Southwest Bankruptcy Conference

CONCURRENT SESSION

General

Supreme Court Jurisprudence

Sasha M. Gurvitz
KTBS Law LLP | Los Angeles

Hon. William J. Lafferty, III
U.S. Bankruptcy Court (N.D. Cal.) | Oakland

Mary Langsner
Garman Turner Gordon | Las Vegas

Jeffrey N. Pomerantz
Pachulski Stang Ziehl & Jones LLP | Los Angeles

2023

No. 22-631

IN THE
Supreme Court of the United States

HIGHLAND CAPITAL MANAGEMENT, L.P.,
Petitioner,
v.
NEXPOINT ADVISORS, L.P., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS NEXPOINT ADVISORS, L.P. AND NEXPOINT ASSET MANAGEMENT, L.P.

BENOIT QUARMBY
MOLOLAMKEN LLP
430 Park Ave.
New York, NY 10022

JEFFREY A. LAMKEN
Counsel of Record
ROBERT K. KRY
EUGENE A. SOKOLOFF
MOLOLAMKEN LLP
The Watergate, Suite 500
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

Counsel for Respondents NexPoint Advisors, L.P. and NexPoint Asset Management, L.P.

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

Section 524(e) of the Bankruptcy Code provides that the "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. §524(e). The provision thus limits the effect of a discharge to the debtor itself, expressly excluding other parties. Section 524(g) creates a narrow exception, but only for certain asbestos-related claims. Consistent with those provisions, the Fifth Circuit held below that Section 524(e) generally prohibits a bankruptcy court from exculpating or enjoining claims against third parties who have not themselves declared bankruptcy and thereby subjected themselves to the bankruptcy court's supervision. The question presented is:

Whether Section 524(e) prohibits a bankruptcy court from exculpating or enjoining claims against third parties who have not themselves declared bankruptcy.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, respondents state that NexPoint Advisors, L.P.'s majority owner is the Dugaboy Investment Trust, that NexPoint Asset Management, L.P.'s majority owner is Highland Capital Management Services, Inc., and that no publicly held company owns 10% or more of any of those entities' ownership interests.

iii

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

United States Court of Appeals (5th Cir.):

- *Dondero* v. *Highland Capital Management, L.P.*, No. 21-10219 (dismissed May 18, 2021)
- *NexPoint Advisors, L.P.* v. *Highland Capital Management, L.P.*, No. 21-10449 (judgment entered Aug. 19, 2022)
- *Highland Capital Management Fund Advisors, L.P.* v. *Highland Capital Management, L.P.*, No. 22-10189 (judgment entered Jan. 11, 2023)
- *NexPoint Advisors, L.P.* v. *Pachulski Stang Ziehl & Jones, L.L.P.*, No. 22-10575 (pending)
- *Dugaboy Investment Trust* v. *Highland Capital Management, L.P.*, No. 22-10831 (pending)
- *Dondero* v. *Highland Capital Management, L.P.*, No. 22-10889 (pending)
- *Dugaboy Investment Trust* v. *Highland Capital Management, L.P.*, No. 22-10960 (pending)
- *Dugaboy Investment Trust* v. *Highland Capital Management, L.P.*, No. 22-10983 (pending)
- *Charitable DAF Fund, L.P.* v. *Highland Capital Management, L.P.*, No. 22-11036 (pending)

United States District Court (N.D. Tex.):

- *Dondero* v. *Highland Capital Management, L.P.*, No. 3:20-cv-03390-X (dismissed Mar. 8, 2022)
- *UBS Securities LLC* v. *Highland Capital Management, L.P.*, No. 3:20-cv-03408-G (dismissed June 14, 2021)

- *Dondero* v. *Highland Capital Management, L.P.*, No. 3:21-cv-00132-E (leave to appeal denied Feb. 11, 2021)
- *Dugaboy Investment Trust* v. *Highland Capital Management, L.P.*, No. 3:21-cv-00261-L (judgment entered Sept. 26, 2022)
- *Highland Capital Management Fund Advisors L.P.* v. *Highland Capital Management L.P.*, Nos. 3:21-cv-00538-N, 3:21-cv-00539-N, 3:21-cv-00546-N, 3:21-cv-00550-N (administratively closed July 12, 2022)
- *Charitable DAF Fund, L.P.* v. *Highland Capital Management, L.P.*, No. 3:21-cv-00842-B (administratively closed Oct. 18, 2021)
- *Dondero* v. *Jernigan*, No. 3:21-cv-00879-K (dismissed Feb. 9, 2022)
- *Highland Capital Management, L.P.* v. *Highland Capital Management Fund Advisors, L.P.*, Nos. 3:21-cv-881-X, 3:21-cv-880-X, 3:21-cv-1010-X, 3:21-cv-1378-X, 3:21-cv-1379-X, 3:21-cv-03160-X, 3:21-cv-3162-X, 3:21-cv-3179-X, 3:21-cv-3207-X, 3:22-cv-00789-X (pending)
- *Official Committee of Unsecured Creditors* v. *CLO Holdco Ltd.*, No. 3:21-cv-01112-C (pending)
- *PCMG Trading Partners XXIII, L.P.* v. *Highland Capital Management, L.P.*, No. 3:21-cv-01169-N (administratively closed July 6, 2022)
- *Official Committee of Unsecured Creditors* v. *CLO Holdco Ltd.*, No. 3:21-cv-01173-X (dismissed May 6, 2022)
- *Official Committee of Unsecured Creditors* v. *CLO Holdco Ltd.*, No. 3:21-cv-01174-S (pending)

v

- *Dugaboy Investment Trust* v. *Highland Capital Management, L.P.*, No. 3:21-cv-01295-X (judgment entered Sept. 22, 2022)
- *Charitable DAF Fund, L.P.* v. *Highland Capital Management, L.P.*, No. 3:21-cv-1585 (administratively closed Oct. 6, 2021)
- *Dondero* v. *Highland Capital Management, L.P.*, No. 3:21-cv-01590-N (judgment entered Aug. 18, 2022)
- *Charitable DAF Fund, L.P.* v. *Highland Capital Management, L.P.*, No. 3:21-cv-01710-N (administratively closed July 6, 2022)
- *Highland Capital Management Fund Advisors, L.P.* v. *Highland Capital Management, L.P.*, No. 3:21-cv-01895-D (judgment entered Jan. 28, 2022)
- *Charitable DAF Fund, L.P.* v. *Highland Capital Management, L.P.*, Nos. 3:21-cv-01974-X, 3:21-cv-01979-S (judgment entered Sept. 28, 2022)
- *Dugaboy Investment Trust* v. *Highland Capital Management, L.P.*, No. 3:21-cv-02268-S (dismissed Aug. 8, 2022)
- *NexPoint Advisors, L.P.* v. *Pachulski Stang Ziehl & Jones, L.L.P.*, Nos. 3:21-cv-03086-K, 3:21-cv-3088-K, 3:21-cv-3094-K, 3:21-cv-3096-K, 3:21-cv-3104-K (judgment entered May 9, 2022)
- *Charitable DAF Fund, L.P.* v. *Highland Capital Management, L.P.*, Nos. 3:21-cv-03129-B, 3:22-cv-00695-B (judgment entered Sept. 2, 2022)
- *Kirschner* v. *Okada*, Nos. 3:22-cv-00203-S, 3:22-cv-229-S, 3:22-cv-253-S, 3:22-cv-367-S, 3:22-cv-369-S, 3:22-cv-370-S (pending)
- *NexPoint Advisors, L.P.* v. *Kirschner*, No. 3:22-cv-00335-L (pending)

- *CLO Holdco Ltd.* v. *Kirschner*, No. 3:22-cv-02051-B (pending)
- *NexPoint Advisors, L.P.* v. *Highland Capital Management, L.P.*, No. 3:22-cv-02170-S (administratively closed Jan. 23, 2023)
- *Charitable DAF Fund, L.P.* v. *Highland Capital Management, L.P.*, No. 3:22-cv-02280-S (pending)
- *Charitable DAF Fund, L.P.* v. *Highland Capital Management, L.P.*, No. 3:22-cv-02802-S (pending)

United States Bankruptcy Court (N.D. Tex.):

- *In re Highland Capital Management, L.P.*, No. 19-34054 (confirmation order entered Feb. 22, 2021)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

NO. 22-631

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Petitioner,

v.

