No. 3:21-cv-01585-S

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

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

Debtor.

THE CHARITABLE DAF FUND L.P. and CLO HOLDCO LTD.,
APPELLANTS

v.

HIGHLAND CAPITAL MANAGEMENT, L.P.,
APPELLEE.

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

APPELLEE'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY AFFIRMANCE

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Appellants' *Response to Appellee's Motion for Summary Affirmance* ("Response") confuses the procedural posture of this appeal and the dispositive effect of the Fifth Circuit's Confirmation Opinion.[1] Those efforts at misdirection are easily dispatched.

Indeed, after Highland filed its motion, Judge Starr issued an opinion rejecting Appellants' attempt to evade the Confirmation Opinion in order to keep pursing meritless collateral attacks on the bankruptcy court's Appointment Order. The decision below should be summarily affirmed because there is no substantial question as to the outcome of this appeal. Further briefing would be a waste of judicial and party resources.[2]

1. Appellants are wrong, as an initial matter, that Highland's motion is "premature" or procedurally improper. *See* Response at 1. On October 6, 2021, the Court entered an Order abating and administratively closing this case "pending the

[1] Capitalized terms not defined herein have the meanings given to them in *Appellee's Motion for Summary Affirmance* [Docket No. 23] (the "Motion").

[2] Appellants misrepresent (Response at 1) that Appellee "insisted" that Appellants had to respond to the Motion "without extension" of the seven-day deadline set by rule. Not so. In fact, one day *after* Appellants' response deadline had already come and gone without Appellants filing a response, their counsel asked Appellee to consent to an (unnecessary) motion to reopen the case and to set an (already established and expired) briefing deadline. In reply to that inquiry, Highland's counsel observed that, no matter what became of that proposed motion, it would not affect Appellants' existing deadline to respond to the Motion. Appellants' counsel never requested an extension of that deadline, and Appellee never refused to consent to one. Appellants' latest disregard for and attempt to manipulate the applicable rules is of a piece with their contemptuous violation of a final order entered by the bankruptcy court followed by an attempt to obtain the court's modification of that final order well after the time for objection or appeal had passed and without any good cause.

resolution of" the confirmation appeal. (Docket No. 21). In a separate order entered the same day, the Court required Appellants to "file their opening merits brief in this appeal within 14 days of the Fifth Circuit's disposition of the [confirmation] appeal." (Docket No. 19). Accordingly, this appeal's abatement and administrative closure terminated of its own force when the Fifth Circuit entered the Confirmation Opinion on September 7, 2022, and Appellants' opening brief was due 14 days later on September 21, 2022.[3] Appellants failed to file their brief, and they did not seek any extension of the briefing deadline set by this Court. Unless it is dismissed for failure to prosecute—as would be entirely appropriate in light of Appellants' missed deadline for their opening brief—this is a live appeal, Appellants' deadline to file a merits brief has passed, and nothing in this Court's prior orders precludes Highland's motion.[4]

2. On the merits, Appellants cannot demonstrate that any substantial question remains in this appeal after the Fifth Circuit's Confirmation Opinion.

First, Appellants cannot evade the Fifth Circuit's unambiguous holding that the Appointment Order is a "final bankruptcy order[]" that has "*res judicata* effects."

[3] Highland recognizes that the docket continues to reflect the prior administrative closure. But that administrative designation has no bearing on the effect of the Court's October 6, 2021, orders, or on the parties' rights and obligations under those orders and the applicable rules.

[4] Contemporaneously with this Reply, Appellee is also filing a response to Appellants' *Motion to Reopen Administratively Closed Appeal, Notice of Fifth Circuit Decision, and Request for Briefing Schedule* (Docket No. 25).

Confirmation Opinion at *12 n.15 (Appellee's Mot. Ex. C). The Confirmation Opinion is clear, in a passage Appellants ignore: "Seery, in his official capacities," is "exculpated to the extent provided in the [Appointment Order and an earlier appointment order] **given those orders' ongoing *res judicata* effects** and our lack of jurisdiction to review those orders." *Id.* (emphasis added). The Fifth Circuit squarely held that any "collateral attack" seeking "to roll back the protections in the bankruptcy court's [Appointment Order]" is "precluded." *Id.*

Appellants are correct (Response at 4) that the Confirmation Opinion declined to extend the Appointment Order's *res judicata* effects to the bankruptcy court's ***separate*** confirmation order approving the similar protections in Highland's reorganization plan. But Appellants miss the other side of that same coin: The Fifth Circuit held that Appointment Order ***is*** *res judicata* with respect to what the bankruptcy court finally and conclusively decided ***by that Order***. That ruling is dispositive of this appeal.

Another court in this district concluded as much in an opinion filed after Highland had moved for summary affirmance in this appeal. *See Memorandum Opinion and Order*, *The Charitable DAF Fund LP v. Highland Capital Management LP*, No. 3:21-cv-01974-X, Docket No. 49 (Sept. 28, 2022) (attached hereto as **Exhibit A**) (the "Contempt Appeal Opinion"). Judge Starr affirmed the bulk of the contempt sanctions awarded against Appellants for violating the Appointment

Order. *Id.* at 32. Appellants had challenged those sanctions in part by repeating the same attacks on the Appointment Order's gatekeeper provision that they also raise in this appeal. *See id.* at 10-13. But the district court expressly relied on the Confirmation Opinion to hold that it "lack[ed] jurisdiction to consider [Appellants'] collateral attack" on the Appointment Order. *Id.* at 11 (citing Confirmation Opinion at *12 n.15). Appellants' Response to Highland's Motion never even acknowledged Judge Starr's recent ruling against them on this critical point.[5]

Second, and independently, there is no substantial question that the bankruptcy court correctly declined to revise the Appointment Order because—*res judicata* or not—it is well supported by law. Contrary to Appellants' baseless assertion (Response at 3), the Fifth Circuit left the confirmation order's gatekeeping provision completely undisturbed. *See* Mot. 4 & n.2; *see also* Confirmation Opinion at *13 ("Appellants object to the bankruptcy court's injunction as vague and the

[5] Among other things, Appellants fail to acknowledge Judge Starr's rejection of their argument—which they reprise in their Response (at 5)—that the Appointment Order cannot be *res judicata* as to them because they lacked notice of the Order. *See* Contempt Appeal Opinion at 12-13; *see also id.* at 11-12 ("Both the Fifth Circuit and other courts have declined to hear collateral challenges to orders even when the litigants have not previously challenged those orders." (Footnotes omitted)).

gatekeeper provision as overbroad. *We are unpersuaded*." (Emphasis added)).[6] And, although the court of appeals narrowed the confirmation order's exculpation provision, it did so solely based on 11 U.S.C. 524(e), which concerns the post-effective-date discharge of debt and has no conceivable bearing on the Appointment Order. *See* Mot. at 4 & n.2.[7]

It does not invite any "absurdity" (Response at 5) for the courts to narrow the confirmation order's exculpation provision while letting the final Appointment Order stand. The latter applies into the future—post-effective-date and post-discharge—whereas the former applied only to the pre-effective-date period during which Seery and others were providing services to the then-debtor.

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[6] *See also id.* at *1 ("We reverse *only* insofar as the plan exculpates certain non-debtors in violation of 11 U.S.C. § 524(e), strike those few parties from the plan's exculpation, *and affirm on all remaining grounds*." (Emphasis added)). Appellants' suggestion (Response at 3 & n.1) that the Confirmation Opinion rejected aspects of the confirmation order's gatekeeper provision based on the *Barton* doctrine cannot be squared with the Fifth Circuit's denial of *all* challenges in that appeal to the scope of the gatekeeper provision. Appellants are likewise wrong (Response at 4) that the Fifth Circuit held that 28 U.S.C. § 959(a) required invalidating the confirmation order's gatekeeper provision. Rather, the Confirmation Opinion (at *13 n.18) held that any argument that Section 959(a) excuses certain claims from a gatekeeper function can be addressed by courts through the gatekeeper provision itself, and do not require invalidating such a provision altogether.

[7] The Fifth Circuit has refused further attempts to delay the effect and implementation of its opinion. On October 7, 2022, NexPoint Advisors, LP and Highland Capital Management Fund Advisors, LP, entities related to Appellants here, asked the Fifth Circuit to recall its mandate in the confirmation appeal and stay the mandate pending their petition for certiorari. Motion to Recall and Stay Mandate, *NexPoint Advisors, LP v. Highland Capital Mgmt., LP*, No. 21-10449 (5th Cir. Oct. 7, 2022) (attached hereto as **Exhibit B**). They argued that the mandate should be recalled and stayed in part because the panel "arguably affirmed various other injunctive and 'gatekeeping' provisions in the plan that have the practical effect of exculpating the very persons that the panel ruled could not be exculpated." *Id.* at 13; *see also id.* at n.3 (noting that Highland has argued that the Confirmation Opinion affirmed the plan's gatekeeping provisions in full). The Fifth Circuit denied the motion the same day. Order, *NexPoint Advisors, LP v. Highland Capital Mgmt., LP*, No. 21-10449 (5th Cir. Oct. 7, 2022) (attached hereto as **Exhibit C**).

Finally, Appellants are mistaken (Response at 1-2) that summary affirmance cannot be granted unless they "concede" that circuit precedent conclusively bars their appeal. There is no "appellant veto" to summary affirmance when an appeal—like this one—presents no substantial question in light of binding precedent and law of the case.

Appellants misconstrue the footnote in *United States v. Houston*, 625 F.3d 871, 873 n.2 (5th Cir. 2010), which merely noted that the court of appeals had denied summary affirmance where circuit precedent "did not address the issue" on appeal.[8] For the reasons described above, the opposite is true here.

CONCLUSION

For the foregoing reasons, Highland respectfully requests that the Court summarily affirm the bankruptcy court's Order Denying Modification.

[8] In any event, if this Court chooses not to summarily affirm, it is free to dispense with further briefing and affirm because Appellants are "not entitled to the relief [they] seek[]." *United States v. Jones*, No. 21-50314, 2022 WL 485194, at *1 (5th Cir. Feb. 17, 2022).

Dated: October 11, 2022

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CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. Bankr. P. 8013(f)(3)(C) because, excluding the portions excluded by Fed. R. Bankr. P. 8015(g), this document contains 1,654 words.

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/s/ Zachery Z. Annable
Attorney for Appellee
Dated: October 11, 2022

CERTIFICATE OF SERVICE

I hereby certify that, on October 11, 2022, the foregoing document was electronically filed using the Court's 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

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE CHARITABLE DAF FUND LP; CLO HOLDCO LTD; MARK PATRICK; SBAITI & COMPANY PLLC; MAZIN A. SBAITI; JONATHAN BRIDGES; and JAMES DONDERO, *Appellants*, v. HIGHLAND CAPITAL MANAGEMENT LP, *Appellee*.	§ § § § § § § § § § § § § § § § §	Civil Action No. 3:21-cv-01974-X

MEMORANDUM OPINION AND ORDER

The Charitable DAF Fund LP, CLO Holdco LTD, Sbaiti & Company PLLC, Mazin Sbaiti, Jonathan Bridges, Mark Patrick, and James Dondero (collectively "Contemnors") appeal the bankruptcy court's *Order Holding Certain Parties and Their Attorneys in Civil Contempt of Court for Violation of Bankruptcy Court Orders*.[1] For the reasons explained below, the Court **AFFIRMS** in part and **VACATES** in part the bankruptcy court's order.

