Case No. 25-11185

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Debtor

NexPoint Real Estate Partners, LLC (f/k/a HCRE Partners, LLC)

Appellant

v.

Highland Capital Management, L.P.

Appellee

Appeal from the United States District Court
Northern District of Texas, Dallas Division
No. 3:24-cv-01479-S

OPPOSITION TO MOTION TO RECALL AND STAY MANDATE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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I. Introduction

This Court correctly and unanimously affirmed the Bankruptcy Court's finding that Appellant HCRE acted in bad faith in filing and prosecuting a proof of claim it ***admittedly knew*** to be baseless. This Court then correctly and unanimously denied HCRE's petition for panel rehearing, and when issuing that denial determined that the mandate should issue forthwith. *See* Fed. R. App. P. 41(b) ("The Court may shorten or extend the time [for issuance of the mandate] by order."); 5th Cir. I.O.P. 41 (providing that "the Clerk will immediately issue the mandate . . . in such other instances as the Court may direct"). HCRE now seeks to recall the mandate, in service of yet another petition for a writ of certiorari (the "**Recall Motion**"). The Recall Motion should be denied.

This Court's Rules provide that "[o]nce issued a mandate will not be recalled except to prevent injustice." 5th Cir. R. 41.2. HCRE cannot come close to meeting that exceptionally high standard. For starters, the certiorari petition HCRE intends to pursue is utterly meritless. There is no plausible basis to suppose that the Supreme Court would grant certiorari to review a decision by this Court that is so quintessentially fact-bound and splitless. In the prohibitively unlikely event the Supreme Court were to review the case,

the prospect of reversal is exceedingly remote. HCRE selectively quotes the panel's decision to suggest it rests on a determination that HCRE's sole manager and senior officer, James Dondero, only "likely" knew that HCRE's Proof of Claim was false. But that misleading excerpt is just more bad faith by HCRE. The panel correctly determined that "Dondero and [Matt] McGraner . . . ***admitted at trial that they knew the claim was baseless***," that "Dondero filed the Proof of Claim ***without investigating***," and that "HCRE filed its claim with an ***ulterior motive***" of trying to disrupt the Highland bankruptcy that Dondero came to regret filing. *In re Highland Cap. Mgmt., L.P.*, --- F.4th ---; 2026 WL 2730275, at *4 (5th Cir. Sept. 16, 2026) (emphasis added). This Court's panel affirmed that the "evidence shows us clearly and convincingly that HCRE filed its claim in bad faith." *Id.* It also affirmed the Bankruptcy Court's evidentiary findings that the claim was not only filed in bad faith but was also aggressively prosecuted in bad faith, and that all the compensatory damages for such bad faith were "causally related to HCRE's conduct." *Id.* at *6. The notion that the Supreme Court would reverse a $375,000 fee award on this record is preposterous.

The only "injustice" here is how cavalierly HCRE and Dondero repeatedly consume this Court's and the parties' resources with meritless demands for relief reserved only for extraordinary circumstances.

II. There Is No Serious Possibility the Supreme Court Would Grant HCRE's Certiorari Petition

As HCRE concedes, the extraordinary relief it seeks requires that HCRE first make a threshold showing that the Supreme Court is likely to grant certiorari. The two questions HCRE intends to present for Supreme Court review do not remotely meet that test.

HCRE first claims that the Court's opinion conflicts with *Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. 101 (2017), because it "affirms nearly $375,000 in fees incurred after HCRE sought to withdraw its proof of claim, without identifying which fees would not have been incurred but for sanctionable conduct." Recall Motion at 2.[1] But there is no conflict with *Goodyear* because this Court concluded (correctly) that the Bankruptcy Court "had good reason to deny permission" for HCRE to withdraw its proof of claim:

> HCRE's failure to propose withdrawal language *caused* the denial of its motion to withdraw, so it cannot plausibly claim now that Highland's subsequent costs were not causally related to its

[1] HCRE's argument is based entirely on an assertion that the Bankruptcy Court imposed inappropriate "withdrawal conditions." HCRE never raised that issue at any point in any of its appeals and has, therefore, waived it. Even had HCRE not waived that issue, two courts' affirmances have already resolved it.

> conduct…. So after two years of costly litigation, Highland has what it sought at the withdrawal motion hearing: "an ironclad" guarantee that HCRE cannot challenge its interest in SE Multifamily again; whether in a bankruptcy court, or any other forum. Had HCRE proposed terms that would achieve this, further litigation would have been unnecessary…. ***Thus, Highland's costs that accrued after HCRE moved to withdraw its claims are still causally related to HCRE's conduct***.

Highland Cap. Mgmt., L.P., 2026 WL 2730275, at *5–6 (emphasis added). The decision here is therefore squarely in line with *Goodyear*.[2] Even if the panel had committed some fact-bound mistake in the application of *Goodyear* (it did not), "the [Supreme Court] does not sit simply to correct such errors." *Supreme Court Practice*, Guidelines for Exercise of Certiorari Jurisdiction § 4.2 (Geller, Shapiro, *et al.* eds., 10th ed. 2019); *see also* S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

[2] Moreover, *Goodyear* recognizes that in "exceptional cases, the but-for standard even permits a trial court to shift all of a party's fees, from either the start or some mid-point of a suit, in one fell swoop . . . . If a plaintiff initiates a case in complete bad faith, so that every cost of defense is attributable only to sanctioned behavior" all fees may be shifted. 581 U.S. at 110. While the Bankruptcy Court did not shift all the fees incurred by Highland, particularly the fees incurred fighting the baseless objection to conflicted counsel, it certainly could have done so based on the record here.

