under the law of the case doctrine, a court may not address issues that have been litigated and decided in earlier proceedings in the same case.”).

11. Additionally, the Bankruptcy Court found that *Pacific Lumber* did not contain a bright line rule against exculpation provisions. Rather, *Pacific Lumber* held that while public policy justified exculpation of creditors' committees and their members, it did not justify exculpation of incumbent prepetition officers or directors or non-debtor plan sponsors. The Bankruptcy Court concluded that *Pacific Lumber's* rationale for exculpation of committees and their members – to encourage their active participation in the chapter 11 process – justified exculpation for the Independent Directors and the CEO/CRO in this case. Here, unlike in both *Pacific Lumber* and *In re Thru*, the Independent Directors and the CEO/CRO were not prepetition officers or directors of the Debtor. The Independent Directors were appointed post-petition by the Bankruptcy Court pursuant to the January 9 Order as an urgent measure to address serious concerns raised by the Committee and the U.S. Trustee as to extensive breaches of fiduciary duty and lack of disinterestedness by the Debtor's prepetition management.¹⁴ Thus, the Bankruptcy Court concluded strong policy reasons existed for approving the Exculpation Provision, consistent with *Pacific Lumber*.¹⁵

¹⁴ Additionally, as the Court indicated, the Independent Directors were appointed as a compromise to the appointment of a trustee, and essentially served in that 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). Confirmation Order, ¶¶ 13, 14, 74(a).

¹⁵ The Bankruptcy Court also determined that the Fifth Circuit had been swayed in *Pacific Lumber* by the fact that neither the proposed exculpated parties in that case nor the reorganization itself would be “swamped” by the costs of the potential litigation from which the

B. Injunction and Gatekeeper Provisions

12. Nor is the Gatekeeper Provision contrary to applicable case law within the Fifth Circuit. Contrary to Petitioners' allegations, the Gatekeeper Provision is not a channeling injunction¹⁶ or any other type of injunction, and it does not effectuate a release. The Gatekeeper Provision requires any Enjoined Party that believes it has *any claims* against a Protected Party relating to the chapter 11 case, the negotiation or administration of the Plan or property to be distributed under the Plan, the wind down of the Debtor's or Reorganized Debtor's business, the administration of the Claimant Trust or the Litigation Sub-Trust, or the transactions relating thereto to first seek leave from the Bankruptcy Court to pursue such alleged claims and present evidence as to why it believes they are colorable. Such provisions have been approved by courts within the Fifth Circuit and other circuits,¹⁷ including in the *Pilgrims Pride* case cited by Petitioners.

exculpated parties sought to be protected. *Pacific Lumber*, 584 F.2d at 252. However, in this case, the Bankruptcy Court found just the opposite based on credible and uncontroverted evidence. Confirmation Order, ¶ 74(b).

¹⁶ A channeling injunction is a permanent injunction that directs certain types of claimants to a trust established for the purpose of handling those types of claims. The concept was first created in the asbestos cases, and is codified in section 524(g) of the Bankruptcy Code, but has been used in other mass tort or mass liability cases.

¹⁷ See, e.g., *In re Pilgrim's Pride Corp.*, 2010 Bankr. LEXIS 72 *18, 20-21 (bankruptcy court channeled to itself exclusive jurisdiction to hear claims against debtors' management (including their boards of directors, chief restructuring officer and their professionals) based upon their conduct in pursuit of their responsibilities during the chapter 11 cases.); see also *In re CHC Group, Ltd.* (Case No. 16-31854, Bankr. N.D. Tex.) *Debtors' Fourth Amended Joint Chapter 11 Plan of Reorganization* [D.I. 1671-1, attached to *Findings of Fact and Conclusions of Law, and Order Confirming the Debtors' Fourth Amended Joint Chapter 11 Plan of Reorganization*], Section 10.8(b) at p. 57 (court retained *exclusive* jurisdiction to hear claims against any

Tellingly, Petitioners have not cited to any case within the Fifth Circuit or any other circuit where a gatekeeper provision was found to be an improper exercise of Bankruptcy Court jurisdiction or improper in any other way.