I. Factual Background

Highland Capital Management, LP ("Highland")—previously headed by James Dondero—filed for Chapter 11 bankruptcy in October 2019. "[A] nasty breakup between Highland Capital and . . . James Dondero" ensued, and "[Dondero] and other

[1] *See* Doc. No. 8-1 at 33.

creditors began to frustrate the [bankruptcy] proceedings by objecting to settlements, appealing orders, seeking writs of mandamus, interfering with Highland Capital's management, threatening employees, and canceling trades between Highland Capital and its clients."[2]

Ultimately, Dondero agreed to relinquish some of his positions, and three individuals—John Dubel, Russell Nelms, and James P. Seery, Jr.—became independent directors of Highland.[3] The bankruptcy court approved that settlement in January 2020 (the "Governance Order").[4] Later, one of those directors, Seery, became Highland's CEO, and the bankruptcy court approved that appointment in July 2020 (the "Seery Order").[5] Given "Dondero's continued litigiousness,"[6] both orders (collectively the "gatekeeping orders") provided that "[n]o entity may commence or pursue a claim . . . against Mr. Seery relating in any way to his role as the chief executive officer . . . of the Debtor without the Bankruptcy Court . . . specifically authorizing such entity to bring such claim."[7] Those orders were not appealed.[8]

But those gatekeeping orders failed to deter: Less than a year later, two entities attempted to sue Seery. Their claims centered on a settlement between

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[2] *In re Highland Capital Mgmt., L.P.*, No. 21-10449, 2022 WL 4093167, at *2–3 (5th Cir. Sept. 7, 2022).

[3] *See* Doc. No. 8-2 at 127, 39; Doc. No. 8-4 at 33.

[4] Doc. No. 8-4 at 33.

[5] Doc. No. 8-2 at 164–65.

[6] *Highland Capital*, 2022 WL 4093167, at *3.

[7] Doc. No. 8-2 at 165, 127–28.

[8] *Highland Capital*, 2022 WL 4093167, at *2.

Highland and one of its creditors, HarbourVest. When Seery requested the bankruptcy court's approval of that settlement, Dondero, two trusts of which he is a beneficiary, and CLO Holdco, Ltd. ("CLO Holdco") objected—but to no avail. The bankruptcy court approved the settlement. Believing that "filing [a] motion with the bankruptcy court would have been . . . futile," Dondero took a different tack.[9]

Dondero had founded the Charitable DAF Fund LP ("DAF") and historically acted as its informal investment advisor. Mark Patrick had become DAF's managing member on March 24, 2021. Although Patrick initially had "no reason to believe that Mr. Seery had done anything wrong with respect to the HarbourVest transaction," Dondero quickly "told [him] that an investment opportunity was essentially usurped."[10] Patrick thus "engaged [Sbaiti & Company PLLC] to launch an investigation" and asked "Dondero to work with the Sbaiti firm with respect to their investigation of the underlying facts."[11]

Following that investigation, DAF and CLO Holdco—which DAF owns and controls—sued Highland in this Court, alleging that Highland fraudulently withheld information when it settled with HarbourVest. That lawsuit centered on "Mr. Seery's allegedly deceitful conduct" and "mention[ed] Mr. Seery 50 times."[12] The complaint named Seery as a "[p]otential party," and it provided his citizenship and domicile.[13]

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[9] Doc. No. 38 at 13.

[10] Doc. No. 8-45 at 179.

[11] *Id.* at 178.

[12] Doc. No. 8-1 at 58–59. DAF and CLO Holdco agree that "the action [was] based on Seery's misrepresentations, omissions, and other breaches of duty committed in his role as HCM's CEO." Doc. No. 8-7 at 117.

[13] Doc. No. 8-7 at 48.

Unsurprisingly, then, DAF and CLO Holdco quickly moved for leave to amend their complaint to add Seery as a defendant (the "Seery Motion").[14] The movants highlighted the bankruptcy court's gatekeeping orders but requested leave to add Seery as a defendant anyhow. This Court denied that motion the following day on the ground that the defendants had not yet been served.

Back in the bankruptcy court, Highland moved for an order requiring DAF, CLO Holdco, and those that authorized the Seery Motion to show cause why they should not be held in contempt for violating the gatekeeping orders. The bankruptcy court granted that motion, adding Dondero to the list of individuals and entities that had to show cause. After holding a hearing on Highland's motion, the bankruptcy court found Contemnors in contempt for violating its gatekeeping orders. The court imposed $239,655 in sanctions to compensate Highland for its attorneys' fees and $100,000 in sanctions for each unsuccessful appeal of its contempt order.

Contemnors now appeal.

II. Legal Standards

District courts have jurisdiction to hear appeals from final judgments of bankruptcy courts.[15] This Court reviews a bankruptcy court's sanctions for abuse of discretion, reviewing the court's findings of fact for clear error and its conclusions of

[14] Doc. No. 8-7 at 115.

[15] 28 U.S.C. § 158(a)(1).

law *de novo*.[16] A finding of fact is clearly erroneous when "the reviewing court is left with the definite and firm conviction that a mistake has been committed."[17]

III. Analysis

Contemnors assert that the bankruptcy court (A) erroneously found them in contempt, (B) unlawfully issued the gatekeeping orders, (C) punitively sanctioned them, (D) erroneously sanctioned Dondero, and (E) violated the Constitution in myriad ways. Each argument is meritless.

A. Contempt Finding

Contemnors claim that the bankruptcy court erred in finding them in contempt for violating its gatekeeping orders. "[T]he movant in a civil contempt proceeding bears the burden of establishing by clear and convincing evidence: (1) that a court order was in effect; (2) that the order required certain conduct by the respondent; and (3) that the respondent failed to comply with the court's order."[18]

The bankruptcy court found each element by clear and convincing evidence. In particular, the bankruptcy court had previously ordered that "[n]o entity may commence or pursue a claim . . . against Mr. Seery."[19] Contemnors failed to comply with this order and "pursu[ed] litigation" against Seery because they filed a motion

[16] *In re Pratt*, 524 F.3d 580, 584 (5th Cir. 2008) (cleaned up).

[17] *In re Am. Dev. Intern. Corp.*, 188 B.R. 925, 933 (N.D. Tex. 1995) (cleaned up).

[18] *Tex. v. Dep't of Labor*, 929 F.3d 205, 213 n.11 (5th Cir. 2019) (cleaned up).

[19] Doc. No. 8-2 at 165.

requesting leave to add Seery as a defendant to a lawsuit that already centered on "Mr. Seery's allegedly deceitful conduct."[20] Contemnors raise five objections.

First, they contend that the term *pursue* in the gatekeeping orders refers only to legal activities that occur *after* a claim has already been filed. They cite dictionaries defining *pursue* as to "prosecute or sue" or to "carry it out or follow it."[21] But Contemnors' definitions appear absent in most dictionaries.[22] Instead, most dictionaries define *pursue* as "seeking"[23] or "trying"[24] to obtain a desired end.

Contemnors counter that expanding *pursue* beyond "prosecute" begets a slippery slope such that even "legal research . . . [or] conferring with a client" could count.[25] Not so. To pursue a claim, a party must "try" or "seek" to bring that claim. Requesting leave to amend differs from legal research or client communications

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[20] Doc. No. 8-1 at 58–59.

[21] Doc. No. 19 at 28 (cleaned up). Contemnors also cite the Court's distinction in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 408 (1821), between *commence* and *prosecute*: "[T]o commence a suit, is to demand something by the institution of process in a Court of justice, and to prosecute the suit, is, according to the common acceptation of language, to continue that demand."

[22] *See Hepp v. Facebook*, 14 F.4th 204, 212 (3d Cir. 2021) (recognizing that "[a] comparative weighing of dictionaries is often necessary," by which a court checks multiple dictionaries (quoting Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 417 (2012))).

[23] *Pursue*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("[T]o ***seek***." (emphasis added)); *Pursue*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/pursue (last visited Sept. 26, 2022) ("[T]o find or employ measures to obtain or accomplish : ***seek***." (emphasis added)).

[24] *Pursue*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("To ***try*** persistently to gain or attain . . . ." (emphasis added)); *Pursue*, MACMILLAN DICTIONARY, https://www.macmillandictionary.com/us/dictionary/american/pursue (last visited Sept. 26, 2022) ("[T]o ***try*** to achieve something." (emphasis added)); *Pursue*, OXFORD LEARNER'S DICTIONARY, https://www.oxfordlearnersdictionaries.com/us/definition/english/pursue?q=pursue (last visited Sept. 26, 2022) ("[T]o do something or ***try*** to achieve something . . . ." (emphasis added)); *Pursue*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/pursue (last visited Sept. 26, 2022) ("***[T]ry*** to do." (emphasis added)).

[25] Doc. No. 19 at 29.

because "a party who moves to amend usually does intend to amend."[26] In fact, in this Court, Contemnors would have had no choice: They attached the proposed amended complaint, and, as the local rules make clear, "[i]f leave [to amend] is granted . . . the clerk will file a copy of the amended pleading."[27] In short, by requesting leave to amend, Contemnors tried to—and, in fact, took every action necessary on their part to—bring a claim against Seery.

Contemnors next aver that the gatekeeping orders' requirement that litigants seek the bankruptcy court's authorization to bring claims "confirms that a motion for leave to amend cannot itself be deemed to 'commence or pursue a claim.'"[28] But Contemnors shoot themselves in the foot: "The expression of one thing implies the exclusion of others," so the gatekeeping orders' reference to an allowed method of pursuing a claim implies that other methods—like petitioning a district court—are prohibited.[29]

Second, Contemnors contend that they, in fact, complied with the gatekeeping orders by asking this Court for authorization because bankruptcy courts "constitute a unit of the district court."[30] But the Fifth Circuit has already "reject[ed] the . . .

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[26] *Blanks v. Lockheed Martin Corp.*, No. 4:05CV137LN, 2006 WL 1139941, at *2 (S.D. Miss. Apr. 25, 2006).

[27] N.D. TEX. CIV. R. 15.1(b); *see, e.g.*, Electronic Order Granting Motion for Leave to File, *Christman v. Walmart Inc*, No. 3:21-cv-03055-X (N.D. Tex. Sept. 20, 2022), ECF No. 20 (Starr, J.) ("Unless the [Amended Complaint] has already been filed, clerk to enter the document as of the date of this order.").

[28] Doc. No. 19 at 30.