NEXPOINT ADVISORS, L.P., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENTS NEXPOINT ADVISORS, L.P. AND NEXPOINT ASSET MANAGEMENT, L.P.

PRELIMINARY STATEMENT

The Fifth Circuit correctly held below that the Bankruptcy Code generally forbids third-party exculpations. That holding follows from the plain text of Section 524(e), which makes clear that the "discharge of a debt of the debtor *does not affect the liability of any other entity* on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e) (emphasis added). It is also buttressed by Section 524(g), which allows bankruptcy courts to exculpate third parties *only* in certain carefully limited circumstances involving asbestos-related claims.

Although the court below reached the right result on that issue, Highland's petition is correct that there is a circuit conflict. The issue is also important: Parties have increasingly used third-party releases to avoid responsibility for everything from the opioid epidemic to sex-abuse scandals, claiming the benefits of a bankruptcy discharge while avoiding all of bankruptcy's burdens. The Court should grant review and restore uniformity among the circuits by putting an end to those abuses.

This case, moreover, is a particularly good vehicle for review because the decision below implicates two related questions that also divide the circuits. First, while the Fifth Circuit correctly struck most of the third-party exculpations, it permitted others. The court upheld provisions that shielded Highland's "Independent Directors" for all misconduct short of gross negligence, invoking an expansive view of the common-law immunity of bankruptcy trustees. That ruling implicates an acknowledged three-way circuit conflict over the standard for common-law immunity: The Fourth, Sixth, Seventh, and Tenth Circuits hold that bankruptcy trustees are immune for all but *willful* violations; the First, Second, Ninth, and Eleventh Circuits allow suits for simple negligence; and the Fifth Circuit requires gross negligence.

Second, the court of appeals upheld provisions that exculpate both Highland and third parties from liabilities arising in the ordinary course of their business operations *after* the bankruptcy discharge. That holding conflicts with the rule in the Seventh, Eighth, Ninth, and Eleventh Circuits. Those courts recognize that, once a debtor emerges from the bankruptcy court's oversight, it leaves behind the bankruptcy court's protections too. The Fifth Circuit's approach has particularly perverse results for registered investment advisers like Highland, seem-

ingly relieving them from liability even for violations of fiduciary duties under federal law.

NexPoint has filed its own petition seeking review of those questions. See No. 22-669. This case thus presents the opportunity to address multiple important questions regarding third-party exculpations—all of which have divided the circuits—in a single proceeding. Review that fails to consider the full range of relevant issues would protract the confusion in the lower courts and undermine the Court's ability to provide clear guidance. A ruling against third-party exculpations, moreover, may have limited practical effect if courts continue to grant broad protections through expansive interpretations of common-law immunity. Highland's own petition therefore underscores why the Court should grant NexPoint's petition as well, so it has the full range of issues before it.

STATEMENT

This case arises out of the Chapter 11 bankruptcy of Highland Capital Management, L.P., a multibillion-dollar investment management firm co-founded by James Dondero. Over the objections of both Mr. Dondero and the U.S. Trustee, the bankruptcy court exculpated a sprawling cast of third parties from liability and purported to immunize both Highland and third parties from ordinary post-bankruptcy business liabilities.

I. THE BANKRUPTCY COURT'S APPROVAL OF A PLAN WITH BROAD EXCULPATORY PROVISIONS

1. During the bankruptcy, Highland initially operated as a debtor-in-possession under Mr. Dondero's control. Pet. App. 49a-50a. Later, the bankruptcy court appointed three "Independent Directors" to manage the company. *Id.* at 58a. Highland ultimately proposed a Fifth Amended

Plan of Reorganization for approval. See Pet. App. in No. 22-669, at 167a-196a ("Plan").

Highland's plan of reorganization provides that, following confirmation of the plan, Highland will "continue to manage funds and conduct its business in the same manner" as before, while gradually paying off creditors and winding down its business. Pet. App. 102a; Plan § IV.C.6-7. "[T]here is no specified time frame by which this process must conclude." Pet. App. 102a. The plan calls for Highland to complete distributions within three years, but permits the court to extend that period indefinitely. Plan § IV.B.14.

The plan includes a sweeping exculpatory provision that extends to "nearly all bankruptcy participants." Pet. App. 8a-9a. The "Exculpated Parties" include "(i) the Debtor and its successors and assigns, (ii) the Employees, (iii) [the Debtor's general partner] Strand, (iv) the Independent Directors, (v) the Committee, (vi) the members of the Committee (in their official capacities), (vii) the Professionals retained by the Debtor and the Committee in the Chapter 11 Case, (viii) the CEO/CRO; and (ix) the Related Persons of each." Plan § I.B.62. "Related Persons" include all "present, future, or former officers, directors, employees, managers, managing members, members, financial advisors, attorneys, accountants, investment bankers, consultants, professionals, advisors, shareholders, principals, partners, subsidiaries, divisions, management companies, heirs, agents, and other representatives." *Id.* § I.B.112.

The exculpatory provision bars "any claim * * * for conduct occurring on or after the Petition Date in connection with," among other things, "the implementation of the Plan," "the funding or consummation of the Plan," or "the offer, issuance, and Plan Distribution of any secu-

rities issued or to be issued pursuant to the Plan, * * * whether or not such Plan Distributions occur following the Effective Date." Plan § IX.C. Because the plan contemplates that Highland will continue to operate its business for three years or longer, that exculpation sweeps in a broad range of post-discharge conduct. The provision permits claims for "bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct," but not for ordinary negligence. *Ibid.*

The plan also includes a permanent injunction and gatekeeping provision that prohibits bankruptcy participants from asserting claims, without prior court approval, against any "Protected Party"—a category even broader than the list of Exculpated Parties. Plan § IX.F; see *id.* § I.B.56, .105. That provision covers claims relating to, among other things, "the administration of the Plan or property to be distributed under the Plan" or "the wind down of the business of the Debtor." *Id.* § IX.F. Again, because the plan contemplates that Highland will carry on business for multiple years, that provision sweeps in a broad range of post-bankruptcy conduct.