13. The Plan further provides that if the Bankruptcy Court determines the claim is colorable, the Bankruptcy Court will make a secondary determination of whether or not it has jurisdiction to adjudicate the claim on the merits, after which, the claimant will either be required to file the proposed litigation in the Bankruptcy Court or be permitted to file in such other court of appropriate jurisdiction.¹⁸

14. Petitioners claim that because the Bankruptcy Court *may* not have jurisdiction to determine certain types of claims on the merits, the Bankruptcy Court is precluded from acting as the gatekeeper and making the initial determination as to whether a claim is colorable. That, however, is not the law in this Circuit.

“Protected Party,” including any claims “in connection with or arising out of ... the administration of this Plan or the property to be distributed under this Plan, ... or the transactions in furtherance of the foregoing, ...”) (emphasis added); *In re Motors Liquidation Co.*, 541 B.R. 104 (Bankr. S.D.N.Y. 2015) (discussing bankruptcy court’s gatekeeper role over GM ignition switch cases in determining if cases could be pursued against asset buyer or only against post-confirmation debtor); *In re Motors Liquidation Co.*, 568 B.R. 217 (Bankr. S.D.N.Y. 2017) (same); *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 546 B.R. 284 (Bankr. S.D.N.Y. 2016) (discussing court’s gatekeeper function to determine if claim is a direct claim that may be asserted by a claimant or a derivative claim that can only be asserted by the estate).

¹⁸ Petitioners appear to presuppose that if the Bankruptcy Court determines an alleged claim is not colorable, they will be forever enjoined from asserting the claim. Nothing in the Plan prevents Petitioners from appealing such hypothetical future determination.

15. The Gatekeeper Provision is not an impermissible extension of the Bankruptcy Court's post-confirmation jurisdiction. This Court has determined that where post-confirmation acts would impact the ability of the reorganized debtor to perform under the plan or recoveries under the plan, the bankruptcy court retains jurisdiction.¹⁹ The fact that the Bankruptcy Court may not have jurisdiction to adjudicate a potential claim once the claim is determined to be colorable does not prevent the Bankruptcy Court from having jurisdiction to determine if the claim is colorable in the first instance.²⁰ In a related context, this Circuit has held that a bankruptcy court has jurisdiction under the *Barton Doctrine* to determine if a claim may be brought against a trustee even if the bankruptcy court may not have

¹⁹ See *United States Brass Corp. v. Travelers Ins. Group, Inc. (In re United States Brass Corp.)*, 301 F.3d 296, 305 (5th Cir. 2002) (holding that bankruptcy court had jurisdiction to determine whether arbitration could be used to liquidate claims post-effective date; while the plan had been substantially consummated, it had not been fully consummated, the dispute related directly to the plan, the outcome would affect the parties' post confirmation rights and responsibilities and the proceeding would impact compliance with, or completion of the plan; specifically referencing section 1142(b)); *Bank of La. v. Craig's Stores of Tex., Inc. (In re Craig's Stores of Tex., Inc.)*, 266 F.3d 388, 390 (5th Cir. 2001) (post-confirmation bankruptcy jurisdiction continues to exist for "matters pertaining to the implementation or execution of the plan."); *EOP-Colonnade of Dallas Ltd. P'ship v. Faulkner (In re Stonebridge Techs., Inc.)*, 430 F.3d 260, 266-67 (5th Cir. 2005) (bankruptcy court had jurisdiction over lawsuit brought by post-confirmation trustee against landlord over letter of credit draw where trustee was assignee of bank claim against landlord).