[29] *In re Benjamin*, 932 F.3d 293, 298 (5th Cir. 2019) (quoting Scalia & Garner, *supra* note 22, at 107).

[30] Doc. No. 19 at 31 (quoting 28 U.S.C. § 151).

argument" that a party may bypass bankruptcy gatekeeping orders "by filing suit in the district court with supervisory authority over the bankruptcy court."[31]

Third, Contemnors claim they lacked "clear notice" that their request to the district court violated the gatekeeping orders because that is not a "plain or exclusive reading of those orders."[32] It's true that only a "definite and specific order" that proscribes the performance of "a particular act" can form the foundation of a contempt finding.[33] But the underlying order need not "anticipate every action to be taken in response to it[],"[34] because bankruptcy courts are "entitled to a degree of flexibility in vindicating [their] authority against actions that . . . violate the reasonably understood terms of the order."[35]

The gatekeeping orders were definite and specific: They proscribed the pursuit of claims against Seery sans bankruptcy-court approval. Accordingly, the bankruptcy court did not need to delineate every activity that could constitute pursuit of a claim against Seery. And it certainly did not need to explain that filing a proposed complaint—which this Court could automatically docket—constituted pursuit of a claim. Although Contemnors cite cases where the sanctioned conduct was unrelated

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[31] *Villegas v. Schmidt*, 788 F.3d 156, 159 (5th Cir. 2015). Although Contemnors claim that *Villegas* "was careful to limit its holding," they only cite limiting language from a section that did not deal with the argument that bankruptcy courts are merely units of the district court. Doc. No. 19 at 31 n.5. When it actually addressed Contemnors' argument, the Fifth Circuit was clear that it "maintained the distinction between the bankruptcy court and the district court." *Villegas*, 788 F.3d at 159.

[32] Doc. No. 19 at 32.

[33] *In re Skyport Glob. Commc'ns, Inc.*, 661 F. App'x 835, 840 (5th Cir. 2016) (cleaned up).

[34] *Am. Airlines, Inc. v. Allied Pilots Ass'n*, 228 F.3d 574, 578 (5th Cir. 2000).

[35] *Hornbeck Offshore Servs., L.L.C. v. Salazar*, 713 F.3d 787, 792 (5th Cir. 2013).

to the underlying order, they fail to find any precedent where an underlying order was fatally indefinite merely on account of a contemnor's definitional quibble.[36]

Fourth, Contemnors Sbaiti and Bridges assert deficient notice because they "entered the case after" the gatekeeping orders were already in existence.[37] But the record belies Contemnors' cry of ignorance. Acknowledging that Contemnors Sbaiti and Bridges were "new to the case," Highland's counsel—prior to the Seery Motion—made them "aware of the . . . Bankruptcy Court orders that prohibit Mr. Seery . . . from being sued without first obtaining authority from the Bankruptcy Court."[38] Lest doubt remain, Highland's counsel clarified that Contemnors would "violate such Orders by filing [their] motion in the District Court."[39] Sbaiti and Bridges had notice.

Fifth, Contemnors contend that their "good faith" and "forthright[ness]" counsel against a contempt finding.[40] And Contemnors Sbaiti and Bridges claim they lacked notice that the Seery Order would prohibit the conduct of those "who acted with complete candor towards this Court."[41] But candor is inapposite. The

[36] *See In re Baum*, 606 F.2d 592, 593 (5th Cir. 1979) (reversing sanctions for attorney's taking deposition, when the bankruptcy court previously ordered that the deposition notice was vacated but "did not explicitly direct that the deposition not take place"); *In re Gravel*, 6 F.4th 503, 513 (2d Cir. 2021) (concluding that a bankruptcy court's order did not provide notice where it prohibited challenges to a debtor's status "in any other proceeding," and the sanctioned conduct occurred outside of court), *cert. denied sub nom. Sensenich v. PHH Mortgage Corp.*, 142 S. Ct. 2829 (2022).

[37] Doc. No. 19 at 34.

[38] Doc. No. 8-7 at 93.

[39] *Id.* at 92.

[40] Doc. No. 19 at 35.

[41] *Id.* at 34.

gatekeeping orders didn't proscribe deceitful conduct—they prohibited pursuit of claims against Seery. Forthright disregard of a court order is no defense.[42]

Similarly, Contemners assert that the Seery Motion was "harmless[]" because this Court denied it "before Highland expended any time responding."[43] But the time entries of Highland's counsel tell another story. Highland spent thousands of dollars preparing to fight the Seery Motion before this Court denied it.[44] With no indication Contemnors would abandon their ambitions to sue Seery, Highland did not need to wait to suffer more harm.

The bankruptcy court did not err in finding Contemnors in contempt for violating its gatekeeping orders.

B. Gatekeeping Orders

Contemnors challenge the gatekeeping orders themselves, claiming that bankruptcy courts may not shield the actions of a company's CEO. They also assert

[42] *Cf. Taggart v. Lorenzen*, 139 S. Ct. 1795, 1802 (2019) ("[A] party's subjective belief that she was complying with an order ordinarily will not insulate her from civil contempt if that belief was objectively unreasonable.").

[43] Doc. No. 19 at 35.

[44] Doc. No. 8-45 at 21–23 (recognizing that Highland's lawyers billed myriad hours discussing "DAF lawyers[] correspondence to add CEO to DAF lawsuit, and how to respond," reviewing "e-mails . . . re[garding] DAF intention to name Seery as a defendant," "telephone conferenc[ing] . . . re: DAF intention to name Seery as a defendant," "[r]eview[ing] . . . DAF motion for leave to amend and add CEO," reviewing "correspondence with Board" regarding the motion, and "conferenc[ing] . . . regarding DAF motion to amend and response," to name a few).

that gatekeeping orders cannot shield "debtors in possession . . . with respect to any of their acts or transactions in carrying on business connected with such property."[45]

Highland asserts that this Court cannot consider Contemnors' collateral challenge of the gatekeeping orders. A "collateral attack on an [order] during contempt proceedings is prohibited if earlier review of the [order] was available."[46] In fact, when asked to review the Governance and Seery Orders, the Fifth Circuit recently concluded that it lacked "jurisdiction to consider collateral attacks on final bankruptcy orders."[47] This Court agrees that it lacks jurisdiction to consider Contemnors' collateral attack. Like the Fifth Circuit, this Court declines to "roll back the protections" of the gatekeeping orders.[48] Contemnors provide three responses.

First, Contemnors claim that the bar against collateral attacks applies only when the contemnor "previous[ly]" challenged the order and then, during contempt proceedings, asked the court to "reopen" the issue.[49] That's wrong. Both the Fifth

[45] Doc. No. 19 at 40 (quoting 28 U.S.C. § 959(a)).

[46] *W. Water Mgmt., Inc. v. Brown*, 40 F.3d 105, 108 (5th Cir. 1994); *accord Reich v. Crockett*, No. 95-50159, 1995 WL 581875, at *2 (5th Cir. 1995) (per curiam) ("The collateral attack of an injunction in a contempt proceeding is prohibited where the injunction was subject to earlier review."); *G. & C. Merriam Co. v. Webster Dictionary Co., Inc.*, 639 F.2d 29, 34 (1st Cir. 1980) ("Ordinarily the validity and terms of an injunction are not reviewable in contempt proceedings."); *cf. Maggio v. Zeitz*, 333 U.S. 56, 68 (1948) ("[T]he turnover proceeding is a separate one and, when completed and terminated in a final order, it becomes res judicata and not subject to collateral attack in the contempt proceedings.").

[47] *Highland Capital*, 2022 WL 4093167, at *12 n.15.

[48] *Id.*

[49] Doc. No. 38 at 11 (cleaned up); *see also Brown*, 40 F.3d at 108 (declining to allow litigants to "reopen consideration of [an] issue" after their "previous attack" on an injunction).

Circuit[50] and other courts[51] have declined to hear collateral challenges to orders even when the litigants had not previously challenged those orders. And, in considering the gatekeeping orders, the Fifth Circuit did not require a previous challenge to solidify "the orders' ongoing *res judicata* effects and our lack of jurisdiction to review those orders."[52]

Second, Contemnors assert that "the Seery Order was not even a 'final' appealable order because the bankruptcy court retained jurisdiction."[53] The Fifth Circuit disagreed, describing the gatekeeping orders as "final."[54]

Third, Contemnors aver that they lacked "notice of the Seery Order when it was issued" and thus could not "have filed a timely appeal even if they wanted to."[55] It's true that collateral attacks are barred only where the party—or "those in privity with them"—had "a fair chance to challenge" the orders.[56] But that doesn't help Contemnors. Dondero affirmatively agreed to the Governance Order,[57] and both Dondero and CLO Holdco were served with the Seery Order.[58] Further, DAF is in

[50] *Crockett*, 1995 WL 581875, at *1–2 (declining to allow a collateral attack when a party previously "consent[ed]" to an injunction, but it was "subject to direct review by this court").

[51] *John Zink Co. v. Zink*, 241 F.3d 1256, 1260 (10th Cir. 2001) ("This issue ***should have been raised*** in an appeal from the 1987 proceeding and defendants are barred from raising the issue now." (emphasis added)); *G. & C. Merriam*, 639 F.2d at 34 (finding that an injunction was "not reviewable in contempt proceedings" even when the contemnor "failed effectively to exercise its right of appeal").

[52] *Highland Capital*, 2022 WL 4093167, at *12 n.15.

[53] Doc. No. 38 at 15 (cleaned up).

[54] *Highland Capital*, 2022 WL 4093167, at *12 n.15.

[55] Doc. No. 38 at 15.

[56] *In re Linn Energy, L.L.C.*, 927 F.3d 862, 867 (5th Cir. 2019) (cleaned up).

[57] Doc. No. 8-4 at 32.

[58] Doc. No. 8-28 at 88.

privity with CLO Holdco because it controls and owns 100% of CLO Holdco.[59] Patrick is in privity with DAF and CLO Holdco because he is DAF's managing member, and his predecessor was "the only human being authorized to act on behalf of CLO Holdco and [] DAF."[60] Likewise, the Sbaiti firm and its lawyers are in privity with DAF because they represent DAF. Thus, Contemnors had a fair chance to challenge the gatekeeping orders or are in privity with an entity that did.[61]

C. Punitive Sanctions

Contemnors first assert that the bankruptcy court's $100,000-per-appeal sanction was excessive and punitive.[62] Highland agrees that this Court should vacate that award. Because the parties are in accord, the Court vacates the bankruptcy court's $100,000-per-appeal sanction without prejudice.[63]

Contemnors also assert that the bankruptcy court's $239,655 sanction was "criminal, rather than civil."[64] "[B]ankruptcy courts do not have inherent *criminal* contempt powers"—they can only issue civil contempt sanctions.[65]

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[59] Doc. No. 8-41 at 84–85.

[60] Doc. No. 8-41 at 84–85; *see also* Doc. No. 19 at 34–35.

