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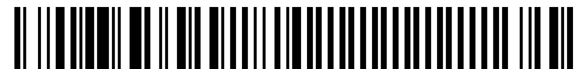
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff,	§	Case No. 3:21-cv-00881-X
	§	
vs.	§	
	§	
HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., et al.,	§	(Consolidated with 3:21-cv-00880-X, 3:21-cv-01010-X, 3:21-cv-01378-X, 3:21-cv-01379-X)
	§	
	§	
Defendants.	§	
	§	

REQUEST TO TAKE JUDICIAL NOTICE OF DECISIONS RELEVANT TO HIGHLAND CAPITAL MANAGEMENT, L.P.'S MOTION TO DEEM THE DONDERO ENTITIES VEXATIOUS LITIGANTS AND FOR RELATED RELIEF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HCMLP,[1] by and through its undersigned counsel, respectfully requests that, pursuant to Federal Rule of Evidence 201(c), the Court take judicial notice of: (a) the *Memorandum Opinion and Order* entered by the United States District Court for the Northern District of Texas, Dallas Division (the "District Court"), on September 10, 2024, in connection with the appeal captioned *The Charitable DAF Fund, L.P., et al. v. Highland Capital Management, L.P., et al. (In re Highland Capital Management, L.P.)*, Civ. Action No. 3:23-cv-1503-B (N.D. Tex.) [Docket No. 39] (the "HarbourVest Opinion"),[2] and (b) the published opinion by the United States Court of Appeals for the Fifth Circuit (the "Fifth Circuit") on September 16, 2024, in connection with the appeal captioned *Highland Capital Management, L.P. v. NexPoint Asset Management, L.P., et al. (In re Highland Capital Management, L.P.)*, No. 23-10911 (5th Cir.) [Document No. 117-1] (the "Notes Opinion").[3] Copies of the HarbourVest Opinion and Notes Opinion are attached hereto as **Exhibits A and B**, respectively.

The HarbourVest Opinion[4] and Notes Opinion[5] are directly relevant to issues the parties addressed in their briefs.

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[1] Capitalized terms used but not defined herein have the meanings given to them in *Highland Capital Management, L.P.'s Memorandum of Law in Support of Its Motion to Deem the Dondero Entities Vexatious Litigants and for Related Relief* [Docket No. 137] ("Highland's Brief").

[2] In the HarbourVest Opinion, the District Court affirmed the Bankruptcy Court's order dismissing with prejudice a Complaint filed by two of the Dondero Entities, The Charitable DAF Fund, L.P. and CLO Holdco, Ltd.

[3] In the Notes Opinion, the Fifth Circuit affirmed this Court's grant of summary judgment to HCMLP on over $70 million in breach of contract claims asserted against Mr. Dondero and four of his controlled entities.

[4] *See, e.g.*, Highland's Brief at 22-25; *Memorandum in Opposition to Motion to Deem Dondero Entities Vexatious Litigants and for Related Relief* [Docket No. 167] ¶¶45-46, 62.

[5] *See, e.g.*, Highland's Brief at 18-19; *Nancy Dondero's Memorandum of Law in Opposition to Motion to Deem Various Parties Vexatious Litigants and for Related Relief* [Docket No. 168] ¶¶ 21-16; *Highland Capital Management, L.P.'s Reply to Objections to Motion to Deem the Dondero Entities Vexatious Litigants and for Related Relief* [Docket No. 189] ¶ 16; *Respondents' Response to July 19, 2024 Order* [Docket No. 218] at 8, filed by James Dondero, NexPoint Asset Management, L.P., NexPoint Advisors, L.P., Highland Capital Management Services, Inc., NexPoint Real Estate Partners, LLC, The Dugaboy Investment Trust, Strand Advisors, Inc., and Get Good Trust.

CONCLUSION

WHEREFORE, HCMLP respectfully requests that the Court take judicial notice of the HarbourVest Opinion and Notes Opinion and grant such other and further relief as the Court deems just and proper.

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Dated: September 19, 2024

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EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	
HIGHLAND CAPITAL	§	
MANAGEMENT, L.P.,	§	
	§	
Debtor,	§	
--	§	
	§	
THE CHARITABLE DAF FUND, L.P.	§	
and CLO HOLDCO, LTD.,	§	
	§	
	§	
Plaintiffs/Appellants,	§	
	§	
v.	§	**CIVIL ACTION NO. 3:23-CV-1503-B**
	§	
	§	
HIGHLAND CAPITAL	§	
MANAGEMENT, L.P., et al.,	§	
	§	
Defendants/Appellees.	§	

MEMORANDUM OPINION & ORDER

Before the Court is Plaintiffs/Appellants The Charitable DAF Fund, L.P. ("DAF") and CLO Holdco, Ltd. ("CLO Holdco")'s appeal from the bankruptcy court's Memorandum Opinion and Order dismissing the case. For the reasons that follow, the bankruptcy court's Order is **AFFIRMED**.

I.

BACKGROUND

This is an appeal arising out of an adversary proceeding in a bankruptcy case. The Debtor, Highland Capital Management, L.P. ("HCM"), filed for Chapter 11 bankruptcy on October 16, 2019, in the United States Bankruptcy Court for the District of Delaware and that court transferred venue to the United States Bankruptcy Court for the Northern District of Texas. *In re Highland Cap.*

Mgmt. L.P., 2022 WL 780991, at *1 (Bankr. N.D. Tex. Mar. 11, 2022). Appellants DAF and CLO Holdco (collectively, "Appellants") initiated this adversary proceeding based on conduct allegedly engaged in by Defendant/Appellee HCM during HCM's Chapter 11 bankruptcy proceedings. Doc. 18-2, R., 102.[1]

Appellants have alleged the following: In 2017, DAF—through its holding entity CLO Holdco—purchased 49.02% of the available shares of Highland CLO Funding, Ltd. ("HCLOF") based upon investment advice from HCM. Doc. 18-2, R., 107. Another entity, HarbourVest, acquired 49.98% of the HCLOF shares, while HCM and its employees acquired the remaining 1% of HCLOF. *Id.* The HCLOF Member Agreement contained a "Right of First Refusal" provision specifying that, when an HCLOF member, such as Appellants or HCM, intends to sell its HCLOF interest to a third-party, "the other members have the first right of refusal to purchase those interests pro rata for the same price that the member has agreed to sell." *Id.* at 120.

During HCM's bankruptcy proceedings, HarbourVest filed a proof of claims against HCM, seeking over $300 million in damages from HCM. *Id.* at 107–09. HCM offered to settle HarbourVest's claims by purchasing HarbourVest's 49.98% interest in HCLOF ("HarbourVest Settlement"). *Id.* at 110. CLO Holdco then filed an objection to the HarbourVest Settlement, contesting that the Settlement violated the Right of First Refusal provision in the HCLOF Member Agreement because CLO Holdco was not first given an opportunity to purchase HarbourVest's shares at the same price. Doc. 18-19, R. 4008–17. However, CLO Holdco later withdrew this objection at the Settlement Hearing. *Id.* at 4103–04. The Bankruptcy Court subsequently approved the HarbourVest Settlement. Doc. 18-20, R., 4246–52. At the time of the HarbourVest Settlement,

[1] The parties' record on appeal is a multi-volume record found in Document 18 on the docket. The record cites refer to the parties' pagination of that multi-volume record.

HCM provided evidence that the HarbourVest ownership interest in HCLOF was worth $22.5 million. Doc. 18-2, R., 117. Appellants later discovered, however, that the HarbourVest interest was actually worth "almost double that amount." *Id.*

The final reorganization plan in the underlying bankruptcy proceedings included an exculpatory provision, *see* Doc. 18-12, R., 2380, which provided that the parties could not bring any cause of action against the Debtors—here, HCM—arising from the underlying bankruptcy proceedings unless HCM engaged in "bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct." *Id.* at 2432–33.

Appellants assert five claims in this suit. Count 1 is a breach of fiduciary duty claim brought under § 206 of the Investment Advisors Act ("IAA"), 15 U.S.C. § 80b–6, based on the theory that HCM breached their fiduciary duties to Appellants by acquiring the HarbourVest ownership interest in HCLOF without first offering it to Appellants.[2] Doc. 18-2, R., 113–19. Count 2 is a breach of contract claim, alleging that the HarbourVest Settlement breached the Right of First Refusal provision found in the HCLOF Member Agreement. *Id.* at 120–21. Count 3 is a negligence claim based on the theory that HCM should have known its actions violated the IAA. *Id.* at 121–22. Count 4 is a civil Racketeer Influenced and Corrupt Organizations ("RICO") claim arising out of the HarbourVest Settlement. *Id.* at 122–26. And Count 5 is a claim for tortious interference with an existing contract arising out of the HCLOF Member Agreement's Right of First Refusal provision. *Id.* at 126–27.