²⁰ The use of the gatekeeper structure in the *General Motors* cases is particularly apt to this point. 568 B.R. 217. The causes of action arising from defective ignition switches are based on state tort law – both product liability and personal injury – and are causes of action unquestionably outside the jurisdiction of a bankruptcy court to hear on the merits. Nevertheless, the *General Motors* bankruptcy court acted as the gatekeeper post-confirmation to determine whether such litigation should proceed against the estate of the old debtor or the asset purchaser under the confirmed plan.

authority to adjudicate the underlying claim under *Stern v. Marshall*.²¹ See *Villegas v. Schmidt*, 788 F.3d 156, 158-59 (5th Cir. 2015). Thus, the Bankruptcy Court has jurisdiction to determine if a claim is colorable, and the Gatekeeper Provision merely requires the Bankruptcy Court to make the same type of analysis done by bankruptcy courts in this Circuit to determine if a cause of action owned by a debtor may be brought by a creditors' committee.²²

16. The Fifth Circuit has also recognized that in appropriate circumstances, a federal court can enjoin or issue other appropriate sanctions against vexatious litigants – persons who have a history of filing repetitive and spurious litigation for the purposes of harassment and intimidation.²³ See ALL WRITS ACT, 28 U.S.C. §1651; *Carroll v. Abide (In re Carroll)*, 850 F.3d 811 (5th Cir. 2017) (court can enjoin litigant with history of filing litigation for the purpose of delay and harassment). Gatekeeper provisions are less restrictive and balance the due process rights of both the parties protected by it and any potential litigants. See *Baum v. Blue Moon Ventures, LLC*, 513 F.3d 181, 189 (5th Cir. 2008) (injunction required party with history of filing vexatious, abusive and harassing

²¹ 564 U.S. 462 (2011).

²² See, e.g., *La. World Exposition v. Fed. Ins. Co.*, 858 F.2d 233 (5th Cir. 1988) (bankruptcy court must first determine that claim is colorable before authorizing a committee to sue in the stead of the debtor).

²³ The facts supporting the Bankruptcy Court's findings in this regard are set forth in the Confirmation Order and the record of the bankruptcy case as a whole. See generally Confirmation Order ¶¶ 76-81.

litigation to seek consent of the district court before filing additional litigation); *see also Safir v. United States Lines, Inc.*, 792 F.2d 19, 25 (2d Cir. 1986) (court agreed litigant’s conduct warranted a pre-filing injunction, but narrowed scope such that litigant had to seek permission from district court before filing certain types of additional actions). Based upon the evidence presented at confirmation, the Gatekeeper Provision is a legitimate tool for the Bankruptcy Court to have approved as part of confirmation of the Plan fully supported by Fifth Circuit law.

17. As the Bankruptcy Court found: “The Debtor’s case is not a garden variety chapter 11 case” (Confirmation Order, ¶ 4) and was not caused by any of the typical reasons for a chapter 11. Instead, the filing was necessitated by the Debtor’s prepetition culture of highly acrimonious litigation and its history of hiding assets by transferring them amongst its byzantine web of related entities, including the Petitioners, all owned or controlled by Dondero. The Debtor under Dondero was a “serial litigator” and litigated with its opponents in the U.S. and internationally, in some cases, for over a decade. *Id.*, ¶¶ 8; 77. Petitioners (Dondero and his related entities) have not changed their tune – they have simply moved on from litigating with the Debtor’s creditors to now litigating incessantly with the Debtor itself because the Debtor and its creditors have not been receptive to Dondero’s efforts to regain control of the Debtor. *Id.*, ¶¶ 74(b), 76-82. The

Gatekeeper Provision is supported by the Bankruptcy Court's detailed findings of fact as well as by applicable Fifth Circuit law.

CONCLUSION

18. While resolution of the issues raised on appeal by Petitioners by direct appeal will materially advance the progress of the case, none of these issues are contrary to applicable Fifth Circuit law, involve matters of public importance, or require resolution of conflicting opinions within the Circuit. Therefore, the Fifth Circuit should authorize direct appeal of the Confirmation Order solely because it will materially advance the progress of the case.

WHEREFORE, BASED ON THE FOREGOING, Appellees respectfully request that this Court permit the appeal to proceed directly to this Court pursuant to 28 U.S.C. § 158(d)(2)(A)(iii).

RESPECTFULLY SUBMITTED ON THIS 26TH DAY OF APRIL, 2021.

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT,
TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS**

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Dated: April 26, 2021