2. The bankruptcy court confirmed the plan. Pet. App. 39a-160a. Citing *In re Pacific Lumber Co.*, 584 F.3d 229 (5th Cir. 2009), the court recognized that the Fifth Circuit had previously rejected third-party exculpations on the ground that "section 524(e) of the Bankruptcy Code 'only releases the debtor, not co-liable third parties.'" Pet. App. 108a. But the court asserted that Mr. Dondero's purported "litigious conduct" justified a different result here. *Id.* at 111a.

II. THE COURT OF APPEALS' OPINION

The Fifth Circuit affirmed in part and reversed in part. Pet. App. 1a-38a.

1. Section 524(e), the court observed, states that the "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." Pet. App. 28a. The court held that "the exculpation here partly runs afoul of that statutory bar on non-debtor discharge by reaching beyond Highland Capital, the Committee, and the Independent Directors." *Ibid.* The court acknowledged that "there is a circuit split concerning the effect and reach of § 524(e)." Pet. App. 30a. But the court followed its own precedent construing Section 524(e) to prohibit non-debtor exculpations. *Id.* at 31a.

The Fifth Circuit nonetheless upheld the plan's exculpation of the Independent Directors. Citing *In re Smyth*, 207 F.3d 758 (5th Cir. 2000), the court observed that it had "recognized a limited qualified immunity [for] bankruptcy trustees." Pet. App. 32a. *Smyth* acknowledged a "circuit split" over "the proper standard of care to which a trustee should be held." 207 F.3d at 761. Several courts applied an "intentional and deliberate standard," while others permitted claims for "mere negligence." *Ibid.* *Smyth* adopted an "intermediate position" and held that "the proper standard is gross negligence." *Ibid.* Applying that standard, the court below held that the plan's exculpation of the Independent Directors was permissible because it tracked the gross negligence standard that governed their common-law immunity as bankruptcy trustees. Pet. App. 33a.

The court also rejected NexPoint's argument that the plan improperly immunized Highland and third parties for ordinary post-bankruptcy business liabilities. Nex-

Point urged that the plan's post-discharge exculpations amounted to "a perpetual 'get out of jail free' card" for "future, post-confirmation liabilities." NexPoint C.A. Br. 26. In the Fifth Circuit's view, however, "permanency alone is no reason to alter a bankruptcy court's otherwise-lawful injunction on appeal." Pet. App. 35a.

2. The court of appeals granted rehearing and amended its opinion. Pet. App. 2a.[1] Highland and NexPoint then filed two separate petitions seeking this Court's review. See Pet.; Pet. in No. 22-669.

ARGUMENT

The court of appeals correctly held that Section 524(e) ordinarily prohibits bankruptcy courts from exculpating non-debtor third parties. NexPoint agrees with Highland, however, that the court's ruling raises an important and recurring question that has divided the courts of appeals. With alarming frequency, parties have used non-debtor releases to evade responsibility for everything from the opioid crisis to sex-abuse scandals, claiming the benefits of a bankruptcy discharge without enduring bankruptcy's burdens. This is an appropriate case in which to

[1] Highland errs in claiming that the Fifth Circuit rejected the argument that "the persons and entities it had struck from the plan's exculpation provision must likewise be left unprotected by the plan's injunction and gatekeeper provisions." Pet. 12. Even in its original opinion, the Fifth Circuit stated that "Appellants' primary contention—that the Plan's injunction 'is broad' by releasing non-debtors in violation of § 524(e)—is resolved by our striking the impermissibly exculpated parties." Pet. App. in No. 22-669, at 61a; Pet. App. 35a. The court then amended its opinion on rehearing to make the point even more clear. Compare Pet. App. in No. 22-669, at 61a, with Pet. App. 35a (deleting the text "[t]he injunction and gatekeeper provisions are, on the other hand, perfectly lawful" and replacing it with "[w]e now turn to the Plan's injunction and gatekeeper provisions").

grant review, restore uniformity to the law, and put an end to those rampant abuses of the bankruptcy system.

This case is a particularly good vehicle for doing so. The case would allow the Court to address two closely related issues that have also divided the lower courts—issues that are presented in NexPoint's own petition from the same judgment. See No. 22-669. There is a wide-ranging and acknowledged circuit conflict over the standard that governs a bankruptcy trustee's common-law immunity. The circuits also disagree over whether a reorganization plan may exculpate parties from ordinary post-bankruptcy business liabilities. The Fifth Circuit's decision takes the wrong side of both of those independently certworthy issues. Granting both parties' petitions would enable the Court to resolve multiple circuit conflicts in a single proceeding and bring clarity to this thorny area of the law.

The issues, moreover, are intertwined. A ruling from this Court that the Bankruptcy Code bars non-debtor exculpations may accomplish little if courts could achieve the same result by inventing expansive common-law principles instead. Granting both petitions would enable the Court to resolve these related issues with a full picture of the relevant principles and how they interact.

I. THIRD-PARTY EXCULPATIONS ARE AN IMPORTANT ISSUE THAT DIVIDES THE COURTS OF APPEALS

1. Section 524(e) provides that the "discharge of a debt of the debtor *does not affect the liability of any other entity* on * * * such debt." 11 U.S.C. §524(e) (emphasis added). That provision limits the effect of a discharge to the debtor itself, expressly excluding other parties from the discharge. Nonetheless, some courts of appeals refuse to enforce that provision as written, resulting in a

circuit conflict and widespread abuse of the bankruptcy process in many parts of the country.

The Fifth and Tenth Circuits read Section 524(e) to mean what it says. That provision "categorically bars third-party exculpations absent express authority in another provision of the Bankruptcy Code." Pet. App. 30a; see also *In re Pac. Lumber Co.*, 584 F.3d 229, 251-253 (5th Cir. 2009); *In re Zale Corp.*, 62 F.3d 746, 760-761 (5th Cir. 1995); *In re W. Real Estate Fund, Inc.*, 922 F.2d 592, 600 (10th Cir. 1990), modified on other grounds, 932 F.2d 898 (10th Cir. 1991). By contrast, the Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits hold that Section 524(e) "does not foreclose a third-party release from a creditor's claims." *In re Airadigm Commc'ns, Inc.*, 519 F.3d 640, 656 (7th Cir. 2008); see also *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070, 1078 (11th Cir. 2015), cert. denied, 577 U.S. 823 (2015); *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002), cert. denied, 537 U.S. 816 (2015); *In re A.H. Robins Co.*, 880 F.2d 694, 702 (4th Cir. 1989), cert. denied, 493 U.S. 959 (1989); cf. *Blixseth* v. *Credit Suisse*, 961 F.3d 1074, 1084 (9th Cir. 2020), cert. denied, 141 S. Ct. 1394 (2021). NexPoint thus agrees with Highland that there is "an acknowledged and substantial circuit split" over this issue. Pet. 13.

2. NexPoint also agrees that the question is important. "Third-party releases are among the most controversial issues in Chapter 11 bankruptcy." Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 Tex. L. Rev. 1079, 1106 (2022). In recent years, parties have used them to avoid liability for everything from the opioid crisis to sex-abuse scandals without actually declaring bankruptcy themselves. Pet. in No. 22-669, at 18. Widespread outrage over those practices has sparked debate over bankruptcy

courts' authority and even proposed legislation in Congress. See, *e.g.*, Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 Yale L.J. Forum 960, 967 (2022); Nondebtor Release Prohibition Act of 2021, H.R. 4777, 117th Cong. (July 28, 2021); Nondebtor Release Prohibition Act of 2021, S. 2497, 117th Cong. (July 28, 2021). Highland is therefore also correct that the case presents an "important and recurring issue." Pet. 18.