[2] The parties dispute what breach of fiduciary claims Appellants asserted in their Complaint. The Court will address this dispute in the Analysis section of this Order.

This is the second time that this matter has been appealed to this Court. Previously, this Court affirmed in part and reversed in part the bankruptcy court's dismissal of the case based on collateral estoppel and judicial estoppel. *See In re Highland Cap. Mgmt., L.P.*, 643 B.R. 162, 167 (N.D. Tex. 2022) (Boyle, J.). This Court reversed the decision on collateral estoppel grounds and affirmed in part and reversed in part the decision on judicial estoppel grounds. *Id.* at 173–75. This Court then remanded the case to the bankruptcy court to make findings on the inadvertence element of judicial estoppel, and to otherwise rule on the merits of the case. *Id.* at 175.

After remand, HCM subsequently filed a Renewed Motion to Dismiss all five of Appellants' claims. *See* Doc. 18-18, R., 3844–81. The bankruptcy court granted the Renewed Motion to Dismiss in its entirety and dismissed all five claims with prejudice. *See* Doc. 18-1, R., 41. Appellants subsequently appealed this final order, arguing that the bankruptcy court erred in dismissing their claims, as well as not granting them leave to file an amended complaint. *See generally* Doc. 22, Appellants' Br. The Court considers the Appeal below.

II.

LEGAL STANDARDS

A. *Bankruptcy Appeal*

Final judgments, orders, and decrees of a bankruptcy court may be appealed to a federal district court. 28 U.S.C. § 158(a). Because the district court functions as an appellate court in this scenario, it applies the same standards of review that federal appellate courts use when reviewing district court decisions. *In re Webb*, 954 F.2d 1102, 1103–04 (5th Cir. 1992) (citations omitted). The Court reviews the bankruptcy court's conclusions of law *de novo* and the bankruptcy court's findings of fact for clear error. *Drive Fin. Servs., L.P. v. Jordan*, 521 F.3d 343, 346 (5th Cir. 2008).

B. *Motion to Dismiss*

Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 12(b)(6) authorizes a court to dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). In considering a Rule 12(b)(6) motion to dismiss, "the Court must accept all well-pleaded facts as true, and view them in the light most favorable to the appellant." *Walker v. Beaumont Indep. Sch. Dist.*, 938 F.3d 724, 735 (5th Cir. 2019) (alteration in original) (citation omitted). But the Court will "not look beyond the face of the pleadings to determine whether relief should be granted based on the alleged facts." *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999).

To survive a motion to dismiss, plaintiffs must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A claim has facial plausibility when the appellant pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556). When well-pleaded facts fail to meet this standard, "the complaint has alleged—but it has not shown—that the pleader is entitled to relief." *Id.* at 679 (alteration in original) (citation omitted).

III.

ANALYSIS

The Court first affirms the bankruptcy court's finding that judicial estoppel bars Counts 2 and 5 of Appellants' Complaint because Appellants took the position that the HarbourVest Settlement did not violate the Right of First Refusal provision. The Court next affirms the dismissal of the Appellants' breach of fiduciary duty claim. Section 206 of the IAA does not confer a private cause of action for damages, Appellants did not assert a claim under § 215 of the IAA, and Appellants did not plead any state law breach of fiduciary duty claims in their Complaint. Next, the Court affirms the bankruptcy court's dismissal of Appellants' negligence claim. Lastly, the Court concludes that the bankruptcy court did not err by not granting Appellants leave to amend their RICO claim or any of their other claims.

A. Judicial Estoppel Bars Counts 2 and 5 of the Complaint.

Judicial estoppel is an equitable common law doctrine aimed at preventing a party from asserting an inconsistent legal position from a previous proceeding. *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999). "The purpose of the doctrine is 'to protect the integrity of the judicial process', by 'prevent[ing] parties from playing fast and loose with the courts to suit the exigencies of self interest.'" *Id.* (quoting *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir. 1988)) (alteration in original). A court examines three criteria when determining the applicability of judicial estoppel: "(1) the party against whom judicial estoppel is sought has asserted a legal position which is plainly inconsistent with a prior position; (2) a court accepted the prior position; and (3) the party did not act inadvertently." *Reed v. City of Arlington*, 650 F.3d 571, 574 (5th Cir. 2011) (en banc).

This Court previously affirmed the bankruptcy court's finding that the first two elements of judicial estoppel are satisfied here—i.e., that Appellants previously took the position that the HarbourVest Settlement did not violate the Right of First Refusal provision and that this position led to the bankruptcy court accepting the HarbourVest Settlement. *In re Highland Cap. Mgmt., L.P.*, 643 B.R. 162, 173–75 (N.D. Tex. 2022) (Boyle, J.). But the Court remanded to the bankruptcy court to determine whether the third element, inadvertence, was also satisfied. *Id.* at 176. The Court now affirms the bankruptcy court's finding that Appellants did not act inadvertently, and that they are judicially estopped from pursuing Claims 2 and 5.

The Court reviews the bankruptcy court's decision to invoke judicial estoppel for abuse of discretion. *See Cox v. Richards*, 761 F. App'x 244, 246 (5th Cir. 2019). "A [bankruptcy] court abuses its discretion if it: (1) relies on clearly erroneous factual findings; (2) relies on erroneous conclusions of law; or (3) misapplies the law to the facts." *In re Chamber of Com. of United States of Am.*, 105 F.4th 297, 311 (5th Cir. 2024) (citations omitted). The question of whether the third element of judicial estoppel, inadvertence, is satisfied is a finding of fact. *Love v. Tyson Foods, Inc.*, 677 F.3d 258, 262 (5th Cir. 2012). So, the Court must determine whether the bankruptcy court's conclusion as to the third element was clearly erroneous. *In re Chamber of Com. of United States of Am.*, 105 F.4th at 311. The Court concludes that it was not.

A party's failure to disclose a claim arising out of a bankruptcy case is only inadvertent if the party either (1) lacked knowledge of the claim or (2) the party has no motive to conceal the claims. *In re Coastal Plains, Inc.*, 179 F.3d at 210. Neither apply here. Appellants knew about the potential breach of contract claim and the potential tortious interference with a contract claim arising from the Right of First Refusal provision because CLO Holdco, one of the plaintiffs in this suit, initially

objected to the underlying HarbourVest Settlement on grounds that it would violate the Right of First Refusal provision. Doc. 18-19, R. 4014–15. Claims 2 and 5 accuse HCM of the same violations with respect to the same settlement. Doc. 18-2, R., 120–21, 126–27. Thus, their objection in the underlying bankruptcy proceedings establishes that Appellants had knowledge of these two claims.

The only argument Appellants raise in response to the bankruptcy court's finding is that they did not know the exact value of the HarbourVest interest—the assets that would be purchased by HCM in the HarbourVest Settlement. Doc. 22, Appellants' Br., 37–38. The bankruptcy court correctly rejected this argument because Appellants did not learn it could potentially assert a breach of contract claim or tortious interference with a contract claim after the HarbourVest Settlement was approved. Instead, Appellants only learned they could potentially recover *more damages* from asserting these claims after the HarbourVest Settlement was approved. Later learning that a claim could potentially lead to recovering more damages does not establish that they lacked knowledge of their claims as necessary to establish inadvertence. *Cf. Howard v. Am. Healthways Servs., LLC*, No. SA-13-CV-1164-XR, 2014 WL 2168401, at *3 (W.D. Tex. May 22, 2014) (concluding a debtor's failure to disclose a potential claim was not inadvertent when the debtor knew about the claim but did not know she could recover monetary damages if she pursued the claim).

Appellants offer no argument in response to the bankruptcy court's conclusion that Appellants would have plenty of motive to take inconsistent positions. *In re Coastal Plains, Inc.*, 179 F.3d at 210. The Court concludes that the bankruptcy court did not err in this finding either.

The Court ultimately concludes that the bankruptcy court did not abuse its discretion to apply judicial estoppel. Appellants offer numerous arguments for why the Court should not apply judicial estoppel in this case. Doc. 22, Appellants' Br., 35–39. However, the Court largely rejected

these arguments previously when it affirmed the bankruptcy court's finding that the first two elements of judicial estoppel were satisfied, *In re Highland Cap. Mgmt., L.P.*, 643 B.R. at 173–75, and the Court will not reconsider its previous decision here. And because there is no clear error as to the third element, the Court now concludes the bankruptcy court did not abuse its discretion in invoking the judicial estoppel doctrine. Accordingly, the Court affirms the bankruptcy court granting the Renewed Motion to Dismiss as to Counts 2 and 5 of Appellants' Complaint.