[61] Contemnors also analogize to as-applied challenges, claiming that parties may "challenge regulations as applied to them, despite the limitations period for facial challenges having expired." Doc. No. 19 at 33. Whatever the merits of that analogy, it does not allow this Court to ignore Fifth Circuit precedent barring collateral attacks during contempt proceedings.

[62] Doc. No. 8-1 at 41 ("[T]he court will add on a sanction of $100,000 for each level of rehearing, appeal, or petition for [*certiorari*] that the Alleged Contemnors may choose to take with regard to this Order, to the extent any such motions for rehearing, appeals, or petitions for certiorari are not successful.").

[63] Because the Court vacates that award based on the parties' agreement, it need not reach Contemnors' arguments that that award is punitive, unconstitutional, or outside the bankruptcy court's authority.

[64] Doc. No. 19 at 44.

[65] *In re Hipp, Inc.*, 895 F.2d 1503, 1511 (5th Cir. 1990).

To determine whether a sanction is criminal or civil, courts examine the "primary purpose" of the sanction.[66] If the primary purpose is "to punish the contemnor and vindicate the authority of the court," then the sanction is criminal; but if the primary purpose is "to coerce the contemnor into compliance with a court order, or to compensate another party for the contemnor's violation," then the order is civil.[67]

The bankruptcy court recognized that it could only order sanctions necessary to "coerce obedience" or "compensate the Debtor," deciding that "compensatory damages are more appropriate."[68] Thus, the court reviewed "invoices of the fees incurred by [Highland's] counsel relating to this matter," finding that fees totaling $187,795 were "reasonable and necessary fees incurred in having to respond . . . to the contemptuous conduct."[69] In addition, the court recognized that three attorneys participated in the contempt hearing, multiplied their hourly rates times the length of the hearing, and thus imposed $11,860 in additional costs. After that, the court made some assumptions. For instance, the court recognized an additional $22,271.14 that Highland's counsel "incurred during this time period" and reduced that number to $10,000, "assum[ing]" that that lower amount related to the contempt hearing.[70] The court also "assume[d] the [Unsecured Creditors Committee] incurred $20,000 in fees monitoring this matter," evidenced by the fact that the Committee's lawyer

[66] *Lamar Fin. Corp. v. Adams*, 918 F.2d 564, 566 (5th Cir. 1990).

[67] *Id.*

[68] Doc. No. 8-1 at 60.

[69] *Id.*

[70] *Id.* at 61.

attended the contempt hearing.[71] Lastly, the court assumed that Highland's local counsel "incurred $10,000 in fees."[72] Contemnors lodge five objections to that award.

First, Contemnors aver that the bankruptcy court "repeatedly emphasized" that it imposed sanctions to punish Contemnors—not to compensate Highland.[73] Oddly enough—considering the alleged "repeated emphasis"—Contemnors can't come up with a solitary quote supporting that assertion. That's because the bankruptcy court expressly designed its award to "compensate the Debtor"[74]—not to mete out punishment—and based its sanctions entirely on its calculation of Highland's attorneys' fees.[75]

Second, Contemnors contend that the sanction is excessive and that the bankruptcy court "largely pulled numbers out of thin air" in making assumptions about which fees might relate to the contempt motion.[76] But "[t]he essential goal in shifting fees . . . is to do rough justice."[77] This Court need not demand "auditing perfection" of the bankruptcy court, and it must give "substantial deference" to the "court's overall sense of a suit."[78] Although the bankruptcy court did make multiple

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[71] *Id.*

[72] *Id.*

[73] Doc. No. 19 at 45.

[74] Doc. No. 8-1 at 60.

[75] *See Ravago Americas L.L.C. v. Vinmar Int'l Ltd.*, 832 F. App'x 249, 255 (5th Cir. 2020) (per curiam) ("[F]or a sanction to be compensatory, it must be measured in some degree by the pecuniary injury caused by the act of disobedience." (cleaned up)).

[76] Doc. No. 19 at 49.

[77] *Roussell v. Brinker Intern., Inc.*, 441 F. App'x 222, 233 (5th Cir. 2011) (per curiam) (cleaned up).

[78] *Id.* (cleaned up).

assumptions, Contemnors do not quibble with any particular assumption. Absent any argument that the bankruptcy court botched a particular calculation, this Court cannot conclude that the bankruptcy court erred.[79]

Third, Contemnors assert that the bankruptcy court erred in awarding Highland fees associated with the contempt motion because "litigants are expected to pay the fees for the litigation tactics they employ."[80] Not so. The Fifth Circuit has affirmed sanctions that "reimburse [the opposing litigant] for its reasonable attorney fees related to the hearing on the motion for contempt."[81] In awarding compensatory civil sanctions, bankruptcy courts do not err in awarding a sanction that "restores the

[79] *See Skyport Glob.*, 661 F. App'x at 841–42 (finding no error where "the bankruptcy court carefully calculated the fees and awarded far less than was requested").

[80] Doc. No. 19 at 47.

[81] *Ravago*, 832 F. App'x at 253, 261; *accord Skyport Glob.*, 661 F. App'x at 841 ("Almost without exception it is within the discretion of the trial court to include, as an element of damages assessed against the defendant found guilty of civil contempt, the attorneys' fees incurred in the investigation and prosecution of the contempt proceedings." (cleaned up)). Although Contemnors make an argument "borrowing . . . from tort law," they fail to explain how this Court could abandon binding Fifth Circuit authority in favor of a tort-law theory. Doc. No. 19 at 48.

. . . parties to where they were before they incurred attorneys' fees in an attempt to ensure compliance with the injunction."[82]

Fourth, Contemnors aver that civil sanctions must be "conditional" in that they "may be lifted if the contemnor changes course."[83] And they cite the Supreme Court's statement that "a flat, unconditional fine totaling even as little as $50 announced after a finding of contempt is criminal if the contemnor has no subsequent opportunity to . . . avoid the fine through compliance."[84] Because the $239,655 sanction was not conditional, they contend it constituted a criminal sanction.

But Contemnors strip the Supreme Court's statement from its salient context. The Supreme Court really said that civil sanctions can either (1) "coerce[] the defendant into compliance" or (2) "compensate[] the complainant."[85] "Where a fine is ***not compensatory***, it is civil only if the contemnor is afforded an opportunity to purge" and "avoid the fine through compliance."[86] In other words, the conditional nature of a sanction matters only if the sanction is meant to "***coerce***[] the defendant

[82] *Skyport Glob.*, 661 F. App'x at 841. Contemnors also assert that Highland might have paid more attorneys' fees if Contemnors had properly requested the bankruptcy court's permission to sue Seery, and they cite *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1187 (2017) (cleaned up), for the proposition that a "complainant in a contempt action may recover only the portion of his fees that he would not have paid but for the misconduct." Doc. No. 19 at 47 (cleaned up). But Contemnors misconstrue *Goodyear*. In reality, *Goodyear* made clear that courts must "determine whether a given legal fee—say, for taking a deposition or drafting a motion—would or would not have been incurred in the absence of the sanctioned conduct." *Goodyear*, 137 S. Ct. at 1187. The bankruptcy court properly constrained its compensatory award to fees incurred during the contempt hearing, which would not have occurred in the absence of the sanctioned conduct.

[83] Doc. No. 19 at 45.

[84] Doc. No. 38 at 18 (quoting *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 829 (1994)).

[85] *Bagwell*, 512 U.S. at 829 (cleaned up).

[86] *Id.* (emphasis added).

into compliance"—not where it ***compensates*** the injured party.[87] Thus, when the bankruptcy court expressly designed its award to "compensate the Debtor," it did not need to craft a conditional sanction.[88]

The bankruptcy court did not err in imposing the $239,655 sanction.

D. Dondero

Arguing separately, Dondero asserts that the bankruptcy court erred in holding him in contempt. At the outset, the parties dispute the appropriate standard of review.[89] This Court reviews the bankruptcy court's sanction of Dondero for abuse of discretion.[90] Thus, to the extent Dondero challenges the bankruptcy court's factual findings about him, this Court reviews those findings for clear error.[91] To the extent he challenges the court's legal conclusions concerning the scope of its gatekeeping orders, this Court reviews that issue *de novo*.[92]

The bankruptcy court made three factual findings concerning Dondero. It concluded that "Dondero sparked this fire," meaning that he had "the idea of bringing the District Court Action to essentially re-visit the HarbourVest Settlement and to find a way to challenge Mr. Seery's and the Debtor's conduct."[93] Next, the court

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[87] *Bagwell*, 512 U.S. at 829 (emphasis added).

[88] Doc. No. 8-1 at 60.

[89] *Compare* Doc. No. 33 at 40 (arguing that this issue involves "factual matter" that this Court reviews for "clear error"), *with* Doc. No. 37 at 6 n.2 (arguing that this issue involves a "question of law that is reviewed *de novo*").

[90] *Pratt*, 524 F.3d at 584 (cleaned up).

[91] *Id.*

[92] *Id.*

[93] Doc. No. 8-1 at 53.

concluded that "Dondero encouraged Mr. Patrick to do something wrong."[94] Finally, it concluded that Patrick "basically abdicated responsibility to Mr. Dondero with regard to dealing with Sbaiti and executing the litigation strategy."[95] Dondero lodges four objections.

First, Dondero asserts that "[t]hese findings are not supported by the record"[96] and that he "had no involvement with the Seery Motion."[97] Instead, he claims that he provided the Sbaiti Firm and Patrick "*factual information only*."[98] This Court reviews the bankruptcy court's factual conclusions for clear error, which occurs only if, "on the entire evidence, the court is left with the definite and firm conviction that a mistake has been committed."[99]

Ample evidence supports the bankruptcy court's factual findings. Dondero has had a significant role in DAF for over a decade. DAF's assets come in part from Dondero and his "family trusts."[100] Dondero "was DAF's managing member until 2012," and he remains "DAF's informal investment advisor."[101] After Dondero stepped down as managing member, that role went to Grant Scott, "Dondero's long-

[94] *Id.*

[95] *Id.*

[96] Doc. No. 17 at 37.

[97] *Id.* at 29.

[98] Doc. No. 37 at 12.

[99] *In re Dennis*, 330 F.3d 696, 701 (5th Cir. 2003) (cleaned up).

[100] Doc. No. 8-1 at 34.

[101] *Id.*

time friend, college housemate, and best man at his wedding."[102] Scott ultimately resigned due to "disagreements with . . . Dondero."[103]

Patrick replaced Scott as "DAF's general manager on March 24, 2021"—19 days before the Seery Motion.[104] Patrick initially had "no reason to believe that Mr. Seery had done anything wrong with respect to the HarbourVest transaction."[105] Only once "Dondero told [him] that an investment opportunity was essentially usurped"[106] did Patrick "engage[] the Sbaiti firm to launch an investigation" and ask "Mr. Dondero to work with the Sbaiti firm with respect to their investigation of the underlying facts."[107] After that, Dondero "communicated directly with the Sbaiti firm"—Patrick did not.[108] Dondero "saw versions of the complaint before it was filed" and had "conversations with attorneys" about the complaint pre-filing.[109] That complaint focused on "Seery's allegedly deceitful conduct" and "mention[ed] Mr. Seery 50 times."[110] Further, when listing the parties, the complaint listed each party named

[102] *Id.* at 34–35.