3. Finally, NexPoint agrees with Highland that this case is a suitable vehicle. The fact that this case involves third-party *exculpations* that limit liability to gross negligence or willful misconduct, rather than third-party *releases* that eliminate liability altogether, does not diminish the importance of the issue or make this case a faulty vehicle. Cf. Pet. 3 n.1, 22.

For one thing, there is no relevant difference between exculpations and releases. An exculpation clause *is* a release with respect to the category of claims that falls within its terms. In this case, for example, the plan purports to eliminate liability for a broad range of third-party claims—all claims short of gross negligence. Whether one labels that provision an "exculpation" or a "release" makes no real difference; the plan purports to eliminate those liabilities. The impact can be very great indeed where, as here, the provision eliminates all liability for ordinary negligence. See *Conway* v. *O'Brien*, 312 U.S. 492, 495 (1941) ("Gross negligence is substantially and appreciably higher in magnitude and more culpable than ordinary negligence.").

Moreover, nothing in the statutory text supports a distinction between exculpations and releases. Section 524(e) states that a bankruptcy discharge shall not "*affect* the liability of any other entity." 11 U.S.C. §524(e) (em-

phasis added). An exculpatory clause clearly "affects" a party's liability: It eliminates liability for a particular category of claims.

Courts thus routinely analyze both exculpations and releases under the same principles. Many courts do not even draw a clear distinction, using the term "release" to embrace exculpations too. See, *e.g.*, *Blixseth*, 961 F.3d at 1081-1082 (describing "Exculpation Clause" as a "liability release" that "releas[ed] the parties from liability * * * [from] negligence claims * * * [but not] willful misconduct or gross negligence"); *In re Dynegy, Inc.*, 770 F.3d 1064, 1066 (2d Cir. 2014) (referring to a "binding release of non-debtor third parties" that "did not cover intentional fraud, willful misconduct, gross negligence, or criminal conduct"); *Seaside*, 780 F.3d at 1081 ("release" did not include "claims arising out of fraud, gross negligence, or willful misconduct"); *Airadigm*, 519 F.3d at 657 ("release" did not include "willful misconduct"); *In re PWS Holding Corp.*, 228 F.3d 224, 247 (3d Cir. 2000) ("release" set forth "applicable standard of liability * * * rather than eliminating it altogether").

The court below thus properly rejected Highland's effort to justify the exculpatory provision in this case on the theory that it merely restricts rather than eliminates liability. Highland urged a "distinction between a concededly unlawful release of all non-debtor liability and the Plan's limited exculpation of non-debtor post-petition liability." Pet. App. 29a. But the Fifth Circuit "rejected th[at] parsing between limited exculpations and full releases," making clear that its interpretation of Section 524(e) applies equally to both types of provisions. *Id.* at 31a. This case thus squarely presents the issue that divides the courts of appeals.

II. This Case Is A Particularly Good Vehicle In Light Of The Issues NexPoint Raises In Its Own Petition

NexPoint has filed its own petition seeking review of the same judgment. See No. 22-669. As that petition explains, the court of appeals' decision implicates two related circuit conflicts that warrant review in their own right. Those questions provide yet another reason this case presents a good vehicle for review.

1. First, the circuits are divided over the standard that governs the common-law immunity of bankruptcy trustees. The First, Second, Ninth, and Eleventh Circuits permit suits for ordinary negligence. See *In re Mailman Steam Carpet Cleaning Corp.*, 196 F.3d 1, 7 (1st Cir. 1999), cert. denied, 530 U.S. 1230 (2000); *In re Gorski*, 766 F.2d 723, 727 (2d Cir. 1985); *Bennett* v. *Williams*, 892 F.2d 822, 823 (9th Cir. 1989); *Red Carpet Corp. of Panama City Beach* v. *Miller*, 708 F.2d 1576, 1578 (11th Cir. 1983). The Fourth, Sixth, Seventh, and Tenth Circuits require intentional misconduct. See *United States* v. *Sapp*, 641 F.2d 182, 184-185 (4th Cir. 1981); *Ford Motor Credit Co.* v. *Weaver*, 680 F.2d 451, 462 (6th Cir. 1982); *In re Chi. Pac. Corp.*, 773 F.2d 909, 915 (7th Cir. 1985); *Sherr* v. *Winkler*, 552 F.2d 1367, 1375 (10th Cir. 1977). The Fifth Circuit takes an "intermediate position" that requires "gross negligence." *In re Smyth*, 207 F.3d 758, 761 (5th Cir. 2000). The court of appeals applied that standard below and upheld the plan's exculpatory provision with respect to the Independent Directors because it tracked that common-law gross negligence standard. Pet. App. 32a-33a.

That conflict is important. The Fifth Circuit's gross negligence standard sharply limits the relief available for trustee misconduct. For that reason, the U.S. Trustee

filed an amicus brief in another Fifth Circuit case urging that court to reconsider its standard. See *In re Schooler*, 725 F.3d 498, 511-512 n.10 (5th Cir. 2013). The Fifth Circuit recognized that "the government has advanced a persuasive argument challenging our holding in *Smyth*," but refused to budge, deeming itself "bound." *Ibid.*

2. The Fifth Circuit's decision below also creates a circuit conflict over whether bankruptcy courts may exculpate debtors from ordinary post-bankruptcy business liabilities. The plan in this case contemplates that Highland will "continue to manage funds and conduct its business in the same manner" as before, while gradually winding down operations. Pet. App. 102a. Yet it broadly exculpates Highland and other parties for their "implementation" of that plan. Plan § IX.C. It also enjoins claims over the "administration" of the plan and "the wind down of the business of the Debtor." *Id.* § IX.F. The plan thus purports to exculpate Highland and third parties for ordinary post-bankruptcy business liabilities.

Other courts of appeals would not permit such provisions. As one circuit explains: "A firm that has emerged from bankruptcy is just like any other defendant" and must defend itself under the "applicable non-bankruptcy law." *Pettibone Corp.* v. *Easley*, 935 F.2d 120, 122 (7th Cir. 1991); see also *In re Fairfield Cmtys., Inc.*, 142 F.3d 1093, 1095 (8th Cir. 1998); *Sw. Marine Inc.* v. *Danzig*, 217 F.3d 1128, 1140 (9th Cir. 2000), cert. denied, 532 U.S. 1007 (2001); *In re Sure-Snap Corp.*, 983 F.2d 1015, 1017 (11th Cir. 1993).

This issue is important too. Under the decision below, debtors can grant themselves indefinite immunity following a bankruptcy so long as their reorganization plan calls for them to continue doing business and exculpates them for "implementing" or "administering" that plan.

The consequences are particularly striking for a registered investment adviser like Highland. Pet. App. 49a-50a. The decision below seemingly exculpates such debtors even from claims over their important fiduciary duties under federal law. See *SEC* v. *Cap. Gains Rsch. Bureau, Inc.*, 375 U.S. 180, 191 (1963).

3. Those two further circuit conflicts underscore this case's suitability for review. By granting both petitions, the Court can settle, in a single case, three related issues that have divided the courts of appeals. That is a far more efficient course than addressing each issue piecemeal. Conversely, review that fails to consider the full range of issues would protract the confusion and undermine the Court's ability to provide clear guidance based on a full understanding of the relevant context.