B. The Court Affirms the Bankruptcy Court Dismissing Count 1 of the Complaint.

The Court next turns to whether Appellants stated a claim for breach of fiduciary duties. At the outset, the Court notes that the parties dispute the type of fiduciary duty claims Appellants have asserted in their Complaint. *Compare* Doc. 22, Appellants' Br., 12–13, *with* Doc. 27, Appellee's Br., 27, 32–33. After reviewing the Complaint, the Court concludes that Appellants have only asserted one breach of fiduciary duty claim under § 206 of the IAA.

Section 206 of the IAA imposes fiduciary duties upon investment advisors to act in the best interest of their investors. 15 U.S.C. § 80b-6; *see also Nat'l Ass'n of Priv. Fund Managers v. Sec. & Exch. Comm'n*, 103 F.4th 1097, 1103 (5th Cir. 2024) (noting that the IAA "recognizes a fiduciary duty between an investment adviser and his client"). Appellants go to great lengths discussing rules promulgated by the SEC defining the duties owed by investment advisors to their clients. Doc. 22, Appellants' Br., 16–20. However, § 206 does not confer a private cause of action. *Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 24 (1979). Thus, the bankruptcy court correctly dismissed this claim.

The main thrust of Appellants' arguments appears to be that HCM breached the fiduciary duties created by § 206 of the IAA, which then gives rise to an equitable claim under § 215. Doc.

32, Reply Br., 2, 4–5. The problem with this argument is that the Appellants failed to plead a § 215 claim in their Complaint. *See* Doc. 18-1, R., 32–33.

Section 215 of the IAA dictates that "[e]very contract made in violation of any provision of [the IAA] and every contract heretofore or hereafter made, the performance of which involves the violation of . . . [the IAA] . . . shall be void." 15 U.S.C. § 80b-15(b). The Supreme Court has interpreted § 215 of the IAA to render certain contracts void and to allow appellants to maintain "a suit for rescission or for an injunction against continued operation of the contract, and for restitution." *Transamerica Mortg. Advisors*, 444 U.S. at 19. The Complaint never cites § 215 of the IAA—the breach of fiduciary duties section only discusses §§ 204 and 206 of the IAA, as well as various federal regulations interpreting § 206. Doc. 18-2, R., 113–19. Appellants also did not allege in their Complaint that the HarbourVest Settlement was void because it violated the IAA[3] and that, because the Settlement is void, Appellants were entitled to recover the HarbourVest interest under a theory of restitution. *Id.*; *see Transamerica Mortg. Advisors*, 444 U.S. at 19. Appellants, therefore, did not assert a claim under § 215 of the IAA.

Appellants' arguments that they properly asserted a § 215 claim in their Complaint fail. The argument goes as follows: Section 215 of the IAA allows for equitable relief if a contract violates the IAA, Appellants asked for disgorgement in their Complaint, thus they asserted a claim under § 215. Doc. 22, Appellants' Br., 21. This is far too attenuated. In Appellants' view, they properly asserted a claim under a statutory provision that was mentioned nowhere in their Complaint solely because

[3] The Complaint only alleges that any attempt by Defendants to waive their alleged breach of the IAA's fiduciary duties under are void. Doc. 18-2, R., 166. Appellants did not, however, allege that the HarbourVest Settlement itself or any other contract entered into by Defendants is void as would be necessary to assert a claim under § 215.

of one of five forms of relief[4] they claimed to be entitled to recover. Such a conclusion would effectively require defendants to look at each remedy a plaintiff requested and then by process of reverse engineering, determine every possible statutory provision that a plaintiff could conceivably use to seek that relief. Appellants entirely fail to explain how HCM would have fair notice of such a claim. *Cf. Sims v. City of Madisonville*, 894 F.3d 632, 643 (5th Cir. 2018) (affirming a district court's decision to not consider a claim that was not mentioned in the complaint because the defendant was not given fair notice that plaintiff intended to assert such a claim).

Appellants also contest that the lower court "incorrectly assumed that Appellants were not seeking relief under § 215 of the [IAA] even though it featured prominently in Appellants' Response briefing." Doc. 22, Appellants' Br., 12. However, "[i]t is wholly inappropriate to use a response to a motion to dismiss to essentially raise a new claim for the first time." *United States ex rel. Grynberg Prod. Corp. v. Kinder Morgan CO2 Co., L.P.*, 491 F. Supp. 3d 220, 233 (N.D. Tex. 2020) (Kinkeade, J.) (citation and internal alterations omitted). As Appellants were not permitted to allege a new claim in their Response to HCM's Renewed Motion to Dismiss, any purported § 215 claim was not properly before the bankruptcy court. Therefore, the Court agrees with the bankruptcy court's conclusion that Appellants failed to plead a § 215 claim in their Complaint.

Next, the Court concludes that Appellants did not assert a state law breach of fiduciary duty claim in their Complaint. Appellants contend that a violation of a fiduciary duty owed under § 206 of the IAA can be used to maintain a state law breach of fiduciary duty claim. Doc. 22, Appellants' Br., 23–28. However, as with Appellants' purported § 215 claim, the Complaint does not assert a state law claim for breach of fiduciary duty. The breach of fiduciary duties section of the Complaint

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[4] Appellants also asked for "damages, exemplary damages, attorneys' fees and costs." Doc. 18-1, R., 119.

exclusively discusses federal law and federal regulations, Doc. 18-2, R., 113–19, and the Complaint makes no mention of any state law regarding fiduciary duties. *Id.* at 103–13. Because Appellants did not assert a state law breach of fiduciary duty claim, the Court agrees with the bankruptcy court that they failed to state such a claim.

To the extent Appellants argue it is sufficient to assert a claim under state law through the Complaint's allegation that HCM owed them a duty of loyalty and a duty of care, Appellants are mistaken. As Appellants have argued throughout this lawsuit, *see* Doc. 18-21, R., 4427, the IAA imposes the duties of loyalty and care upon investment advisors. *SEC v. Ambassador Advisors, LLC*, 576 F. Supp. 3d 286, 300 (E.D. Pa. 2021); *see also Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, 84 Fed. Reg. 33,669-01 (June 5, 2019). Thus, simply alleging HCM owed these fiduciary duties, while exclusively discussing federal law, is insufficient to have raised a state law claim in their Complaint. Because the Court concludes that Appellants did not assert a state law breach of fiduciary duty claim, the Court need not address the bankruptcy court's conclusion that Appellants failed to allege sufficient facts to state a claim for breach of fiduciary duty under Texas law or the parties' dispute about whether Texas law or Guerney law would apply.

In sum, Appellants only asserted a breach of a fiduciary duty claim under § 206 of the IAA, which does not confer a private cause of action. Thus, the Court affirms the bankruptcy court's dismissal of the Appellants' breach of fiduciary duty claim.

C. *The Court Affirms the Bankruptcy Court's Dismissal of Count 3 of the Complaint.*

The bankruptcy court dismissed Count 3 of Appellants' Complaint—a negligence claim—because the final reorganization plan in the underlying bankruptcy proceedings includes an exculpation provision that prohibits Appellants from later asserting a negligence claim arising out

of HCM's conduct in the bankruptcy proceedings. Doc. 18-1, R., 34. On appeal, Appellants contend the dismissal was erroneous for two reasons. First, Appellants argue that the Plan's exculpation provision does not bar their negligence claim because they allege HCM breached a duty that is unwaivable under federal law. Doc. 22, Appellants' Br., 33–35. Second, Appellants argue the exculpation provision does not prohibit Appellants from asserting a claim for gross negligence, and Appellants properly pleaded such a claim. Doc. 22, Appellants' Br., 13. The Court disagrees on both counts.

First, the bankruptcy Plan's exculpation provision bars Appellants' negligence claim. Appellants argue that the Plan's exculpation provision does not bar their negligence claim because their negligence claim is premised on duties of care and loyalty imposed by § 206 of the IAA and that these duties are unwaivable under 15 U.S.C. § 80b-15. Doc. 22, Appellants' Br., 34–35. However, § 80b-15 only prevents an investment advisor from waiving the IAA's fiduciary duties by contract, *see* 15 U.S.C. § 80b-15, which is not what happened here. Instead, the bankruptcy court entered an order in the underlying bankruptcy proceedings that prevented Appellants from later asserting certain causes of action, including negligence, arising out of the HCM's conduct during the underlying bankruptcy proceedings. The Court concludes that a court order limiting future liability against an investment advisor does not serve as the investment advisor attempting to improperly waive its duties imposed by the IAA. Thus, the Plan's exculpation provision prohibits Appellants from asserting a negligence claim against HCM.