[103] *Id.*

[104] *Id.* at 35.

[105] Doc. No. 8-45 at 179.

[106] *Id.*

[107] *Id.* at 178.

[108] *Id.* at 180.

[109] Doc. No. 8-30 at 145–46.

[110] Doc. No. 8-1 at 58–59.

in the caption along with "[p]otential party James P. Seery, Jr.," providing his citizenship and domicile.[111]

Further, although Dondero averred that he did not direct the Sbaiti firm to add Seery to the complaint, Dondero also contradicted himself, first claiming that he did not know that "the Sbaiti firm intended to file a motion for leave to amend their complaint to add Mr. Seery,"[112] but then agreeing during the hearing that he "[p]robably" was "aware that that motion was going to be filed prior to the time that it actually was filed."[113] He also testified to conversations about the Seery Motion, noting that it involved a "very complicated legal preservation" issue.[114]

Based on all that evidence, the Court is not left with a definite and firm conviction that the bankruptcy court erred. After being stymied in the bankruptcy court, Dondero manufactured the exigency for the lawsuit that challenged Seery's conduct. Dondero's claim that he "did not suggest that Mr. Seery should be added as a defendant"[115] is not credible. Dondero gave Patrick the idea of challenging Seery's conduct, and he worked with the Sbaiti firm to bring that idea to fruition in the complaint—a complaint that clearly contemplated adding Seery to the lawsuit. Likewise, his plea that he "had no involvement with the Seery Motion"[116] is not

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[111] Doc. No. 8-7 at 48.

[112] Doc. No. 8-30 at 153.

[113] Doc. No. 8-46 at 83. Although Dondero asserts that "no evidence demonstrates that he knew about . . . the . . . Seery Motion before it was filed," his testimony that he "probably" knew about the Seery Motion provides at least some evidence of his knowledge. Doc. No. 37 at 14.

[114] Doc. No. 8-46 at 83.

[115] Doc. No. 17 at 38.

[116] *Id.* at 22.

credible. Dondero himself testified to the contents of attorney communications concerning the Seery Motion, eventually admitting that he "probably" had knowledge of the Motion before it was filed. In short, the bankruptcy court did not err, after considering the "totality of the evidence," in finding that Dondero had "the idea of" suing to "challenge Mr. Seery's . . . conduct," that he "encouraged Mr. Patrick to do something wrong," and that Patrick "abdicated responsibility to Mr. Dondero with regard to . . . executing the litigation strategy."[117]

Second, Dondero repeatedly asserts that the "only way" the bankruptcy court could have found him in contempt is if the court found him to be "an 'authorizing person' for [] DAF or CLO Holdco."[118] Because Patrick was DAF's managing member, Dondero asserts that only Patrick could have been an "authorizing person" who could be held in contempt. Tellingly, Dondero provides no citation for his claim that only "authorizing persons" can be liable for contempt. Although he cites a Texas Supreme Court case holding that corporate agents are "not necessarily" liable for a corporation's contemptuous conduct, that case held that an agent could be liable if there was "evidence in the record that the corporate agent . . . was somehow *personally* connected with defying the authority of the court."[119] And here, evidence

[117] Doc. No. 8-1 at 53.

[118] Doc. No. 17 at 29; *see also id.* at 37 (arguing "that was the ***only way*** Mr. Dondero could have been held in contempt" (emphasis added)).

[119] *Ex parte Chambers*, 898 S.W.2d 257, 261 (Tex. 1995).

abounds that Dondero was personally connected with violating the gatekeeping orders.[120]

Third, Dondero asserts that the bankruptcy court erred in holding him in contempt "sua sponte."[121] Highland's initial contempt motion did not name Dondero, and Dondero contends that "a civil contempt sanction may [not] be imposed without a request of a party."[122] That's wrong. "[B]ankruptcy courts may *sua sponte*, take any action necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process," including issuing "civil contempt orders."[123] For instance, courts may "*sua sponte* order[]" individuals to "show cause why they should not . . . be sanctioned and held in contempt."[124]

Fourth, Dondero complains that he did not have "prior notice" that he could be held in contempt because the bankruptcy court's show cause order did "*not* include[]

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[120] Contemnors also cite agency law and argue that the bankruptcy court found that Dondero was not an agent of DAF or CLO Holdco for purposes of attorney-client privilege. But that misses the point. As Highland rightly argues, "[i]t does not matter whether Dondero was acting as an agent of DAF or CLO Holdco; what matters is whether he acted to violate two Bankruptcy Court Orders *that explicitly restrained his own personal conduct*." Doc. No. 33 at 42.

[121] Doc. No. 17 at 42.

[122] *Id.* at 43 (quoting *United States v. Russotti*, 746 F.2d 945, 949 (2d Cir. 1984)). At the outset, Dondero's cases are inapposite. One of his cases questioned a court's civil-contempt authority to issue a sanction when the purportedly aggrieved party declined to "submit[] any papers in this Court" opposing the contemnors actions. *Russotti*, 746 F.2d at 949. Another case determined which *parties* may institute civil contempt proceedings. *MacNeil v. United States*, 236 F.2d 149, 153 (1st Cir. 1956) ("[C]ivil contempt proceedings may be instituted only by the parties primarily in interest."). Neither of those issues is relevant here because Highland, the proper party, requested sanctions.

[123] *In re Cleveland Imaging & Surgical Hosp., L.L.C.*, 26 F.4th 285, 294 & n.14 (5th Cir. 2022) (cleaned up); *see also Lamar*, 918 F.2d at 566 ("Acting *sua sponte* . . . the district court ordered the Adamses to appear before it . . . and to show cause why they should not be held in contempt.").

[124] *Hill v. Hunt*, No. 3:07-CV-2020-O, 2010 WL 11537888, at *1 (N.D. Tex. Feb. 6, 2010) (Solis, J.); *see also Netsphere, Inc. v. Baron*, No. 3:09-CV-0988-F, 2011 WL 13130079, at *3 (N.D. Tex. Dec. 13, 2011) (Furgeson, J.) ("If ICANN fails to comply with the Court's orders, then the Court will proceed *sua sponte* to hold a hearing to determine if ICANN is in contempt and should be subjected to fines and sanctions.").

[him] in the definition of Violators."[125] Although the show cause order didn't define "violators," it required DAF, CLO Holdco, and "Dondero [to] appear in-person before this Court and show cause why an order should not be granted . . . finding and holding each of the Violators in contempt of court."[126] The only reasonable interpretation is that "violators" denoted the aforementioned individuals and entities summoned to court to defend their conduct.

Dondero disagrees, averring there is nothing "in the record suggesting that the Order should be read" to include him as a violator.[127] *Au contraire*. Dondero himself admitted to the bankruptcy court his understanding that he had been "named by the Court as an alleged or implied violator."[128] Thus, as Highland rightly argues, "Dondero's feigned surprise . . . is an unpersuasive attempt to rewrite history."[129]

The Court cannot find that the bankruptcy court erred in sanctioning Dondero.

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[125] Doc. No. 17 at 46–47. He also claims that this dearth of notice constituted a due process violation. *Id.* at 49. This Court rejects that argument because Dondero did have notice and an opportunity to be heard.

[126] Doc. No. 8-8 at 138 (emphasis omitted).

[127] Doc. No. 37 at 17.

[128] Doc. No. 8-8 at 171. To borrow Contemnors' turn of phrase, Dondero's counsel "repeatedly emphasized" that the court had named Dondero as a violator. *See* Doc. No. 8-45 at 159–60 (acknowledging that Dondero was "an alleged violator"); Doc. No. 8-46 at 150 (acknowledging that Dondero and his counsel appeared because Dondero "was named . . . within the order as an alleged violator"). Dondero contends that he didn't acknowledge that he was named as a violator because he was only making the argument that he was not "a control or authorizing person." Doc. No. 8-8 at 171; *see also* Doc. No. 37 at 19. But his argument that he was not *properly* before the court does not undermine his acknowledgment that he had been *named* by the court as a violator.

[129] Doc. No. 33 at 44. Dondero's citation to *Skinner v. White*, 505 F.2d 685, 690 (5th Cir. 1974), hurts his case. The court there recognized that an order "to show cause . . . called upon [the named person] to answer simply for the act and conduct specified." *Id.* at 690–91 (cleaned up). Thus, *Skinner* suggests that an order to show cause provides the named individual notice that it could be held in contempt for the specified conduct.

E. Constitutional Objections

Contemnors lodge a bevy of constitutional objections, which this Court reviews *de novo*.[130] They ask the Court to recognize these "troubling constitutional issues," practice constitutional avoidance, and bypass these "constitutionally turbulent waters."[131] Finding no constitutional turbulence, this Court declines.

a. Due Process

Contemnors raise five due process issues.

First, Contemnors contend that the bankruptcy court violated due process by failing to provide notice of "the scope of potential sanctions for . . . a minor supposed infraction."[132] Sanction decisions "must comport with due process."[133] "[D]ue process demands . . . that the sanctioned party be afforded notice . . . ."[134] The bankruptcy court's show cause order provided each of the named parties notice of their alleged violations and notice that the court might impose an award equal to Highland's "actual expenses incurred in bringing this Motion."[135] Contemnors cite no authority

[130] *Jarkesy v. SEC*, 34 F.4th 446, 451 (5th Cir. 2022).

[131] Doc. No. 19 at 64–65.

[132] *Id.* at 53.

[133] *Spiller v. Ella Smithers Geriatric Ctr.*, 919 F.2d 339, 346 (5th Cir. 1990) (cleaned up).

[134] *Meyers v. Textron Fin. Corp.*, 609 F. App'x 775, 778 (5th Cir. 2015) (cleaned up).

[135] Doc. No. 8-8 at 138–39.

holding that notice must include a dollar range of any possible sanctions. Their notice argument is meritless.[136]

Second, Contemnors ask this Court to apply the rule of lenity. The rule of lenity "says that . . . ***criminal*** statutes will be construed favorably to ***criminal*** defendants."[137] As this Court has already found, the bankruptcy court did not impose criminal sanctions. The rule of lenity is inapplicable.

Third, Contemnors claim that the bankruptcy court prejudged their case when it referred to Contemnors as "violators" in its show cause order. It's true that "a fair tribunal is a basic requirement of due process."[138] But Contemnors fail to show that the court prejudged the case. The show cause order adopted the term "violators" from Highland's contempt motion.[139] In total, the order referred to Contemnors as "violators" three times. Contemnors cite no precedent where any similar isolated references deprived a contemnor of due process. Absent such an argument, this Court cannot conclude that the bankruptcy court's isolated use of "violators" deprived Contemnors of due process.