Second, HCRE claims that the Court erroneously based its decision on "a determination that one officer 'likely' knew a claim was unfounded." Recall Motion at 2. That grossly mischaracterizes the opinion, which, in reality, recounted the "ample evidence of HCRE's bad faith" that "clearly and convincingly show[ed] that it (1) filed the Proof of Claim in bad faith, and (2) litigated the claim in bad faith." 2026 WL 2730275, at *4. And contrary to HCRE's claim that the Court "ignored" countervailing evidence, this Court correctly recognized that "Dondero and McGraner . . . admitted at trial that they knew the claim was baseless" when it was filed. *Id.* HCRE does not—and cannot—point to any authority suggesting that a bankruptcy court lacks inherent authority to sanction a party for knowingly filing a baseless proof of claim under penalty of perjury (particularly where the entity's *only* officers have confessed to that fact). There is no reasonable likelihood the Supreme Court would grant certiorari on this record to consider adopting such an unprecedented rule facilitating knowingly false proofs of claim.

III. The Supreme Court Would Not Reverse

Even if HCRE could show that the Supreme Court is likely to grant certiorari, HCRE cannot show that the Supreme Court is likely to reverse this Court's decision. HCRE cites no authority suggesting that a bankruptcy court cannot sanction a litigant who files a proof of claim knowing it to be baseless. To state such an extreme proposition is to refute it.

HCRE cites *United States v. Emeary*, 794 F.3d 526 (5th Cir. 2015), and *Calderon v. Thompson,* 523 U.S. 538 (1998), ostensibly as examples of "injustices" similar to what HCRE purportedly faces here. Not so. *Emeary* was a criminal case in which this Court issued an opinion and mandate that directly conflicted with precedents from this Court and the Supreme Court. This Court acknowledged that "the district court committed plain error by sentencing Emeary to fifteen years of incarceration when the statutory maximum was ten, and this court committed plain error when we deemed Emeary's appeal frivolous and dismissed it without any notice of the issue." 794 F.3d at 530. In *Calderon*, the Supreme Court held that the Circuit Court had erred in withdrawing its mandate denying federal habeas corpus relief on the eve of the petitioner's execution, absent clear and convincing evidence of the prisoner's actual innocence. 523 U.S. at 539–40.

Neither case remotely resembles this one. For the reasons explained above, this Court's decision is fully consonant with settled law on bankruptcy courts' inherent authority to sanction litigants. HCRE cites no new evidence and does not face dire consequences from the denial of its motion. Nor does HCRE cite a single case addressing the stay of a mandate pertaining to the repeated affirmance of a bankruptcy court's findings of fact following a full evidentiary hearing. HCRE asks this Court to do something without precedent and without good reason.[3]

HCRE cites a single case—*Cadle Co. v. Moore (In re Moore),* 739 F.3d 724 (5th Cir. 2014)—for the proposition that bad faith should not be lightly imputed to a litigant. HCRE's reliance on *Cadle* is misplaced. Cadle was the largest creditor in Moore's bankruptcy case.[4] This Court faulted the bankruptcy court for imputing the trustee's counsel's alleged misconduct to Cadle. "BNM [the law firm] was the agent of the trustee, not of Cadle." 739 F.3d at 732. This Court held that, "because the bankruptcy court failed to find by clear and convincing evidence that Cadle acted in bad faith, it erred in

[3] HCRE notes in that section of the Recall Motion that "no party has materially relied on the mandate." Highland has the absolute right to immediately draw on the funds HCRE was forced to surrender into the court's registry as soon as this Court issued its mandate. A delay of that right is prejudicial.

[4] Neither HCRE nor Dondero was ever a Highland creditor.

invoking its inherent sanction power…. [T]he record does not establish that Cadle deliberately abused the judicial process." *Id.*

This case presents precisely the opposite situation. The Bankruptcy Court made specific, explicit factual findings of bad faith by HCRE and its officers, something the bankruptcy court in *Cadle* never did. It is difficult to imagine a more inapt comparison than equating the unwarranted imputation of bad faith in *Cadle* to the Bankruptcy Court's ascribing Dondero's bad faith to the entity he used to perpetrate it. In *Cadle*, the bad faith was committed by someone other than the party sanctioned. Here, HCRE's bad faith was committed by Dondero and McGraner, the only individuals running HCRE.

Because neither of HCRE's purported "issues" is an issue at all, the suggestion that the Supreme Court would reverse a factual finding of bad faith affirmed three times on appeal (without dissent) is risible.

IV. HCRE Will Not Suffer Irreparable Harm

HCRE itself "recognizes that payment of money alone ordinarily does not establish irreparable harm." Recall Motion at 17. Instead, HCRE believes itself irreparably harmed by the "published adjudication that HCRE knowingly abused the judicial process." *Id.* It hardly bears noting that the publishing of the truth cannot irreparably harm a litigant. In any event, the

publishing of this Court's opinion is a *fait accompli*. Nor can HCRE or Dondero credibly claim to be harmed by this Court's publishing an opinion regarding Dondero's contumacious behavior given that he or entities he controls have been cited for contempt and bad faith three times now. This Court's affirmances of all of those citations are a matter of public record.

HCRE has already assured this Court that it will file a certiorari petition within the next two months. Whether Highland is permitted finally to receive its compensation for bad faith conduct HCRE committed years ago will not impede Dondero's rancorous campaign of ceaseless litigation.

V. Conclusion

For the reasons stated above, the Court should deny the Recall Motion.

September 30, 2026

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CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because, including footnotes and excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 1,934 words.

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/s/ Zachery Z. Annable
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CERTIFICATE OF SERVICE

I certify that, on September 30, 2026, a copy of the foregoing document was served electronically on all parties registered to receive electronic notice in this case via the Court's CM/ECF system.

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