Further, the Court notes that Appellants have cited no authority supporting the proposition that a court order exculpating one party from future liability against the other party should be construed as a party attempting "to waive compliance with any provision of [the IAA]." *See* Doc. 22,

Appellants' Br., 34–35; 15 U.S.C. § 80b-15(a). Additionally, even if this was a waiver, Appellants also fail to cite any authority for their proposition that § 80b-15 can be used to render a court order unenforceable, thus the Court rejects this argument. Accordingly, the Court affirms the bankruptcy court dismissing the negligence claim.

Second, Appellants' argument that they asserted a claim for gross negligence fails. Appellants did not assert a claim for gross negligence in their Complaint. Count 3 of the Complaint only alleges that HCM was negligent—it does not allege gross negligence, nor can a claim for gross negligence be inferred from the allegations in the Complaint. Doc. 18-2, R., 121–22. Thus, HCM was not given fair notice that Appellants were asserting a claim for gross negligence. *Cf. Sims*, 894 F.3d at 643.

To make matters worse, Appellants did not argue before the bankruptcy court that they pled a claim for gross negligence. Doc. 18-21, R., 4439–40. Thus, any argument about whether the Complaint asserted a claim for gross negligence was not presented to the bankruptcy court, and this Court will not consider it on appeal. *Gilani v. Wynn Las Vegas, LLC*, 654 B.R. 238, 243 (E.D. Tex. 2023), *aff'd sub nom. Matter of Gilani*, No. 23-40477, 2024 WL 340822 (5th Cir. Jan. 30, 2024).

D. The Court Affirms the Bankruptcy Court Dismissing the RICO Claim with Prejudice.

The bankruptcy court dismissed Appellants' civil RICO claim with prejudice, Doc. 18-1, R., 39, and Appellants only appear to argue that the bankruptcy court erred by dismissing this claim with prejudice without giving Appellants leave to amend. Doc. 22, Appellants' Br., 41–42. Before the bankruptcy court ruled on the Renewed Motion to Dismiss, Appellants attempted to use Federal Rule of Civil Procedure 41(a) to voluntarily dismiss their RICO claim without prejudice. Doc. 18-21, R., 4440. To the extent that Appellants argue they successfully dismissed their RICO claim under

Rule 41(a) *before* the bankruptcy court ruled on the Renewed Motion to Dismiss, Appellants are mistaken.

Rule 41(a) allows plaintiffs to unilaterally dismiss *actions* without prejudice if the opposing party has not yet filed an answer or a motion for summary judgment. FED. R. CIV. P. 41(a)(1)(A)(i). The Fifth Circuit has interpreted "action" to mean either a plaintiff's entire lawsuit or all of a plaintiff's claims against one defendant. *Williams v. Seidenbach*, 958 F.3d 341, 345 (5th Cir. 2020). Here, Appellants attempted to use Rule 41(a) to dismiss only one of their claims against HCM, which Rule 41(a) does not allow. *See id.* Thus, Appellants had not effectively dismissed their RICO claim without prejudice before the bankruptcy court ruled on the Renewed Motion to Dismiss.

E. The Bankruptcy Court Correctly Concluded It Would be Futile to Grant Leave to Amend.

The Court lastly addresses Appellants' argument that they should have been granted leave to amend each of their counts. "Ordinarily, this Court reviews the denial of a motion for leave to file an amended complaint for abuse of discretion. However, where, as here, the district court's denial of leave to amend was based solely on futility, we apply a *de novo* standard of review." *Def. Distributed v. Platkin*, 55 F.4th 486, 494 (5th Cir. 2022) (quotation and alteration omitted); *see also In re Webb*, 954 F.2d at 1103–04. The Court concludes that it would be futile to grant Appellants leave to amend.

"[D]istrict courts often afford plaintiffs at least one opportunity to cure pleading deficiencies before dismissing a case, unless it is clear that the defects are incurable or the plaintiffs advise the court that they are unwilling or unable to amend in a manner that will avoid dismissal." *Great Plains Tr. Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002). District courts give plaintiffs leave to amend their complaints "when justice so requires." FED. R. CIV. P. 15(a)(2); *see also*

FED. R. BANKR. P. 7015 (incorporating Federal Rule of Civil Procedure 15 into adversary proceedings filed in bankruptcy court). This liberal standard, however, is "tempered by the necessary power of a district court to manage a case." *Schiller v. Physicians Res. Grp. Inc.*, 342 F.3d 563, 566 (5th Cir. 2003).

When deciding whether to grant leave to amend, district courts consider the following factors: "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility of amendment." *Jacobsen v. Osborne*, 133 F.3d 315, 318 (5th Cir. 1998) (citations and emphasis omitted). Granting leave to amend a complaint is futile if "the amended complaint would fail to state a claim upon which relief could be granted." *Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 873 (5th Cir. 2000).

While courts should ordinarily state their reasons for denying plaintiffs leave to amend, failing to do so is not error when "the record reflects ample and obvious grounds for denying leave to amend." *Mayeaux v. Louisiana Health Serv. & Indem. Co.*, 376 F.3d 420, 426 (5th Cir. 2004) (citation omitted). Appellants argue that the bankruptcy court erred by not addressing their request to amend the Complaint. Doc. 22, Appellants' Br., 43. However, the Court finds that this was not error because it is clear from the record that the bankruptcy court denied leave to amend because it would have been futile to do so. *See Mayeaux*, 376 F.3d at 426.

With regards to Count 1 of the Complaint, it would have been futile to grant Appellants leave to amend as their breach of fiduciary duties claim was brought solely under a statutory provision that does not confer a private cause of action. Thus, the Court finds it appropriate to

dismiss this claim with prejudice as no set of facts would be able to state a claim under § 206. *See Stripling*, 234 F.3d at 873.

With regards to Counts 2 and 5, the Court also finds granting leave to amend these claims would futile because these claims are barred by judicial estoppel—thus any amended complaint would likewise fail to state a claim. *See Stripling*, 234 F.3d at 873.

With respect to Count 3, the final reorganization Plan's exculpation provision expressly prohibits Appellants from asserting a claim for negligence—thus, no set of facts could support a negligence claim. Doc. 18-12, R., 2432–33. Therefore, it would likewise have been futile to grant leave to amend their negligence claim under these circumstances. *See Stripling*, 234 F.3d at 873.

And with regards to Count 4—the civil RICO claim—Appellants did not propose to the bankruptcy court any new set of facts that would have shown the bankruptcy court that Appellants had a viable claim under the RICO statute. Doc. 18-21, R., 4440–41; *see Edionwe v. Bailey*, 860 F.3d 287, 294 (5th Cir. 2017) (affirming a district court denying leave to amend when the plaintiffs "fail[ed] to apprise the district court of the facts that he would plead in an amended complaint, if necessary, to cure any deficiencies" (citation omitted)). Appellants simply asked the bankruptcy court for leave to amend while saying it could plead "other acts" committed by HCM, but their request to amend did not identify any *specific* facts that would address the deficiencies in the RICO claim identified by the bankruptcy court. Doc. 18-21, R., 4441; *see also* Doc. 18-1, R., 35–39.

Accordingly, the Court affirms the bankruptcy court dismissing Appellants' Complaint with prejudice.

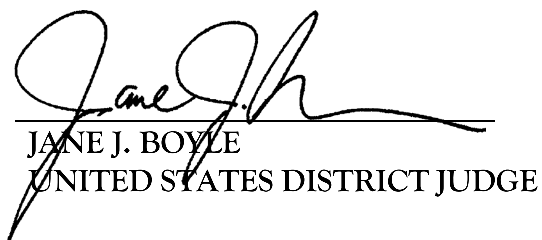
IV.

CONCLUSION

For the reasons discussed above, the Court **AFFIRMS** the bankruptcy court's opinion in its entirety. The appeal is **DISMISSED WITH PREJUDICE**.

SO ORDERED.

SIGNED: September 10, 2024.



JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

EXHIBIT B

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
September 16, 2024
Lyle W. Cayce
Clerk

No. 23-10911

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

Debtor,

Highland Capital Management, L.P.,

Appellee,

versus

NexPoint Asset Management, L.P., *formerly known as* Highland Capital Management Fund Advisors, L.P.; NexPoint Advisors, L.P.; NexPoint Real Estate Partners, L.L.C., *formerly known as* HCRE Partners L.L.C.; Highland Capital Management Services, Incorporated; James Dondero,

Appellants,

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

Debtor,

James D. Dondero;

Appellant,

versus

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Appellee,

CONSOLIDATED WITH

No. 23-10921

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

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Appellee,

versus

NEXPOINT ASSET MANAGEMENT, L.P., *formerly known as*
HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.,

Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC Nos. 3:21-CV-1010, 3:21-CV-1378,
3:21-CV-1379, 3:21-CV-3160,
3:21-CV-3162, 3:21-CV-3179,
3:21-CV-3207, 3:21-CV-880,
3:21-CV-881, 3:22-CV-789,
3:21-CV-1010, 3:21-CV-1378,
3:21-CV-1379, 3:21-CV-3160,
3:21-CV-3162, 3:21-CV-3179,
3:21-CV-3207, 3:21-CV-880,

3:21-CV-881, 3:22-CV-789

Before WIENER, ELROD, and WILSON, *Circuit Judges*.