Fourth, Contemnors claim the bankruptcy court prejudged the case by "shift[ing] the burden" to Contemnors to show cause why they should not be held in

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[136] Contemnors contend that the presence of "notice and due process *during the contempt proceedings* . . . . does not cure the bankruptcy court's failure to provide clear notice before the motion for leave was filed regarding the breadth of the Seery Order." Doc. No. 38 at 28. This Court already concluded Contemnors had notice of the scope of the Seery Order. *See* Part III.A. To the extent they regurgitate that argument as a due-process argument, it is likewise meritless.

[137] Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 332 (2000) (emphases added).

[138] *In re Murchison*, 349 U.S. 133, 136 (1955).

[139] Doc. No. 8-4 at 183.

contempt.[140] But show cause orders do not improperly shift the burden to the alleged contemnor.[141] This Court rejected a similar argument where the bankruptcy court made clear that it was applying a "clear and convincing evidence" burden of proof.[142] Because the bankruptcy court made clear that it was applying a "clear and convincing evidence" burden of proof, this Court cannot conclude that the bankruptcy court improperly shifted the burden to Contemnors.[143]

Fifth, Contemnors assert that the bankruptcy court prejudged the case by allowing evidence of Dondero's actions, even though he was not a litigant in the HarbourVest suit. But one of the primary purposes of the gatekeeping orders was to shield Seery from "Dondero's continued litigiousness."[144] Further, Contemnors filed the Seery Motion shortly after Dondero and CLO Holdco objected concerning the same transaction in the bankruptcy court. The court did not need to ignore the context of this litigation, and it was entitled to question whether Dondero might be

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[140] Doc. No. 19 at 54.

[141] *Am. Airlines*, 228 F.3d at 581–84 (recognizing "the district court's Show Cause Order" and still recognizing that the "movant in a civil contempt proceeding bears the burden" (cleaned up)).

[142] *In re LATCL&F, Inc.*, No. 398-35100-HCA, 2001 WL 984912, at *3 (N.D. Tex. Aug. 14, 2001) (Buchmeyer, C.J.).

[143] Doc. No. 8-1 at 58.

[144] *Highland Capital*, 2022 WL 4093167, at *3.

involved with the Seery Motion. The bankruptcy court did not prejudge the suit by allowing evidence concerning Dondero.

The Court cannot conclude that the bankruptcy court violated due process.

b. Appointments Clause

Contemnors next argue that "construing Judge Jernigan's authority as expansive and subject to deference runs headlong into caselaw concerning the Appointments Clause."[145] Specifically, Contemnors apply four factors enumerated in *Morrison v. Olson*, 487 U.S. 654 (1988), contending that bankruptcy judges are principal offers.

The Appointments Clause says that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States"—known as principal officers.[146] The so-called Excepting Clause says that "Congress may by Law vest the Appointment of [] inferior Officers . . . in the Courts of Law."[147] Bankruptcy judges are "appointed by the court of appeals of the United States."[148] Consequently, if bankruptcy judges are principal officers, then an Appointments Clause issue arises, given the dearth of presidential appointment or

[145] Doc. No. 19 at 59.

[146] U.S. Const. art. II, § 2, cl. 2.

[147] *Id.*

[148] 28 U.S.C. § 152(a)(1).

senatorial advice and consent. Thus, this issue hinges on whether bankruptcy judges are principal or inferior officers.

Edmond v. United States, 520 U.S. 651, 658–66 (1997)—a case conspicuously absent from Contemnors' copious briefing—considered whether judges of the Coast Guard Court of Criminal Appeals were principal or inferior officers. *Edmond* held that "'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."[149] The Coast Guard judges qualified as inferior because both the Judge Advocate General and the Court of Appeals for the Armed Forces (the "CAAF") had power to review their judgments.[150] Even though the CAAF's review was limited to determining whether there was "some competent evidence in the record to establish each element," the Court concluded that this "limitation upon review does not . . . render the [Coast Guard] judges . . . principal officers" because they could only render a final decision if "permitted to do so by other Executive officers."[151]

Edmond's reasoning suggests that bankruptcy judges are inferior officers. For instance, bankruptcy judges' work is "subject to appellate review, first by the district courts and then by the courts of appeals."[152] Although Contemnors are correct that this Court, on certain issues, provides deference to the bankruptcy court, that

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[149] *Edmond*, 520 U.S. at 663.

[150] *Id.* at 664.

[151] *Id.* at 664–65.

[152] Tuan Samahon, *Are Bankruptcy Judges Unconstitutional? An Appointments Clause Challenge*, 60 Hastings L.J. 233, 288 (2008).

deference in no way rivals the CAAF's deference approved in *Edmond*. As Contemnors' leading source on the issue candidly concedes, "bankruptcy judges ultimately 'have no power to render a final decision . . . unless permitted to do so' by superior judicial officers."[153] Thus, it's not shocking that the only courts to consider the issue have rejected similar Appointments Clause challenges.[154]

Contemnors' contrary argument rests entirely on *Morrison v. Olson*. But "*Edmond* . . . essentially displaced the faulty Appointments Clause analysis of *Morrison*."[155] And *Edmond* itself acknowledged that the Coast Guard judges would have satisfied multiple *Morrison* factors—yet it failed to follow those factors.[156] Further, the Fifth Circuit cites *Edmond* as the defining test for Appointments Clause issues—not *Morrison*.[157]

Contemnors provide no justification for their reliance on *Morrison* over *Edmond*. Absent such an argument, this Court cannot conclude that bankruptcy judges are unconstitutionally appointed.

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[153] *Id.* (quoting *Edmond*, 520 U.S. at 665).

[154] *In re Khan*, No. 10-46901-ESS, 2014 WL 10474969, at *54 (E.D.N.Y. Dec. 24, 2014) ("Defendant has not shown that Article II and the Appointments Clause prevent this Court from hearing and determining this adversary proceeding."); *see also In re Khan*, 706 F. App'x 22, 22–23 (2d Cir. 2017) (rejecting the argument that "bankruptcy judges are not appointed in accordance with the Appointments Clause of the United States Constitution"). Contemnors assert that "much water has passed under the Appointments Clause bridge since" those cases. Doc. No. 38 at 30. But they fail to identify said "water."

[155] Steven G. Calabresi, *The Structural Constitution and the Countermajoritarian Difficulty*, 22 Harv. J.L. & Pub. Pol'y 3, 5 (1998) (emphases added).

[156] *Edmond*, 520 U.S. at 661 (concluding that the Coast Guard judges are "not 'limited in tenure,' as that phrase was used in *Morrison* . . . . Nor are military judges 'limited in jurisdiction'").

[157] *See Burgess v. FDIC*, 871 F.3d 297, 303 (5th Cir. 2017) ("As the Supreme Court stated in *Edmond*, inferior Officers' work is often directed and supervised . . . by a superior." (cleaned up)).

c. Other Constitutional Issues

Contemnors claim that the sanctions violate the Eighth Amendment's prohibition on excessive fines. But "a fine assessed for civil contempt does not implicate the Excessive Fines Clause."[158] And this Court has already determined that the bankruptcy court's sanctions were civil—not criminal.

Next, Contemnors assert that the gatekeeping orders constitute a judicial taking. Their paltry argument on this point spans three sentences, culminating in their admission that their on-point case held that "Takings Clause claims for compensation are unavailable against a bankruptcy judge."[159] Without more, Contemnors have failed to make out a judicial-takings argument.

Lastly, Contemnors assert that "the power exercised by bankruptcy courts . . . raise[s] serious separation of powers concerns" because "the gatekeeping orders purport to oust the authority of this Court to hear cases between private parties in the first instance, imposing an initial non-judicial bite at the apple."[160] Once again,

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[158] *In re Grand Jury Proc.*, 280 F.3d 1103, 1110 (7th Cir. 2002); *accord United States v. City of Yonkers*, 856 F.2d 444, 459 (2d Cir. 1988) ("Even if the Excessive Fines Clause should be determined to apply to punitive damages, it does not apply to civil contempt sanctions imposed to obtain compliance with court orders."), *rev'd sub nom. on other grounds Spallone v. United States*, 493 U.S. 265 (1990); *Spallone v. United States*, 487 U.S. 1251, 1257 (1988) (Marshall, J., concurring in the denial of stay) ("[T]he Cruel and Unusual Punishments Clause does not apply to civil contempt sanctions. This is not surprising since the Cruel and Unusual Punishments Clause, like the Excessive Fines Clause, applies to punishments for past conduct, while civil contempt sanctions are designed to secure future compliance with judicial decrees." (cleaned up)).

[159] Doc. No. 19 at 64 (cleaned up).

[160] Doc. No. 19 at 58.

this Court "lack[s] jurisdiction to consider [Contemnors'] collateral attacks" on the gatekeeping orders.[161]

IV. Conclusion

For the foregoing reasons, the judgment of the bankruptcy court is **AFFIRMED** in part and **VACATED** in part. The Court **AFFIRMS** the bankruptcy court's judgment as to the $239,655 sanction and **VACATES** the judgment as to the $100,000-per-appeal sanction without prejudice.

IT IS SO ORDERED this 28th day of September, 2022.

BRANTLEY STARR
UNITED STATES DISTRICT JUDGE

[161] *Highland Capital*, 2022 WL 4093167, at *12 n.15.

EXHIBIT B

Case 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.

MOTION OF APPELLANTS NEXPOINT ADVISORS, L.P. AND HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P. TO RECALL AND STAY MANDATE

Direct Appeal from the United States Bankruptcy Court for
the Northern District of Texas, the Honorable Stacey G.C. Jernigan

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I. INTRODUCTION

Appellants NexPoint Advisors, L.P. and NexPoint Asset Management, L.P. (together, the "Advisors") respectfully move this Court to recall the prematurely issued mandate in this appeal. The mandate appears to have been issued without knowledge or consideration of the Funds' (defined below) petition for rehearing, the panel's decision to grant that petition, the panel's withdrawal of its initial opinion, and the publication of an amended opinion. *See In re Highland Cap. Mgmt., L.P.*, ___ F.4th ____, No. 21-10449, 2022 U.S. App. LEXIS 25107 (5th Cir. Sept. 7, 2022). The Advisors also ask for a stay of the mandate, in the interests of justice, while they petition for certiorari.

II. ARGUMENTS & AUTHORITIES

The Advisors respectfully make two requests: (1) the Court should recall its prematurely issued mandate in this action; and (2) the Court should stay issuing its mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The Advisors address these requests in turn.

A. THE MANDATE SHOULD BE RECALLED BECAUSE IT ISSUED PREMATURELY[1]

The Court issued its original opinion on August 19, 2022. Rehearing was sought by Highland Income Fund, NexPoint Strategic Opportunities Fund, Highland

[1] The Advisors respectfully request that the Court take judicial notice of prior proceedings and opinions in this Appeal. *See In re Deepwater Horizon*, 934 F.3d 434, 440 (5th Cir. 2019).