The close relationship between the issues reinforces the desirability of addressing them all in a single case. The common-law immunity issue is particularly intertwined with the broader question of third-party exculpations. A ruling prohibiting third-party exculpations may do little to settle the disarray in this area if courts continue to grant broad protections to third parties based on expansive views of common-law immunity. Reviewing those issues together is necessary to put an end to third parties' abuse of the bankruptcy system by claiming the benefit of a bankruptcy discharge while avoiding bankruptcy's burdens.

Finally, the questions in NexPoint's petition confirm that the fact pattern here—a case involving exculpations rather than wholesale releases from all liability—is a virtue rather than a defect. Cf. Pet. 3 n.1, 22. A case involving a wholesale release would not permit the Court to address the circuit conflict over the common-law immunity standard. No circuit holds that the common law

provides *complete* immunity, so common-law immunity could never justify a wholesale third-party release. Because this case involves provisions that purport to exculpate third parties only for misconduct short of gross negligence, it squarely presents both the permissibility of third-party exculpations and the scope of the common-law immunity the court of appeals relied on to uphold the provisions for certain third parties.

III. The Fifth Circuit's Interpretation Is Correct

While Highland is correct about the circuit conflict and the importance of the issue, it is wrong on the merits. The Fifth Circuit correctly held that Section 524(e) prohibits third-party exculpations.

Section 524 describes the effect of a discharge in bankruptcy. Section 524(a) provides that the discharge bars any effort to collect "a personal liability *of the debtor*." 11 U.S.C. § 524(a) (emphasis added). Section 524(e) then explains that the "discharge of a debt of the debtor *does not affect the liability of any other entity* on, or the property of any other entity for, such debt." *Id.* § 524(e) (emphasis added). That provision makes clear that "Congress did not intend to extend such benefits to third-party bystanders." *W. Real Estate*, 922 F.2d at 600; see also *In re Lowenschuss*, 67 F.3d 1394, 1401 (9th Cir. 1995) (Section 524 "does not * * * provide for the release of *third parties* from liability"), cert. denied, 517 U.S. 1243 (1996).

Section 524(g) erases any doubt. That provision states that a bankruptcy court may issue an injunction that bars an "action directed against a third party" for certain asbestos-related claims "*[n]otwithstanding the provisions of section 524(e)*." 11 U.S.C. § 524(g)(4)(A)(ii) (emphasis added). That provision would make no sense unless Section 524(e) otherwise prohibited such releases. See Jonathan M. Seymour, *Against Bankruptcy Exceptionalism*,

89 U. Chi. L. Rev. 1925, 2008 (2022) (deeming this "the best reading of the statute"). Moreover, where "a general authorization and a more limited, specific authorization exist side-by-side," the "terms of the specific authorization must be complied with." *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012). Section 524(g)'s specific authorization for third-party protections in asbestos cases implies that other generic provisions of the Bankruptcy Code do not already authorize such relief.

Highland contends that Section 524(e) is "merely a 'saving clause' intended to clarify that a debtor's discharge from its debts has no effect on the liability of others on those same debts." Pet. 21. But that is precisely the point. The Bankruptcy Code makes clear that the debtor, and the debtor alone, benefits from the discharge. Bankruptcy courts cannot disregard that fundamental structural feature of the statute by invoking generic authorities to grant discharges to third parties too. Moreover, Highland does not even attempt to square its "saving clause" theory with Section 524(g)'s express authorization for third-party injunctions in asbestos cases "[n]otwithstanding the provisions of section 524(e)." 11 U.S.C. § 524(g)(4)(A)(ii). That provision is an insurmountable obstacle for Highland's interpretation.

Highland also urges that Section 1123(b)(6) authorizes Chapter 11 plans to include "any * * * appropriate provision not inconsistent with the applicable provisions of this title." Pet. 21. But the court below explained why that argument begs the question: Section 1123(b)(6) authorizes only provisions that are "*not inconsistent*" with other Code sections. Pet. App. 32a. Third-party exculpations *are* inconsistent with other sections, namely Sections 524(e) and (g)—and if not with their plain text,

then at the very least with their irresistible structural implications. As a result, Section 1123(b)(6) does not authorize such provisions. Highland has no response to that straightforward analysis.

CONCLUSION

The Court should grant both Highland's petition and NexPoint's petition in No. 22-669.

Respectfully submitted.

BENOIT QUARMBY
MOLOLAMKEN LLP
430 Park Ave.
New York, NY 10022

JEFFREY A. LAMKEN
Counsel of Record
ROBERT K. KRY
EUGENE A. SOKOLOFF
MOLOLAMKEN LLP
The Watergate, Suite 500
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

Counsel for Respondents NexPoint Advisors, L.P. and NexPoint Asset Management, L.P.

FEBRUARY 2023

No.

In the Supreme Court of the United States

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Petitioner,

v.

NEXPOINT ADVISORS, L.P., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

JEFFREY N. POMERANTZ
JOHN A. MORRIS
GREGORY V. DEMO
PACHULSKI STANG ZIEHL & JONES LLP
10100 Santa Monica Blvd., 13th Fl.
Los Angeles, CA 90067

ROY T. ENGLERT, JR.
Counsel of Record
MATTHEW M. MADDEN
PAUL BRZYSKI
SHIKHA GARG
KRAMER LEVIN NAFTALIS & FRANKEL LLP
2000 K Street NW, 4th Fl.
Washington, DC 20006
(202) 775-4500
renglert@kramerlevin.com

Counsel for Petitioner

QUESTION PRESENTED

Section 524(e) of the Bankruptcy Code states that the "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." According to the Fifth Circuit, even though the text refers to the effect of a discharge rather than to the powers of a bankruptcy court, section 524(e) "categorically bars" a court from confirming any chapter 11 plan of reorganization that releases third parties from liability, either in full or through their limited exculpation for negligence claims relating to the administration of the bankruptcy estate as in this case.

In the opinion below, the Fifth Circuit acknowledged that, by contrast, the Second, Third, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits "read[] § 524(e) to allow varying degrees of limited third-party exculpations."

The question presented is whether section 524(e), as its text suggests, states only the effect of a discharge on third parties' liability for a debtor's own debts or instead, as the Fifth Circuit holds, constrains the power of a court when confirming a plan of reorganization.

PARTIES TO THE PROCEEDING

Petitioner is Highland Capital Management, L.P., the reorganized chapter 11 debtor in the bankruptcy proceedings below, and the appellee in the court of appeals.

Respondents are NexPoint Advisors, L.P., NexPoint Asset Management, L.P., Highland Income Fund, NexPoint Strategic Opportunities Fund, Highland Global Allocation Fund, NexPoint Capital, Incorporated, James Dondero, The Dugaboy Investment Trust, and Get Good Trust. Respondents were the appellants in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Highland Capital Management, L.P., has no parent corporation, and no publicly held company owns 10% or more of its stock.