JACQUES L. WIENER, JR., *Circuit Judge*:

Defendant-Appellant James Dondero managed Plaintiff-Appellee Highland Capital Management ("Highland"), an investment fund with several subsidiaries. Highland had a practice of lending its subsidiaries—and Dondero personally—money to meet investment demands. Dondero was effectively on both sides of these promissory notes, acting on behalf of Highland and the relevant subsidiaries. The potential for litigation arising from that arrangement lay dormant until Dondero was removed from Highland during the company's bankruptcy proceedings. Highland, then managed by a court-appointed board, attempted to make good on the promissory notes executed in its favor by the subsidiaries and Dondero (hereafter referred to as "Appellants"). When Appellants refused to pay, Highland brought several adversary actions against them in the bankruptcy court. After consolidation and a joint motion to withdraw the reference, the district court entered judgment in favor of Highland on all claims. We AFFIRM.

I.

Dondero founded Highland, a Dallas-based investment firm, in 1993. He was the general partner of Highland, and his family's trust, Dugaboy Investment Trust, was a part-owner. Dondero served as the trustee of Dugaboy from October 2010 until August 2015, when, after a six-month period when the trust was led by someone else, his sister, Nancy Dondero (hereinafter referred to as "Nancy" for clarity) became the trustee. She remains so today.

Dondero also managed a number of Highland's corporate affiliates, through which it did business, including Highland Capital Management

Fund Advisors ("HCMFA"),[1] NexPoint Advisors, Highland Capital Real Estate Partners ("HCRE"),[2] and Highland Capital Management Services ("HCMS"). Highland loaned tens of millions of dollars to these companies and to Dondero through a series of demand and term notes, allegedly to enable them to make investments. Each of the demand notes had identical terms, which provided, *inter alia*, that the "accrued interest and principal of this Note shall be due and payable on demand of the Payee." Each of the term notes was also identical in requiring repayment through thirty annual installments due, one each, on December 31 of each year. As one employee testified, "it's all one big happy family, and whoever needed cash, the cash moved around."

On October 16, 2019, while Dondero was acting as its CEO and President, Highland filed for relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. (No. 19-12239 (CSS)). The court appointed a committee and transferred the case to the Dallas Division of the Bankruptcy Court for the Northern District of Texas (No. 19-34054-sgj11). Dondero had a contentious relationship with the committee, which had explored appointing a Chapter 11 trustee because of "its concerns over and distrust of Mr. Dondero, his numerous conflicts of interest, and his history of alleged mismanagement (and perhaps worse)." *See Matter of Highland Cap. Mgmt., L.P.*, 98 F.4th 170, 172 (5th Cir. 2024) ("The bankruptcy provoked a nasty breakup between Highland Capital and . . . Dondero." (internal quotation marks and citation omitted)). Highland (through Dondero) and the committee finally agreed on a settlement whereby Dondero would relinquish control of Highland to an

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[1] HCMFA is now known as NexPoint Asset Management, L.P.

[2] HCRE is now known as NexPoint Real Estate Partners, L.L.C.

independent board approved by the court. As of January 9, 2020, Dondero was "out."

In conjunction with its Chapter 11 proceedings, on December 3, 2020, Highland—now controlled by the independent board—made demands on the demand notes executed by Dondero, HCMFA, HCMS, and HCRE. Appellants did not reply or make payment. ***Id.*** Additionally, while each of the Appellants subject to a term note (NexPoint, HCMS, and HCRE) had met its first three annual installment requirements, each failed to make the payments that became due on December 31, 2020. ***Id.*** Those Appellants made belated payments in January of 2021, after Highland notified them of their defaults.

The Highland board filed a reorganization plan with the bankruptcy court on January 22, 2021. Part of the board's plan rested on the assumption that "[a]ll demand notes are collected in the year 2021." All Appellants were made aware of Highland's reorganization plan before it became effective on August 11, 2021. Although they contested certain aspects of the plan, Appellants did not take issue with the assumption that Highland would recover on all notes that it was owed. *See In re Highland Cap.*, 48 F.4th at 439.

On January 22, 2021, Highland filed five adversary actions in the bankruptcy court, one each against Dondero (No. 21-3003), HCMFA (No. 21-3004), NexPoint (No. 21-3005), HCMS (No. 21-3006), and HCRE (No. 21-3007) (collectively, the "Main Notes Litigation," consolidated as No. 21-3003-sgj in the bankruptcy court). It sought enforcement of sixteen promissory notes executed in favor of Highland, with more than $60 million of unpaid principal and interest alleged to be due and owing. On November 9, 2021, Highland filed a second action against HCMFA that was specifically focused on the two pre-2019 notes issued by HCMFA in favor of Highland ("Second HCMFA Action," No. 21-3082-sgj in the bankruptcy court).

Highland moved for summary judgment in both cases, which were eventually consolidated into one before the district court (No. 21-881). After a joint motion to withdraw the reference, the bankruptcy court acted "essentially as a magistrate judge for the District Court prior to trial," and recommended that both of the motions for summary judgment be granted. The district court adopted the report and recommendations and entered judgment against all Appellants.

II.

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "An issue of material fact is genuine if a reasonable jury could return a verdict for the nonmovant." *Nall v. BNSF Ry. Co.*, 917 F.3d 335, 340 (5th Cir. 2019) (citation omitted). We review orders granting summary judgment de novo, applying the same standards as the district court. *Miller v. Michaels Stores, Inc.*, 98 F.4th 211, 215–16 (5th Cir. 2024). "As a general rule, the admissibility of evidence on a motion for summary judgment is subject to the same rules that govern the admissibility of evidence at trial." *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 175–76 (5th Cir. 1990) (footnote omitted), *abrogated on other grounds*, *Little v. Liquid Air Corp.*, 37 F.3d 1069 (5th Cir. 1994). Evidentiary determinations are reviewed for abuse of discretion. *Id.* at 176.

"Ordinarily, suits on promissory notes provide fit grist for the summary judgment mill." *Resol. Tr. Corp. v. Starkey*, 41 F.3d 1018, 1023 (5th Cir. 1995) (internal quotation marks and citation omitted). Under Texas law, to prevail on summary judgment in these types of cases, the movant must establish that (1) the note exists, (2) the non-movant signed the note, (3) the movant was the legal holder of the note, and (4) there was a balance due and owing on the note. *Id.* (citation omitted); *see also Zentech, Inc. v. Gunter*, 606

S. W. 3d 847, 852 (Tex. App.–Houston [14th Dist.] 2020, pet. denied). If the movant makes out a prima facie case, the burden shifts to the nonmovant to demonstrate the existence of a genuine dispute of material fact precluding summary judgment. *United States v. Lawrence*, 276 F.3d 193, 197 (5th Cir. 2001); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

III.

Highland established its prima facie case by showing that the notes were valid, due, and owing. The notes were (1) provided to Price Waterhouse Cooper ("PwC"), Highland's auditor; (2) included in all of Highland's financial statements, books, and records; (3) carried as assets on Highland's balance sheet with values equal to their accrued and unpaid principal and interest; and (4) incorporated into all of Highland's bankruptcy filings. Appellants, however, raise a series of defenses that they say preclude summary judgment.

A.

Appellants first assert that they entered into oral agreements with Highland whereby the notes would be forgiven if specific conditions subsequent occurred.[3] They say the parties agreed that if Highland's interest in three portfolio companies—Trussway, Cornerstone, MGM—was sold for greater than cost or on a basis outside of Dondero's control, the debts would be forgiven. Dugaboy purportedly entered into these agreements on behalf of

[3] In the Main Notes Litigation, all Appellants *except* for HCMFA raised the oral agreement defense. This is likely because the original defense stated that the alleged agreements were entered into "sometime between December of the year in which each note was made and February of the following year." But the relevant notes were executed by HCMFA in May 2019 and Highland filed for bankruptcy in October 2019—so the agreements pertaining to those notes would not have yet existed. In the Second HCMFA Action, pertaining to the pre-2019 notes, HCMFA did assert the oral agreement defense.