Global Allocation Fund, and NexPoint Capital, Inc. (together, the "Funds") on September 2, 2022. This Court granted rehearing, vacating its prior opinion, and issued a new opinion on September 9, 2022, *In re Highland Cap.*, 2022 U.S. App. LEXIS 25107, at *2 (the "Amended Opinion").

Prior to the closing of the parties' fourteen-day window to petition for rehearing, the Clerk issued the mandate just five calendar days after publication of the Amended Opinion. As a result, the case was remanded "to the Bankruptcy Court for further proceedings in accordance with the opinion of this Court." Mandate at p. 2. In the interests of justice, and to preserve Appellants' rights, the Advisors respectfully submit that the mandate should be recalled.

Federal appellate courts retain jurisdiction over appeals until a mandate issues. *Charpentier v. Ortco Contractors*, 480 F.3d 710, 713 (5th Cir. 2007). These courts do, however, possess the "inherent power to recall their mandates." *Goodwin v. Johnson*, 224 F.3d 450, 459 (5th Cir. 2000); *Nat'l Sur. Corp. v. Charles Carter & Co.*, 621 F.2d 739, 741 (5th Cir. 1980). In the Fifth Circuit, mandates "will not be recalled except to prevent injustice." 5TH CIR. R. 41.2. *But see Cole v. Carson*, 957 F.3d 484, 486 (5th Cir. 2020) (Ho, J., dissenting from denial of rehearing en banc) (finding "good cause or unusual circumstances" necessary to recall a mandate to modify or vacate a judgment, but not so "to stay further proceedings pending Supreme Court review").

When entertaining a motion to recall, the Court balances two countervailing interests: "the interest in 'preventing injustice' in the case at hand, and the interest in maintaining the finality of the judgment already rendered in the case. Assessing the relative weights of these competing considerations and determining whether the overall balance warrants recalling the mandate lies within the court's sound discretion." *United States v. Montalvo Davila*, 890 F.3d 583, 586 (5th Cir. 2018) (citation and brackets omitted).

Though recalling a mandate is not routine, "this court has recalled and modified its mandates" "[o]n a number of occasions." *Hall v. White*, 465 F.3d 587, 593 (5th Cir. 2006). Such is the case because "[t]his court retains jurisdiction over its mandates to prevent injustice." *Ferrell v. Estelle*, 573 F.2d 867, 868 (5th Cir. 1978); *see LULAC v. City of Boerne*, 675 F.3d 433, 439 n.7 (5th Cir. 2012). Although the prevention of injustice is no lax standard, relatively minor occurrences have been held to satisfy this standard. *See, e.g.*, *Lee v. Coahoma Cnty.*, 37 F.3d 1068, 1068 (5th Cir. 1993) (recalling the mandate to "correct[] a typographical error in the opinion"). In fact, of all the reasons that justify recalling a mandate, the "clearest" one is "correct[ing] clerical mistakes." *Greater Bos. Television Corp. v. FCC*, 463 F.2d 268, 278 (D.C. Cir. 1971).

The issuance of the mandate here was a ministerial and clerical error by the Clerk. When the Court granted the Funds' petition for panel rehearing, "a new

judgment after the rehearing" should have been entered, and the mandate should have issued "within the normal time after entry of *that* judgment." FED. R. APP. P. 41(b) advisory committee's note to 1998 amendment (emphasis added); *see* SUP. CT. R. 13.3 (explaining that when a federal-appellate court grants a petition for rehearing, "the time to file [a] petition for a writ of certiorari . . . runs from the date of . . . the subsequent entry of judgment"). At such time, a new fourteen-day window to file a petition for rehearing or motion for stay of the mandate should have commenced. *See* FED. R. APP. P. 40(a)(1), 41(c); *see also, e.g.*, *Sanchez v. R. G. L.*, 761 F.3d 495, 499 & n.1 (5th Cir. 2014) (demonstrating that multiple, successive petitions for panel rehearing may be filed and granted).

Unfortunately, this mandate issued before the closing of the fourteen-day window, seemingly shortening this Court's jurisdiction (and the appellate rights of the parties) absent an order of the Court. This "clerical error" constitutes one of the "exceptional circumstances" in which an appellate court should recall its mandate. *See N. Cal. Power Agency v. NRC*, 393 F.3d 223, 225 (D.C. Cir. 2004) (recalling mandate where clerk erroneously entered clerk's order dismissing case and transmitting order in lieu of formal mandate). Indeed, the Appellants were preparing to, and would have, filed a motion to stay issuance of the mandate within the new fourteen (14) day period, when the Clerk's issuance of the mandate occurred, catching them off guard.

The circumstances are all the more exceptional because not recalling the mandate will likely affect the litigants' appellate rights moving forward. *See In re Greene Cnty. Hosp.*, 835 F.2d 589, 591 (5th Cir. 1988). Appellee has already asserted an equitable-mootness defense. *See* Appellee's Mot. to Dismiss Appeals as Equitably Moot 16–26; Appellee's Reply Br. in Support of Mot. to Dismiss Appeals as Equitably Moot 7–17. And while that defense has proved unsuccessful at this stage in this Court, *In re Highland Cap.*, 2022 U.S. App. LEXIS 23237, at *13–19, Appellee's rush in the Bankruptcy Court following the premature mandate further demonstrates that racing towards equitable mootness before Appellants can fully exercise their appellate rights remains a primary strategy.

Indeed, and although the Advisors would vigorously argue against the application of equitable mootness, it is not an unlikely scenario that the Advisors' petition for certiorari may be undercut by post-appeal proceedings in the Bankruptcy Court that have already begun and could result in the reorganization plan soon becoming "substantially consummated" or otherwise too far implemented to enable meaningful appellate review. *See In re Manges*, 29 F.3d 1034, 1039–41 (5th Cir. 1994). At that point, even if the Supreme Court were to grant the writ of certiorari, hear the case, and clarify the law in a manner favorable to Appellants, Appellee will be able to argue equitable mootness backed by an additional year or so of eggs that

may need to be unscrambled.[2] *See id.* at 1039; *see also In re Sneed Shipbuilding, Inc.*, 914 F.3d 1000, 1002 (5th Cir. 2019).

Neither do interests of finality weigh against the Advisors' request here, as they ask well within the time to petition for certiorari and before any legitimate reliance on the premature mandate could be claimed.

Because the Clerk erred by prematurely issuing the mandate, and because such error is likely to diminish the Advisors' appellate rights, *see In re Manges*, 29 F.3d at 1039, the Advisors respectfully ask the Court to recall the mandate in this action.

B. THE MANDATE SHOULD BE STAYED

The Court should stay its mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The applicable rules specifically contemplate such a request, *see United States v. Perez*, 110 F.3d 265, 266 n.3 (5th Cir. 1997), and this Court should grant it because the petition will "present a substantial question" and "good cause for a stay" exists, FED. R. APP. P. 41(d)(1).

[2] The Advisors respectfully note that the Circuit Justice who would consider an application of stay in this action has vocalized particular skepticism regarding the doctrine of equitable mootness. *See, e.g.*, *Nordhoff Invs., Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180, 192 (3d Cir. 2001) (Alito, J., concurring) ("[E]quitable mootness . . . can easily be used as a weapon to prevent any appellate review of bankruptcy court orders confirming reorganization plans. It thus places far too much power in the hands of bankruptcy judges."); *see also* STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 17–19 (11th ed. 2019) ("Before seeking a stay from the Supreme Court or from a single Justice, a stay must first be requested from the court below or a judge thereof.").

Though Rule 41(d)(1)'s requirements are vague, there are "well-established standards for granting a stay of a mandate pending disposition of a petition for certiorari." *Baldwin v. Maggio*, 715 F.2d 152, 153 (5th Cir. 1983).

> To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay.

Hollingsworth v. Perry, 558 U.S. 183, 190 (2010). The Advisors address each factor in turn.

1. The Advisors Have Sufficient Grounds for a Successful Petition for Certiorari

There can be no disagreement that the core issue here—whether a federal court may grant non-debtor liability releases as part of a Chapter 11 reorganization plan—is "sufficiently meritorious to grant certiorari." *See id.* This issue falls squarely within one of the Supreme Court's considerations in reviewing a cert petition: "[t]here is a long-standing conflict among the Circuits that have ruled on the question." *In re Purdue Pharma, L.P.*, 635 B.R. 26, 89 (S.D.N.Y. 2021); *see In re Highland Cap.*, 2022 U.S. App. LEXIS 25107, at *29–30 (describing the split); *see also* SUP. CT. R. 10(a). This fact alone is sufficient to demonstrate the "certworthiness" of the Advisors' forthcoming petition.

Moreover, the legal question at issue is of considerable significance to the federal judiciary and the public at large. *See NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951). The current state of affairs leaves "debtors and their creditors to guess" whether these releases are permissible under bankruptcy law, which substantially impacts the development and finalization of reorganization plans; further, it should not "be the case that their availability, or lack of same, should be a function of where a bankruptcy filing is made," *i.e.*, this matter "ought to be uniform throughout the country." *In re Purdue Pharma*, 635 B.R. at 89, 115; *see In re Davis Offshore, L.P.*, 644 F.3d 259, 262 n.2 (5th Cir. 2011) ("Allowing [equitable mootness] to override [a] statutory protection seems dubious.").

In that respect, it is true that the panel limited the exculpations contained the plan of reorganization here, but the panel arguably affirmed various other injunctive and "gatekeeping" provisions in the plan that have the practical effect of exculpating the very persons that the panel ruled could not be exculpated.[3] Additionally, the Advisors respectfully submit that the panel's decision to leave in place wholesale

[3] The question of the panel's ruling with respect to the plan's injunctive and gatekeeping provisions is disputed. In post-remand filings before the Bankruptcy Court, the Appellee has argued that the panel left completely intact all of the plan's injunctive and gatekeeping provisions. *See* Bankruptcy Case (19-34054), *Motion to Conform Plan,* at Docket No. 3503. The Advisors and the Funds, on the other hand, have argued that the panel's opinion clearly deleted or reformed such provisions in order to apply only to the persons the panel ruled could legally be exculpated. *See id*. at Docket No. 3539 (Funds' objection) and Docket No. 3551 (Advisors' objection). The Bankruptcy Court has yet to address this dispute, although a hearing has been set for October 20, 2022.

exculpations of the "Independent Board" exceeds any permissible exculpation, as these individuals were not the "debtor" and they were not even directors of the Appellee; instead being directors of the Appellee's general partner.