DIRECTLY RELATED PROCEEDINGS

United States Court of Appeals (5th Cir.):

Highland Capital Management Fund Advisors, L.P., et al. v. *Highland Capital Management, L.P.*, No. 22-10189

NexPoint Advisors, L.P. v. *Pachulski Stang Ziehl & Jones, L.L.P., et al.*, No. 22-10575

The Dugaboy Investment Trust v. *Highland Capital Management, L.P.*, No. 22-10831

James Dondero v. *Highland Capital Management, L.P.*, No. 22-10889

The Dugaboy Investment Trust v. *Highland Capital Management, L.P.*, No. 22-10960

The Charitable DAF Fund, L.P., et al. v. *Highland Capital Management, L.P.*, No. 22-11036

iii

DIRECTLY RELATED PROCEEDINGS—Cont'd

The Dugaboy Investment Trust v. *Highland Capital Management, L.P.*, No. 22-10983

United States District Court (N.D. Tex.):

Highland Capital Management, L.P., et al. v. *Highland Capital Management Fund Advisors L.P.*, No. 3:21-cv-881 (consolidated cases: 3:21-cv-880, 3:21-cv-1010, 3:21-cv-1378, 3:21-cv-1379)

The Charitable DAF Fund, L.P., et al. v. *Highland Capital Management, L.P.*, No. 3:21-cv-1585

NexPoint Advisors, L.P., et al. v. *Highland Capital Management, L.P.*, No. 3:22-cv-02170

The Charitable DAF Fund, L.P., et al. v. *Highland Capital Management, L.P.*, No. 3:22-cv-02280

United States Bankruptcy Court (N.D. Tex.):

In re: Highland Capital Management, L.P., No. 19-34054

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES—Cont'd

Constitution

Statutes

TABLE OF AUTHORITIES—Cont'd

Miscellaneous

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-38a) is reported at 48 F.4th 419. The order of the bankruptcy court confirming the plan of reorganization (App., *infra*, 39a-160a) is unreported.

JURISDICTION

The court of appeals entered judgment on August 19, 2022. App., *infra*, 161a. On September 7, 2022, the court issued a revised opinion without entering a new judgment. On November 8, 2022, Justice Alito extended the time to file a petition for a writ of certiorari to and including January 5, 2023.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 524 of the Bankruptcy Code, 11 U.S.C. § 524, provides in relevant part:

(a) A discharge in a case under this title—

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1192, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1192, 1228(a)(1), or 1328(a)(1), or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

* * *

(e) Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

STATEMENT

The court below, on direct appeal from the bankruptcy court, reversed in part an order confirming a chapter 11 plan of reorganization because the plan contained an exculpation clause that included non-debtors. That clause established that specified persons and entities that guided petitioner during its bankruptcy case would be held to a standard of care excluding their liability for simple

negligence.[1] Following circuit precedent—with which most other courts of appeals have disagreed—the Fifth Circuit held that section 524(e) of the Bankruptcy Code, 11 U.S.C. § 524(e), prohibits chapter 11 reorganization plans from exculpating or releasing non-debtors from liability, except as is specifically authorized by some other provision of the Bankruptcy Code. As the court of appeals acknowledged, "[t]he simple fact of the matter is that there is a circuit split" on that issue. App., *infra*, 30a.

The Second, Third, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits all disagree with the Fifth. In those circuits, section 524(e) is not understood to constrain bankruptcy courts from limiting the liability of non-debtors under a chapter 11 plan in appropriate circumstances.

The Fifth and Tenth Circuits, however, read section 524(e) as prohibiting chapter 11 plans from protecting almost all non-debtors from liability in almost any circumstance, even if doing so is vital to the success of the plan and viability of the reorganized debtor.

This deep and intractable dispute among the circuits turns on what section 524(e) means when it

---

[1] "Exculpation clauses" are distinct from third-party releases. Whereas a non-debtor release "eliminat[es]" a non-debtor's liability "altogether," *In re PWS Holding Corp.*, 228 F.3d 224, 247 (3d Cir. 2000), an exculpation clause is a *limited* release that sets a standard of care, *id.* at 245. Petitioner's plan contained a non-debtor exculpation, not a third-party release. As explained below, however, the Fifth Circuit treats 11 U.S.C. § 524(e) as equally prohibiting exculpation clauses and third-party releases, except as applied to a narrow set of parties. For the question presented by this petition, therefore, the distinctions between exculpation clauses and non-debtor releases matter little.

states that the "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e). The seven-circuit majority view is that section 524(e) merely confirms the effect of a discharge under subsection (a) of the same section, *id.* § 524(a): such a discharge does not automatically affect creditors' rights against any other persons or entities also liable on the same debt.

Section 524(e) does not, under the majority view, impose any independent restriction on the bankruptcy court's broad, equitable authority. Among other sources granting that authority, the Bankruptcy Code explicitly empowers a court confirming a plan of reorganization to "include any other appropriate provision not inconsistent with the applicable provisions of" the Bankruptcy Code. 11 U.S.C. § 1123(b)(6).

By contrast, the two-circuit minority view, applied by the court of appeals below, is that section 524(e) states not just the effect of a discharge itself but also a broad limitation of the courts' power to protect non-debtors in any way except under a specific grant of authority elsewhere in the Code.

The majority view is correct, and the decision below is wrong. Section 524(e) simply states that the discharge of a debtor's liability on a debt does not *itself* affect any other creditor's liability *on that same debt*. Section 524(e) uses no mandatory language at all; it does not tell the court or the parties what provisions a plan "shall" or "shall not" include. In other words, section 524(e) is simply a saving clause intended to clarify that a debtor's statutorily defined discharge is limited in scope to the debtor itself.

This is an important and recurring issue of bankruptcy law, as is demonstrated by the depth and duration of the circuit split. The facts of this case further demonstrate that importance.

Petitioner is an SEC-registered investment advisor that, during its bankruptcy, continued to manage billions of dollars of financial assets. Petitioner's professionals and related entities now face a barrage of litigation about their bankruptcy-related conduct from petitioner's ousted founder—a "serial litigator," as the bankruptcy court accurately called him—who objected to petitioner's reorganization and threatened to "burn the place down" when he did not get his way before the bankruptcy court.

In these circumstances, the bankruptcy court found that exculpation—a limitation of liability commonplace in corporate law and routinely afforded to the directors and officers of financial companies outside of bankruptcy—was necessary to prevent the post-effective-date estate from being swamped with frivolous litigation arising from conduct that occurred during the bankruptcy case. Petitioner's reorganization plan thus exculpated certain parties, including petitioner and specified non-debtors, from liability other than for acts or omissions constituting bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct.

The court of appeals struck most non-debtors from the confirmed plan's exculpation provision, holding that section 524(e) "categorically bars" their exculpation. The court of appeals acknowledged the bankruptcy court's findings that those exculpations were necessary to the success of petitioner's

reorganization plan. Nevertheless, it concluded that circuit precedent bound it to strike certain of those exculpations from the plan. That incorrect holding merits review by this Court.

A. Legal Background

A principal goal of bankruptcy law is to afford the debtor a "fresh start." The bankruptcy discharge, which releases the debtor from obligations on its pre-petition debts, is an important tool for accomplishing that goal. Each of the Bankruptcy Code chapters under which debtors can seek relief contains a specific provision for how and when the debtor's discharge occurs under that chapter. See 11 U.S.C. §§ 727, 944, 1192, 1228, 1328. Section 524 provides general provisions, applicable across all chapters, about the effect of a discharge.