Highland, and Dondero did so on behalf of each of the Appellants. Therefore, when Dondero was the trustee of Dugaboy, he entered into these oral agreements with himself. When his sister Nancy became the trustee, she was the one who entered into the agreements on behalf of Highland, with Dondero acting on behalf of Appellants. No one other than Dondero and Nancy knew about these alleged oral agreements. Dondero testified that the agreements were intended to be compensation for him as the chief executive of Highland, a "common practice" at the firm.

The only evidence that Appellants offer to show the existence of a genuinely disputed material fact about whether there was an agreement to forgive these notes is declarations and depositions by the Donderos.[4] The fact that this testimony is self-serving is not, in and of itself, sufficient to defeat summary judgment. *See United States v. Stein*, 881 F.3d 853, 859 (11th Cir. 2018) (en banc) ("[T]he self-serving and/or uncorroborated nature of an affidavit cannot prevent it from creating an issue of material fact."); *McClendon v. United States*, 892 F.3d 775, 785 (5th Cir. 2018) (adopting *Stein*'s reasoning in a tax case). However, coupled with their lack of detail and internal inconsistencies, we hold that these statements are insufficient to "lead a rational jury to find for [Appellants]," as required to successfully oppose summary judgment. *See BMG Music v. Martinez*, 74 F.3d 87, 91 (5th Cir. 1996) (citation omitted). As the Supreme Court has explained, judgment is warranted when, as here, "the evidence is merely colorable[] or is not

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[4] It is unclear whether the district court *excluded* the Dondero declarations, or merely found that they did not establish a dispute of fact. If the district court excluded the declarations from consideration entirely under the sham-affidavit rule, that would be an evidentiary determination which we would review for abuse of discretion. *See Lavespere*, 910 F.2d at 176. If it held that the declarations were not sufficient to establish a dispute of fact, then de novo review would apply. To be safe, we apply the more stringent level of review.

significantly probative." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (internal citations omitted).

The Dondero declarations are "not the type of significant probative evidence required to defeat summary judgment." *Lawrence*, 276 F.3d at 197 (internal quotation marks and citation omitted). They differ with respect to such vital information as who entered into the alleged agreements and when. For example, Dondero declared—and his Answer pled[5]— that the alleged agreements were entered into some ten to twelve months after each of the pre-2019 notes was issued by HCMFA. But that same declaration incorporated by reference two documents which state that the agreements to forgive the loans were made contemporaneously with the issuance of the notes, and were intended to be an option for compensation from the get-go. This further contrasts with an earlier interrogatory in which Dondero claimed that the only thing of value that Dondero received in exchange for these notes was the funds—not the potential for compensation via forgiveness. The evidence is thus inconsistent as to the date and intent of the agreements. Appellants have not "explain[ed] the contradiction[s] or attempt[ed] to resolve the disparit[ies]." *Cleveland v. Pol'y Mgmt. Sys. Corp.*, 526 U.S. 795, 806 (1999).

The proffered evidence also contradicts itself as to whether it was Dondero or Nancy who entered into the agreements about the pre-2019 notes on behalf of Appellants. Dondero's Answer states that Nancy, as Dugaboy trustee, did so on HCMFA's behalf. But after Nancy testified that she could not have entered into the alleged agreement in 2014 since she was not yet the trustee of Dugaboy, Dondero filed another declaration in which he suddenly

[5] "A party cannot present evidence contradicting admissions made in his pleadings for the purposes of defeating a summary judgment motion." *Jonibach Mgmt. Tr. v. Wartburg Enters., Inc.*, 136 F. Supp. 3d 792, 821 n.29 (S.D. Tex. 2015) (citing *Davis v. A.G. Edwards & Sons, Inc.*, 823 F.2d 105, 107–08 (5th Cir. 1987)).

remembered that he was the one who entered into the 2014 agreement. As the district court pointed out, Appellants have "not sought leave to amend [their] Answer[s] in this Action, even though Mr. Dondero's declaration clearly contradicts the factual contentions in the Answer[s] as to who allegedly entered into the 2014 Alleged Oral Agreement." Because facts admitted in pleadings "are no longer at issue," the declarations contesting these facts are not probative of a factual dispute. *Davis*, 823 F.2d at 108 (citation omitted).

The evidence is not only inconsistent as to who acted on behalf of Appellants in agreeing to forgive the loans; it is also contradictory as to the *parties* to the agreement. Dondero testified that the 2016 agreement was between Highland and HCMFA. But Nancy's declaration states that that agreement was "between [Highland] and Jim Dondero." The only two people who Appellants claim know anything about that agreement, then, disagree as to who exactly entered into it, and on whose behalf.

It is true that "every discrepancy contained in an affidavit does not justify a district court's refusal to give credence to such evidence." *Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 894 (5th Cir. 1980) (citation omitted). But a court may decide that there are so many inconsistencies that the testimony does not need to be put before a jury. *See id.* (citation omitted) (distinguishing between testimony that is "not a paradigm of cogency or persuasiveness" and testimony that is a "transparent sham"). Although Appellants characterize Dondero's later statements as an "elaboration" and "clarification" of his earlier declarations and pleadings, the level of contradiction here is a polar binary. *See id.* (citation omitted) (citing a case granting summary judgment where the affidavit testimony "departs so markedly from the prior deposition of defendants' key witness, . . . as to brand as bogus the factual issues sought to be raised"); *cf. Winzer v. Kaufman County*, 916 F.3d 464, 473 (5th Cir. 2019) (explaining that an affidavit that "supplements, rather than

contradicts, an earlier statement" is competent evidence (internal quotation marks and citation omitted)). Who entered into the agreements, on behalf of whom, and when? These contradictions go to the heart of the oral-agreement defense. Because the only evidence Appellants rely on for this defense is internally inconsistent with respect to these key details, it is "not the type of significant probative evidence required to defeat summary judgment." *Lawrence*, 276 F.3d at 197 (internal quotation marks and citation omitted).

When we have found a party's single affidavit sufficient to preclude summary judgment, the evidence is much more specific and consistent. For example, in *Lester v. Wells Fargo Bank, N.A.*, a case relied on by Appellants, we held that a single self-serving affidavit established a genuine dispute of material fact because "the veracity of [the non-movant's] allegations would be difficult to prove any other way, and there are few material factual details omitted." 805 F. App'x 288, 292–93 (5th Cir. 2020) (quorum opinion). Here, if the agreements existed, it should be easy to prove through other means: For example, someone would have written them down or told auditors about them, and they would be reflected in Highland's books and bankruptcy filings. Yet none of this occurred. Further, the Donderos' declarations were not the kind of fact-heavy testimony that suggests "veracity" per *Lester*. There were holes and contradictions and questions left unanswered. To find this testimony insufficient to defeat summary judgment is consistent with this court's decision in *Lester*.

Appellants further rely on *LegacyRG, Inc. v. Harter* for their contention that discrediting a defendant's affidavit on summary judgment is an improper credibility determination. 705 F. App'x 223, 240 (5th Cir. 2017) (per curiam). But in that case, the court wrongly credited one party's affidavit over the other's. That is not the case here; this is not a situation when the nonmovant's statement is "rejected merely because it is not supported by the movant's . . . divergent statements." *Heinsohn v. Carabin & Shaw, P.C.*,

832 F.3d 224, 245 (5th Cir. 2016). The Donderos' statements about the alleged oral agreements are not supported by *their own* divergent statements. No reasonable juror would believe them, meaning that the issue is not "genuine" for the purposes of summary judgment. *See Anderson*, 477 U.S. at 248; *see also Hartsel v. Keys*, 87 F.3d 795, 799 (6th Cir. 1996) ("The mere possibility of a factual dispute is not enough." (internal quotation marks and citation omitted)).

To be clear, we are not entirely excluding the Dondero declarations from consideration under the sham-affidavit doctrine. *See Hacienda Recs., L.P. v. Ramos*, 718 F. App'x 223, 235 (5th Cir. 2018) (per curiam). We are instead holding that, because of their internal inconsistencies about the contract formation itself and lack of detail, these unsubstantiated statements are "not the type of significant probative evidence required to defeat summary judgment." *Lawrence*, 276 F.3d at 197 (internal quotation marks and citation omitted); *see also Cooper Cameron Corp. v. U.S. Dep't of Labor*, 280 F.3d 539, 550 (5th Cir. 2002) ("[A party] cannot meet its [summary judgment] burden with an internally inconsistent, self-contradictory affidavit."). The oral-agreement defense is entirely unsupported. *See Delta & Pine Land Co. v. Nationwide Agribusiness Ins. Co.*, 530 F.3d 395, 399 (5th Cir. 2008) (holding that nonmovants cannot satisfy their burdens in opposing summary judgment with unsubstantiated assertions only); *Little*, 37 F.3d at 1075 (holding that a nonmovant's summary judgment burden is not satisfied with "some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence" (internal quotation marks and citations omitted)). The purpose of summary judgment is to prevent factually unsupported claims and defenses from going to trial "with the attendant unwarranted consumption of public and private resources." *Celotex*, 477 U.S. at 327. Granting judgment in favor of Highland serves this purpose.