Furthermore, the Appellee is a registered investment advisor, subject to the Investment Advisers Act of 1940 (15 U.S.C. § 80b-1 *et seq.*) and its enforcement regulations (17 C.F.R. § 275.0-2 *et seq.*). However, the plan enjoins actions seeking remedies for—and indeed exculpates the debtor and its control persons from—*future* violations of federally-imposed fiduciary duties under the securities laws. *See Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 17 (1979) ("[Advisers Act §] 206 establishes federal fiduciary standards to govern the conduct of investment advisers." (internal quotation marks omitted)); *SEC v. Cap. Gains Rsch. Bureau, Inc*., 375 U.S. 180, 191 (1963) ("The Investment Advisers Act of 1940 thus reflects a congressional recognition of the delicate fiduciary nature of an investment advisory relationship." (internal quotation marks omitted)).

The Advisors respectfully submit that nothing in the Bankruptcy Code authorizes a release of individuals from federal securities laws or for the exculpation of *future violations* of law. Neither does any precedent of this Circuit or the Supreme Court. Indeed, the issue of whether an Article I bankruptcy judge can effectively immunize individuals from and against federal securities laws enacted by Congress and enforced by Article III courts is a serious Constitutional issue in its own right.

Fundamental issues of due process are also implicated. Non-debtor liability releases end the game before it begins—individuals and other litigants may have causes of action arise against non-debtors after a Chapter 11 petition is filed and, because of these releases, will be unable to file suit. *See, e.g.*, Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154, 1171 n.80 (2022). Nor is it any comfort that the Bankruptcy Court can specifically authorize an individual to assert his or her cause of action, because such individual must first prove the existence of "a colorable claim" and the Bankruptcy Court has "sole and exclusive jurisdiction" to decide that issue. ROA.160. Again, an Article I court with no federal securities jurisdiction, sitting without a jury, and after the bankruptcy case is completed and closed, will determine whether a non-debtor has a "colorable" claim against a non-debtor under federal securities laws. The Advisors respectfully submit that such judicial overreach is unprecedented.

Grave matters of individual and Constitutional rights are implicated by the issue of non-debtor liability releases, which only makes the issue at hand even more likely to be considered "certworthy."

2. <u>The Prospects Before the Supreme Court Are More Than Fair</u>

The Advisors' challenge regarding the scope of a bankruptcy court's discharge powers certainly meets this Circuit's fair-prospects standard. The panel's opinion in this case goes to great lengths explaining the limits of those powers and

the reasons for them, before giving short shrift to the notion that the Independent Directors nonetheless fall within the category of non-debtors who may be exculpated (reasoning, without meaningful support, that, "[l]ike a debtor-in-possession, the Independent Directors are entitled to all the rights and powers of a trustee"). Moreover, a similar appeal is currently pending before the Second Circuit. *See In re Purdue Pharma, L.P.*, No. 22-110 (2d Cir.). Undeniably the issue of nonconsensual third party releases is one of national importance that is currently ripe for review.

Additionally, both within and outside the bankruptcy context, the Justices are wholly skeptical of locating statutory rights not specified in the statutory text. The Supreme Court's bankruptcy jurisprudence has affirmed the comprehensiveness of the Bankruptcy Code. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012); *In re Purdue Pharma*, 635 B.R. at 37 ("Given the frequency with which this issue arises, the time has come for a comprehensive analysis of whether authority for such releases can be found in the Bankruptcy Code—that 'comprehensive scheme' devised by Congress for resolving debtor-creditor relations."). Nothing in the Bankruptcy Code permits the Independent Directors' continued exculpation.

Absent statutory authority, this cuts against the bankruptcy principles endorsed by the Supreme Court. *See Norwest Bank Worthington v. Ahlers*, 485 U.S.

197, 206 (1988); *see also, e.g.*, *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 465 (2017) (Breyer, J.) ("The importance of the priority system leads us to expect more than simple statutory silence if, and when, Congress were to intend a major departure. Put somewhat more directly, we would expect to see some affirmative indication of intent if Congress actually meant to make structured dismissals a backdoor means to achieve the exact kind of nonconsensual priority-violating final distributions that the Code prohibits in Chapter 7 liquidations and Chapter 11 plans." (citation omitted)).

Moreover, the Supreme Court has made two statutory-interpretation points clear that are particularly relevant to this matter.[4] For one, the Justices have frequently endorsed the canon of *expressio unius*, which is applicable here considering the Bankruptcy Code does not even mention the possibility of exculpation for persons like the Independent Directors. *See* 11 U.S.C. § 524(e); *see also, e.g.*, *Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) ("That express exception to detention implies that there are no other circumstances under which aliens detained under § 1225(b) may be released." (emphasis omitted)).

Additionally, and importantly, the Supreme Court recently confirmed that "in certain extraordinary cases, both separation of powers principles and a practical

[4] Judge McMahon further states that the general/specific canon of construction applies here. *See In re Purdue Pharma*, 635 B.R. at 111–12; *see also, e.g.*, *United States v. Moss*, 872 F.3d 304, 313–14 (5th Cir. 2017).

understanding of legislative intent" requires specific indication of "'clear congressional authorization' for the power" called upon. *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022). Whether the Bankruptcy Code permits the exculpation of non-debtors in Chapter 11 proceedings is an exemplar of a "major question"—the ramifications of empowering an Article I tribunal the authority to subvert the Article III rights of litigants without their consent would be a major development, to say the least. The Supreme Court has stated that "[e]xtraordinary grants" of authority are "rarely accomplished through 'modest words,' 'vague terms,' or 'subtle devices,'" which is particularly noteworthy here because *no statutory text* grants this extraordinary authority, let alone even hints at it. *See id.*; *Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv.*, 968 F.3d 454, 460 (5th Cir. 2020) (Duncan, J.) ("[C]ourts like to say 'Congress does not hide elephants in mouseholes.'" (quoting *Chamber of Com. v. U.S. Dep't of Lab.*, 885 F.3d 360, 376 (5th Cir. 2018))).

Third-party, non-consensual releases in Chapter 11 proceedings are of such undeniable importance and significance to bankruptcy law that one would "expect more than simple statutory silence if, and when, Congress [intended this] major departure." *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 465 (2017).

3. <u>Irreparable Harm Is Likely Should a Stay Not Be Granted</u>

Finally, were the Court to deny the Advisors' request for stay, there can be little doubt that "irreparable harm will result." *Hollingsworth*, 558 U.S. at 190.

Irreparable harm is "harm 'that cannot be adequately measured or compensated by money and is therefore often considered remediable by injunction.'" *Anyadike v. Vernon Coll.*, No. 7:15-cv-00157-O, 2016 U.S. Dist. LEXIS 3161, at *32 (N.D. Tex. Jan. 11, 2016) (quoting IRREPARABLE INJURY, BLACK'S LAW DICTIONARY (10th ed. 2014)). Here, the likelihood that this action becomes equitably moot steadily increases with time, and involuntarily losing appellate rights is an unquantifiable harm.

With each passing day, the Bankruptcy Court, at Appellee's behest, pushes this action ever closer to equitable mootness—notwithstanding the Advisors' vigorous objections otherwise. *See In re Manges*, 29 F.3d at 1039. Appellee has attempted to upend Appellants' rights via this approach before, and Appellee's hurry on remand before the Bankruptcy Court demonstrates the desire to (once again) eradicate appellate rights under the equitable-mootness doctrine, a doctrine under which an Article III court refuses "to entertain a live appeal over which [it] indisputably possess[es] statutory jurisdiction and in which meaningful relief can be awarded." *In re Cont'l Airlines*, 91 F.3d 553, 571 (3d Cir. 1996) (en banc) (Alito, J., dissenting); *see In re City of Detroit*, 838 F.3d 792, 812 (6th Cir. 2016) (Moore, J., dissenting) ("The problem with equitable mootness is not only that it cuts off entirely the right to appeal to an Article III court, but that 'it effectively delegates the power to prevent that review to the very non-Article III tribunal whose decision is at issue'

because 'bankruptcy courts control nearly all of the variables' that are considered in assessing whether an appeal is equitably moot." (citation omitted)).

Litigants losing their appellate rights without their consent—simply because a tribunal believes "effective relief on appeal" is "impractical, imprudent, and therefore inequitable," *Mac Panel Co. v. Va. Panel Corp.*, 283 F.3d 622, 625 (4th Cir. 2002)—is a bewildering result that plainly constitutes a deprivation of litigants' rights.[5] To demonstrate that the harm here is not irreparable, Appellee must necessarily concede that there is no set of circumstances as to the proceedings currently before the Bankruptcy Court that will equitably moot this action.

The Advisors seek nothing more here than a full opportunity to request the Supreme Court's intervention in a long contested and divisive area of the law, and absent a stay pending the filing of a petition for a writ of certiorari in the Supreme Court, the Advisors may be permanently deprived of their rights to appeal. Irreparable harm will therefore likely result absent a stay of the mandate. For these reasons, the Advisors respectfully request that this Court stay its mandate.

[5] Worth noting, the Advisors have filed the instant motion to help bolster the case against equitable mootness in this action. *See In re Thorpe Insulation Co.*, 677 F.3d 869, 881 (9th Cir. 2012) ("A failure to seek a stay can render an appeal equitably moot.").

III. CONCLUSION

This Court should recall and stay the mandate pending the timely filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court.

RESPECTFULLY SUBMITTED this 7th day of October, 2022.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Davor Rukavina

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CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that he discussed the relief requested herein with counsel for the Appellee, John Morris Esq. and Jeffrey N. Pomerantz, Esq., but that, as of this filing, neither responded to whether the Appellee opposes said relief and, therefore, this Motion is presented as OPPOSED.

By: /s/ Davor Rukavina

Davor Rukavina, Esq.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this the 7th day of October, 2022, a true and a correct copy of the foregoing document was served on the counsel of record listed below via electronic service:

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

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d) because this brief contains 3,740 words.

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Office Word in Times New Roman, 14 pt. font.

Dated: October 7, 2022.

By: /s/ Davor Rukavina
Davor Rukavina, Esq.

EXHIBIT C

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

October 07, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 21-10449 NexPoint v. Highland Capital Management
USDC No. 19-34054
USDC No. 3:21-CV-538

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

Lisa E. Ferrara

By: _____
Lisa E. Ferrara, Deputy Clerk
504-310-7675

Mr. Zachery Z. Annable
Mr. Douglas Scott Draper
Mr. Roy Theodore Englert Jr.
Mr. David R. Fine
Ms. Melissa Sue Hayward
Mr. George W. Hicks Jr.
Mr. A. Lee Hogewood
Ms. Emily K. Mather
Mr. Jeffrey N. Pomerantz
Mr. Davor Rukavina
Mr. Julian Preston Vasek

United States Court of Appeals for the Fifth Circuit

No. 21-10449

IN THE MATTER OF HIGHLAND CAPITAL MANAGEMENT, L.P.

Debtor,

NEXPOINT ADVISORS,; 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,

versus

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Appellee.

Appeal from the United States Bankruptcy Court
for the Northern District of Texas
USDC No. 19-34054
USDC No. 3:21-CV-538

ORDER:

The Appellants' motion for recall and stay of the mandate pending petition for writ of certiorari is DENIED.

STUART KYLE DUNCAN
United States Circuit Judge