Under section 524, discharge does not itself extinguish the debtor's underlying debt. Rather, discharge voids the debtor's (and only the debtor's) liability on the debt and enjoins creditors from pursuing actions against the debtor on any claims arising from that debt. 11 U.S.C. § 524(a). The debt otherwise remains valid and enforceable. Judgments on that debt against any non-debtors are unaffected, and creditors may pursue further recovery from any such liable non-debtors. See 4 *Collier on Bankruptcy* ¶ 524.05 (16th ed. 2022).

Section 524(e) makes this point explicit. It states that, "[e]xcept as provided in subsection (a)(3) of this section," which deals with certain community-property debts, "discharge of a debt of the debtor does not affect the liability of any other entity on, or the

property of any other entity for, such debt." 11 U.S.C. § 524(e).

B. Factual and Procedural Background

1. The Parties

Petitioner Highland Capital Management, L.P., is the reorganized chapter 11 debtor. Highland, a global investment adviser founded in 1993, provided investment management and advisory services, managing billions of dollars of assets, both directly and through affiliates.

Respondent James Dondero is petitioner's co-founder and former CEO. NexPoint Advisors, L.P., and NexPoint Asset Management, L.P. (f/k/a as Highland Capital Management Fund Advisors, L.P.) are registered investment advisors owned or controlled by Dondero. They, in turn, manage Highland Income Fund, NexPoint Strategic Opportunities Fund (n/k/a NexPoint Diversified Real Estate Trust), Highland Global Allocation Fund, and NexPoint Capital Incorporated, which are investment vehicles also controlled by Dondero. The Dugaboy Investment Trust and Get Good Trust are Dondero's family trusts.

2. Petitioner's Chapter 11 Bankruptcy

Petitioner's path to bankruptcy was far from typical. It did not suffer a business calamity, have problems with its vendors or landlords, or default on payments to its lenders. Rather, petitioner's chapter 11 case was brought on by "a myriad of massive, unrelated, business litigation claims that it faced * * * after a decade or more of contentious litigation in multiple forums all over the world" instigated by Dondero when he was petitioner's CEO.

App., *infra*, 52a. As the bankruptcy court found, Dondero is a "serial litigator" whose litigiousness caused petitioner to file for bankruptcy and strapped it with more than a billion dollars in claims. See *id.* at 52a-55a.

Petitioner filed for chapter 11 bankruptcy on October 16, 2019. Its creditors' committee consisted of three entities holding litigation claims against petitioner, and one of petitioner's litigation discovery vendors. Concerned about Dondero's ability to serve as an estate fiduciary, the U.S. Trustee moved to appoint a chapter 11 trustee to manage petitioner's estate. Petitioner ultimately avoided the appointment of a trustee by entering into a settlement agreement with the creditors' committee (the "Governance Settlement"). That settlement—approved by the bankruptcy court—changed petitioner's management and governance during the pendency of the bankruptcy case.

The Governance Settlement removed Dondero from all control positions at petitioner. It appointed three outside, independent directors to manage petitioner and its reorganization. The bankruptcy court later approved one of petitioner's independent directors, James P. Seery, Jr., to be petitioner's new CEO and Chief Restructuring Officer ("CRO").

To induce the independent directors' service, the Governance Settlement (a) limited their and their agents and advisors' prospective liability to claims asserting willful misconduct or gross negligence, and (b) required the bankruptcy court to act as a gatekeeper by screening for colorability any claims against the protected parties. The order appointing Seery as CEO and CRO included similar protections

for Seery in his additional role. The bankruptcy court found as fact that, without the exculpation and gatekeeper provisions, "none of the independent directors would have taken on the role" because of the "litigation culture that enveloped Highland historically." App., *infra*, 60a.

The bankruptcy court found that "this [Governance Settlement] and the appointment of the independent directors changed the entire trajectory of the case and saved the Debtor from the appointment of a trustee." App., *infra*, 58a. Once appointed, Seery and the other independent directors began to negotiate settlements with petitioner's principal creditors, paving the way for approval of the resulting reorganization plan by creditors holding 99.8% in dollar amount of the claims against petitioner.

Petitioner's chapter 11 plan is an "asset monetization plan" in which distributions to creditors will result from the orderly winddown and sale of petitioner's holdings and other assets over the course of several years. App., *infra*, 48a. The bankruptcy court described this plan, and its overwhelming creditor support, as "nothing short of a miracle." *Id.* at 62a.

Dondero, by contrast, had advocated for a reorganization plan that would reinstall him as CEO of an ongoing enterprise. After petitioner and other stakeholders rejected those proposals, Dondero explicitly threatened to "burn the place down." App., *infra*, 111a.

It was no idle threat. Dondero and entities under his control have attempted to frustrate petitioner's reorganization by, among other things, objecting to nearly every settlement between petitioner and its

creditors, challenging nearly every motion, appealing from nearly every order, obstructing petitioner's trading activity, and threatening petitioner's employees. To date, these various obstructions have resulted in two contempt findings against Dondero and one against certain of his controlled entities, including one arising from an attempted meritless lawsuit against Seery in violation of the order appointing him CEO and CRO, and nine separate appeals to the Fifth Circuit.

In recognition that such attacks on petitioner and its reorganization were not going to stop, petitioner's confirmed chapter 11 plan provided three "Plan Protections" to certain persons and entities whose efforts were going to be vital to the plan's success:

First, the plan exculpates certain persons and entities—defined as the "Exculpated Parties"—for conduct relating to the administration of the case (including the negotiation and implementation of the plan) from liability other than for bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct. App., *infra*, 106a-111a, 139a. The Exculpated Parties are, among others, petitioner and its agents, the independent directors, the creditors' committee and its members, and service professionals retained by petitioner and the committee. *Id.* at 34a.

Second, the plan enjoins certain persons—defined as the "Enjoined Parties"—from taking actions to interfere with the implementation and consummation of the plan. App., *infra*, 112a. The Enjoined Parties include Dondero and his related entities.

Third, the plan has a gatekeeper provision, which precludes the Enjoined Parties from commencing claims against any defined "Protected Party" without first obtaining the bankruptcy court's determination that the proposed claim is colorable. App., *infra*, 112a-117a.

The bankruptcy court found that all three Plan Protections were necessary to the success of petitioner's plan. Most pertinently for present purposes, the bankruptcy court found "that the proposed Exculpated Parties might expect to incur costs that could swamp them and the reorganization based on the prior litigious conduct of Mr. Dondero and his controlled entities." App., *infra*, 111a. That finding, as will be explained below, was undisturbed on appeal, but the court of appeals reversed in part despite that finding.

The bankruptcy court confirmed the plan, which then took effect. The Fifth Circuit authorized a direct appeal under 28 U.S.C. § 158(d).

3. The Appeal

The court of appeals affirmed the confirmation order in its entirety except for the plan's exculpation provision, which it found partly violated 11 U.S.C. § 524(e). The court held that "§ 524(e) categorically bars third-party exculpations absent express authority in another provision of the Bankruptcy Code." App., *infra*, 30a (citing *In re Pacific Lumber Co.*, 584 F.3d 229 (5th Cir. 2009)). The court concluded that "the exculpation here partly runs afoul of that statutory bar on non-debtor discharge by reaching beyond Highland Capital, the Committee, and the Independent Directors." *Id.* at 28a. Those three

entities, the court held, were entitled to exculpation from liability under other provisions of the Bankruptcy Code. See *id.* at 32a-34a.