We further note that, even if the alleged oral agreements did exist, they would likely be unenforceable for lack of consideration. Appellants assert that the consideration given to Highland in exchange for forgiving the loans was (1) Dondero's forbearance from increasing his own base compensation, and (2) his incentive to increase the value of the portfolio companies in efforts to sell the companies above cost. There is no evidence that Highland knew or understood either of these alleged reasons for entering into the agreement. It is true that giving up a preexisting legal right, like the right to compensation, can constitute valid consideration. *See Bryant v. Cady*, 445 S. W. 3d 815, 820 (Tex. App.–Texarkana 2014, pet. denied) ("A promisee suffers a legal 'detriment' when, in return for a promise, the promisee surrenders a legal right that the promisee otherwise would have been entitled to exercise."). But just because loan forgiveness was allegedly part of Dondero's compensation does not mean that he would forgo any additional compensation outside of the agreements, which did not contain any formal relinquishment of claims. *Cf. City of New Orleans v. BellSouth Telecomms., Inc.*, 690 F.3d 312, 328 (5th Cir. 2012) (affirming that a settlement agreement was the "exclusive method" under which the plaintiff could receive compensation, since giving up further rights to additional compensation was expressly noted in the agreement). Even if the oral agreements did exist, then, they would be unenforceable. The notes remain due and owing, and summary judgment was proper.

B.

HCMFA raises two unique defenses to contract formation in the Main Notes Litigation and on appeal. First, it asserts that Frank Waterhouse, HCMFA's Treasurer, either did not sign the 2019 notes or did so without authority. Second, it maintains that the creation of these notes was the result of a mutual mistake involving compensation for an alleged error made by Highland. We are not persuaded by either argument.

1.

HCMFA first contends that Waterhouse did not actually sign the 2019 notes executed by HCMFA in favor of Highland, meaning that they are not valid. The notes do bear Waterhouse's signature. The signature appears to be a .jpg image, which was affixed by Accounting Manager Kristin Hendrix.[6] Waterhouse testified that his electronic signature was "used from time to time." Hendrix swore that, although she could not specifically recall Waterhouse authorizing her to use his signature on those two notes, she would not "have done that without authority and approval."

Failure to recall a particular event but testifying as to the usual course of dealing is not significantly probative of a fact issue. *See Anderson*, 477 U.S. at 248; *Rogers v. Bromac Title Servs., L.L.C.*, 755 F.3d 347, 350 (5th Cir. 2014) ("[S]ummary judgment may not be thwarted by conclusional allegations, unsupported assertions, or presentation of only a scintilla of evidence." (citation omitted)). Specifically, a plaintiff's inability to remember signing a particular contract is insufficient to raise a material dispute as to the validity of the agreement. *Batiste v. Island Recs., Inc.*, 179 F.3d 217, 223 (5th Cir. 1999). Therefore, Waterhouse's and Hendrix's testimony does not create a factual dispute about whether the notes were duly signed under Texas law and, without more, does not rebut Highland's prima facie case.

Next, HCMFA submits that Waterhouse was not authorized to sign the notes, also rendering them invalid. The district court found that

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[6] After learning this from Hendrix's deposition, HCMFA filed a motion with the bankruptcy court to amend its answer and assert this defense, alleging that Highland had breached its discovery obligations by failing to produce the metadata for the notes as requested. The bankruptcy court denied that motion, and the district court affirmed. HCMFA "incorporates its objection to the District Court's decision overruling [its] objection" in its appeal. The district court acted within its discretion in determining that amendment would have been futile. *See Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 139 (5th Cir. 1993).

Waterhouse had both actual and apparent authority to bind HCMFA in that way. *Actual* authority is that which "a principal intentionally confers upon an agent or intentionally allows the agent to believe himself to possess." *Polland & Cook v. Lehmann*, 832 S. W. 2d 729, 738 (Tex. App.–Houston [1st Dist.] 1992, writ denied). *Apparent* authority arises when "a principal either knowingly permit[s] an agent to hold himself out as having authority or show[s] such a lack of ordinary care as to clothe an agent with indicia of authority." *Coffey v. Fort Wayne Pools, Inc.*, 24 F. Supp. 2d 671, 680 (N.D. Tex. 1998) (citing *NationsBank N.A. v. Dilling*, 922 S. W. 2d 950, 952–53 (Tex. 1996)).

At the time that the notes were signed, Waterhouse was Treasurer of HCMFA, which, per the company's signed Incumbency Certificate, authorized him to "execute any and all agreements on behalf of the General Partner [of HCMFA]." Such authorization is a clear grant of actual authority, not limited by the size of the agreement as alleged by HCMFA.[7] HCMFA contends further that Waterhouse knew that he did not have the authority to bind HCMFA to loans of this size without Dondero's approval—and he cannot have had actual authority if he knew subjectively that he lacked it. Waterhouse did testify that he would have needed Dondero's approval for Highland to lend that amount of money. But, Waterhouse believed that he did have that approval: Dondero was the one to direct him to transfer the money

[7] Appellants further argue that the Incumbency Certificate cannot confer actual authority because it is not a "corporate governance document." They cite no support for that proposition. Any "written or spoken words or conduct by the principal to the agent" can create actual authority. *Cameron Cnty. Sav. Ass'n v. Stewart Title Guar. Co.*, 819 S. W. 2d 600, 603 (Tex. App.–Corpus Christi 1991, writ denied). This includes incumbency certificates. *See, e.g.*, *Krishnan v. JPMorgan Chase Bank, N.A.*, Civ. No. 4:15-CV-00632-RC-KPJ, 2018 WL 7138385, at *4 (E.D. Tex. Dec. 18, 2018) (relying on certificate to determine authorization to execute documents).

from Highland to HCMFA. There is nothing in the record to suggest that Waterhouse knew that he was acting outside the scope of his authority.

HCMFA's arguments regarding Waterhouse's signature and authorization of the 2019 notes do not preclude summary judgment.

2.

HCMFA asserts alternatively that Dondero did not intend for the $7.4 million transferred from Highland to HCMFA in 2019 to be a loan, but rather compensation for an error made by Highland that allegedly caused HCMFA harm. In March 2019, Highland made an error in calculating the net asset value ("NAV") of securities that a fund managed by HCMFA held in a particular portfolio. With the help of the SEC, Highland and HCMFA determined that the losses to the fund from the NAV error amounted to approximately $7.5 million, which HCMFA paid to its client. Appellants assert that Highland then accepted responsibility for having caused the error and compensated HCMFA in that amount through two transfers in May 2019. Dondero testified that he instructed Waterhouse to transfer those funds, but not that they should be drawn up as loans. HCMFA asserts that Highland's interpretation of the transfer was a mistake: "[W]hen [Highland]'s accountants saw large transfers from [Highland] to [HCMFA], they simply assumed the transfers were loans and, pursuant to their historical practice . . . documented the transfers as loans." And this was reasonable, as it was the standard practice when "transferring funds to one of [Dondero's] affiliates that it should always be booked as a loan."

HCMFA must bear the burden of proving mutual mistake. *See Castrellon v. Ocwen Loan Servicing, L.L.C.*, 721 F. App'x 346, 349 (5th Cir. 2018) (citing Texas law). A mutual mistake of fact occurs when "the parties to an agreement have a common intention, but the written contract does not reflect the intention of the parties due to a mutual mistake." *Okon v. MBank,*

N.A., 706 S. W. 2d 673, 675 (Tex. App.–Dallas 1986, writ ref'd n.r.e.). "In order for the affirmative defense of mutual mistake to be sustained on summary judgment, the defendant must raise fact issues showing that both parties were acting under the same misunderstanding of the same material fact." *Id.* "In determining the intent of the parties to a written contract, a court may consider 'the conduct of the parties and the information available to them at the time of signing' in addition to the written agreement itself." *Whitney Nat'l Bank v. Med. Plaza Surgical Ctr. L.L.P.*, No. H-06 1492, 2007 WL 3145798, at *6 (S.D. Tex. Oct. 25, 2007) (quoting *Williams v. Glash*, 789 S. W. 2d 261, 264 (Tex. 1990)). "The question of mutual mistake is determined not by self-serving subjective statements of the parties' intent, which would necessitate trial to a jury in all such cases, but rather solely by objective circumstances surrounding execution of the [contract.]" *Williams*, 789 S. W. 2d at 264.

Once again, essentially the only evidence that supports this defense is Dondero's own testimony. This is precisely the type of "self-serving subjective statement[]" that Texas law finds unreliable in this context. *See id.* Even if this evidence is considered to be competent, it merely establishes Highland's own assumption regarding the transfer, without suggesting that HCMFA "mutually held the mistake" at the time of contracting. *See Al Asher & Sons, Inc. v. Foreman Elec. Serv. Co., Inc.*, MO:19-CV-173-DC, 2021 WL 2772808, at *9 (W.D. Tex. Apr. 28, 2021). There is no evidence in the summary judgment record on which a reasonable juror could rely in finding that HCMFA believed the payment to be compensation rather than a loan. Instead, the evidence suggests the opposite. *See Whitney Nat'l Bank*, 2007 WL 3145798, at *7 (finding no mutual mistake where there was evidence of the other party's own intention regarding the agreement). HCMFA told its board that it caused the error itself, without ever mentioning Highland. HCMFA admits that it received $5 million in insurance proceeds to cover

the error and paid $2.4 million out of pocket. But it now claims that Highland "compensated" HCMFA in the full amount of $7.4 million, despite already receiving $5 million from insurance. HCMFA never told its insurance carrier that Highland was at fault or that Highland would compensate HCMFA for the error. ***Id.*** There is no evidence (1) that HCMFA ever accused Highland of causing the error or requested compensation, or (2) that Highland accepted responsibility and agreed to pay. There was nothing in HCMFA's books to suggest that the payment from Highland was intended to be compensation rather than a loan.

Dondero's testimony is insufficient to establish a dispute of material fact as to the purpose of the transfer from Highland to HCMFA, because it is directly contradicted by all of the above. *See Lawrence*, 276 F.3d at 197 (citation omitted). The district court did not err in granting summary judgment in favor of Highland on HCMFA's two 2019 notes.

C.

Appellants raise the defense of prepayment on two of the term notes executed in favor of Highland. They assert that NexPoint and HCMS prepaid on these notes earlier in the year, meaning that they did not default when they failed to make their annual payments on December 31, 2020. is undisputed that these Appellants had the right to make prepayments, and that they did in fact do so. Section 3 of the term notes states: "Prepayment Allowed; Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note." But it goes on to state: "Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof." Thus, when NexPoint and HCMS paid on the loans earlier in 2020, Highland was meant to apply those amounts to accrued interest and principal, not to hold the payments in reserve for over a year to satisfy Appellants' future obligations.

Highland generally followed those terms. The notes required that, as of December 31 of each year, the accrued interest on the loan be $0. NexPoint met this requirement in 2017, 2018, and 2019, regardless of whether prepayments were made during those years. Such pre-litigation behavior shows that NexPoint understood that the notes required it to pay all accrued interest by the date on their term notes, regardless of prepayments and how they were applied. As Highland points out, "the parties gave effect to the Term Notes' unambiguous terms prior to the commencement of litigation." "The unrefuted evidence proves that . . . the Term Note Obligors *always* paid their Annual Installment payment by December 31 *regardless* of how many millions they 'prepaid' during the prior calendar year." Thus, Appellants' argument that Highland "never once declared the Term Notes to be in default in years prior when Appellants made prepayments until 2020" is inapposite—they were not in default before that time.

NexPoint knew that it was required to pay all unaccrued interest and 1/30th of the outstanding principal amount of its term note, but it did not do so. Its knowledge is underscored by the fact that the 2020 annual installment was included in a thirteen-week forecast provided by Highland to Waterhouse, NexPoint's Treasurer. Further, the amortization schedule showed that Highland had not saved NexPoint's prepayments (not made for at least thirteen months) to apply to its December 31, 2020 required payment.[8] NexPoint and HCMS did make payments in January of 2021, seemingly attempting to "cure" their defaults after being advised of them by Highland. But the notes did not provide for a legal right to cure default. Objective evidence

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[8] As Appellants point out, prepayments made by NexPoint on December 5, 2017 and May 9, 2018, were applied to future interest. These two exceptions are insufficient to engender NexPoint's reliance, especially given the fact that NexPoint subjectively knew that its 2020 payment was due.

shows that both Appellants understood that they were required to make a payment on December 31, 2020, but did not do so.[9] No reasonable juror could find in favor of Appellants on the issue of prepayment. *See Anderson*, 477 U.S. at 248.

D.

Finally, NexPoint contends that Highland caused it to default on its term note on December 31, 2020, because it was Highland's responsibility to make the payment, which it failed to do. A Shared Services Agreement ("SSA") between NexPoint and Highland provided that Highland would manage "back- and middle-office" tasks for NexPoint.[10] Per the SSA, those tasks included "investment research, trade desk services, . . . finance and accounting, payments, operations, book keeping, cash management . . . accounts payable, [and] accounts receivable." NexPoint asserts that Highland had made NexPoint's term note payments in 2017, 2018, and 2019, without

[9] Appellants complain that the district court did not cite evidence about the HCMS note, relying only on evidence about NexPoint. This is incorrect. The R&R also independently cited the Dondero deposition where he was asked about HCMS and its prepayments. And the court had access to a second Klos Declaration, which clarified his opinion about HCMS. No. 23-1003 (N.D. Tex. Bankr.), ECF No. 166 at 4. Accordingly, the district court had enough evidence to determine that there was no genuine dispute of material fact as to the effect of the prepayments on either note.

[10] NexPoint's Answer raised as an affirmative defense that "[Highland] was responsible for making payments on behalf of [NexPoint] under that note. Any alleged default under the note was the result of [Highland's] own negligence, misconduct, breach of contract, etc." Appellants' briefing argues that the same applies to HCMS and HCRE. But unlike that of NexPoint, HCMS and HCRE's Answers do not specifically allege that it was Highland's job to make NexPoint's payments. Regardless, though, as the district court pointed out, there was no evidence that these defendants had SSAs with Highland. Appellants claim that they had SSAs "established by oral agreement and course of conduct." They again cite only a Dondero declaration in support. Why would there be a written SSA between Highland and NexPoint, but not between it and HCMS or HCRE? Appellants do not explain.

being prompted, "lead[ing] any reasonable person to believe" that it would do the same in 2020. The record evidence that it cites for this proposition is (1) the NexPoint term note's amortization schedule, and (2) a declaration from Dondero. The amortization schedule does not show *who* made the payments on behalf of NexPoint. And, as it does for the oral-agreement defense, Dondero's affidavit contradicts other evidence on this point. The declaration states that "[Highland] made the NexPoint Term Note payments . . . on December 31 of 2017, 2018, and 2019, without any specific authorization or permission" but, in fact, no payments were made on the note on any of those particular dates. In fact, Dondero himself elsewhere (within the context of prepayment) highlighted that Highland accepted those annual payments earlier in the year. A party "cannot meet its [summary judgment] burden with an internally inconsistent, self-contradictory affidavit." *Cooper Cameron*, 280 F.3d at 550. Such evidence does not establish a *genuine* issue of fact. *See Anderson*, 477 U.S. at 248.

A dispute of fact is genuine when the evidence would allow a reasonable juror to find in favor of the nonmovant. *Id.* Dondero's declaration would not allow a reasonable juror to find that it was Highland's responsibility to make NexPoint's payments in 2020. First, as Highland points out, the bankruptcy court approved a settlement in 2020, removing Highland from Dondero's control and placing it in the hands of a court-appointed committee. Thus, there can be no "course of conduct" that reasonably predicted what would happen in 2020, as this was the first time that Dondero was not in control when an annual installment payment became due. Second, Waterhouse testified that no one at Highland was "authorized to effectuate . . . payment on behalf of NexPoint" without approval. And, in December of 2020, not only did no one at Highland have specific approval to make that payment, but Dondero explicitly told Waterhouse that the payment should not be made, and Waterhouse advised Hendrix of the same. Appellants' argument, then,

is that because Highland had made NexPoint's payments in the past, it was reasonable for NexPoint to rely on them to do the same in 2020, despite the fact that an Appellant (Dondero, as CEO of Highland) told the Treasurer of Highland who told the Assistant Controller of Highland *not* to make the payment. It is not as though that was happening "behind closed doors"; the person responsible for making the payments on behalf of NexPoint was the same person who was notified that Highland should not make the payment. Appellants are blaming Highland for failing to do something that they expressly told them not to do. In the context of the record as a whole, no reasonable juror could find that it was Highland's responsibility to make NexPoint's payments and thereby return a verdict in favor of Appellants. *See Anderson*, 477 U.S. at 248.

IV.

Highland presented a prima facie case of promissory note default, and Appellants failed to "set forth specific facts showing that there is a genuine issue for trial." *See Lawrence*, 276 F.3d at 197 (internal quotation marks and citation omitted). Therefore, the district court did not err in granting summary judgment in favor of Highland.

AFFIRMED.