By contrast, the court of appeals held that other persons or entities—whose exculpation was not, in the court's view, grounded in a specific provision of the Bankruptcy Code—could not be exculpated from any liability because of section 524(e). App., *infra*, 28a-35a. Those persons and entities include petitioner's officers and agents and certain retained service professionals—even though the bankruptcy court had found protection of each to be indispensable to the plan's success.

The court of appeals acknowledged that "[t]he simple fact of the matter is that there is a circuit split concerning the effect and reach of § 524(e)," and that the Fifth Circuit had adopted the minority position in that split. App., *infra*, 30a. The court rejected petitioner's invitation to distinguish its prior decision on this issue. See *id.* at 30a-33a.

Certain respondents sought panel rehearing, asking the court to hold that the persons and entities it had struck from the plan's exculpation provision must likewise be left unprotected by the plan's injunction and gatekeeper provisions. In response, the court altered a single sentence of its opinion, which did not affect the Fifth Circuit's ruling that "the injunction and gatekeeping provisions are sound," App., *infra*, 28a, or its conclusion about section 524(e).

REASONS FOR GRANTING THE PETITION

For thirty years, the courts of appeals have been deeply divided over whether section 524(e) prohibits bankruptcy courts from ordering a limited exculpation

or release of non-debtor liability as part of a chapter 11 reorganization plan. That longstanding circuit split—in which such provisions are authorized in seven circuits but generally prohibited in two circuits—shows no signs of dissipating. This Court should therefore grant certiorari to resolve the intractable disagreement among the circuits on an issue of great importance.

A. There Is An Acknowledged And Substantial Circuit Split

As the court of appeals acknowledged below, "there is a circuit split concerning the effect and reach of § 524(e)." App., *infra*, 30a. At least seven circuits have concluded that nonconsensual non-debtor relief is not barred by section 524(e). Only two circuits—including the Fifth Circuit—have reached the opposite conclusion. See *id.* at 30a-31a (listing cases).

This circuit conflict is widely recognized. See *Blixseth* v. *Credit Suisse*, 961 F.3d 1074, 1082 n.4 (9th Cir. 2020) ("There is a long-running circuit split on this issue."), cert. denied, 141 S. Ct. 1394 (2021); *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070, 1077 (11th Cir. 2015) ("Other circuits are split as to whether a bankruptcy court has the authority to issue a non-debtor release."); *In re Dow Corning Corp.*, 280 F.3d 648, 657 (6th Cir. 2002) ("[S]ome courts have found that the Bankruptcy Code does not permit enjoining a non-consenting creditor's claims against a non-debtor."); *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 141 (2d Cir. 2005) (acknowledging conflicting appellate decisions).

As one district court recently observed, this "long-standing conflict among the Circuits that have ruled on the question" has created "the anomaly that

whether a bankruptcy court can bar third parties from asserting non-derivative claim against a non-debtor–a matter that surely ought to be uniform throughout the country–is entirely a function of where the debtor files for bankruptcy." *In re Purdue Pharma, L.P.*, 635 B.R. 26, 89 (S.D.N.Y. 2021), appeal pending, No. 22-110 (2d Cir.) (argued Apr. 29, 2022).[2]

1. The majority approach—followed by the Second, Third, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits—allows bankruptcy courts, in certain circumstances, to confirm a chapter 11 plan containing a non-debtor exculpation or third-party release, and to do so over an interested party's objection. *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 142-143 (2d Cir. 2005); *In re PWS Holding Corp.*, 228 F.3d 224, 247 (3d Cir. 2000); *In re A.H. Robins Co.*, 880 F.2d 694, 702 (4th Cir. 1989); *In re Dow Corning Corp.*, 280 F.3d 648, 657-658 (6th Cir. 2002); *In re Airadigm Commc'ns, Inc.*, 519 F.3d 640, 656 (7th Cir. 2008); *Blixseth* v. *Credit Suisse*, 961 F.3d 1074, 1082 (9th Cir. 2020), cert. denied, 141 S. Ct.

---

[2] See also Fouad Kurdi, *A Question of Power: Non-Consensual Third-Party Releases in Chapter 11 Plans*, 25 No. 4 J. Bankr. L. & Prac. NL Art. 6 (Aug. 2016) ("Courts, practitioners, and scholars have vociferously debated the permissibility of non-consensual third-party releases for decades."); Elizabeth Gamble, *Nondebtor Releases in Chapter 11 Reorganizations: A Limited Power*, 38 Fordham Urb. L.J. 821, 831 (2011) ("Courts are divided on whether bankruptcy courts have the power to grant nondebtor third party releases and injunctions."); Joshua M. Silverstein, *Hiding in Plain View: A Neglected Supreme Court Decision Resolves the Debate Over Non-Debtor Releases in Chapter 11 Reorganizations*, 23 Emory Bankr. Dev. J. 13, 14 (2006) (noting "long-standing circuit split on an issue of critical significance to bankruptcy").

1394 (2021); *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070, 1078 (11th Cir. 2015).

The Seventh Circuit's opinion in *Airadigm Communications*, 519 F.3d 640, sums up the majority approach. See also *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d at 1078 n.7 (recent Eleventh Circuit decision observing that the Seventh Circuit's analysis "squarely supports the majority position"). In *Airadigm Communications*, the confirmed plan released certain non-debtor parties "for any act or omission arising out of or in connection with the Case, the confirmation of this Plan, the consummation of this Plan, or the administration of this Plan or property to be distributed under this Plan, except for willful misconduct." 519 F.3d at 655.

The court upheld that plan provision, holding that section 524(e) does not "bar[] a bankruptcy court from releasing non-debtors from liability to a creditor without the creditor's consent." 519 F.3d at 656. The "natural reading" of section 524(e), the court explained, "does not foreclose a third-party release from a creditor's claims." *Ibid.* Rather, section 524(e) simply clarifies that the discharge of a debtor's debt "does not affect the liability of any other entity on * * * such debt," 11 U.S.C. § 524(e), and thus acts as a "saving clause" to "preserve[] rights that might otherwise be construed as lost after the reorganization," 519 F.3d at 656. In other words, according to the majority view, section 524(e) simply establishes that, if the debtor and a non-debtor are both liable on the same debt, then the debtor *and only the debtor* benefits from discharge with respect to that debt.

The Seventh Circuit also observed that section 524(e) lacks any terms even "purport[ing] to limit the bankruptcy court's powers." 519 F.3d at 656. It does not, for instance, include any "mandatory terms" like "shall" or "will." *Ibid.* By contrast, "where Congress has limited the powers of the bankruptcy court, it has done so clearly—for example, by expressly limiting the court's power." *Ibid.* In the absence of such mandatory, power-limiting language, the court concluded, there is no reason to read section 524(e) as "bar[ring] a non-consensual third-party release from liability." *Ibid.*

The Seventh Circuit further held that "Congress affirmatively gave the bankruptcy court the power to release third parties from a creditor's claims without the creditor's consent" through sections 105(a) and 1123(b)(6) of the Bankruptcy Code. 519 F.3d at 657; see generally *United States* v. *Energy Res. Co.*, 495 U.S. 545, 549 (1990) (construing same provisions). The Seventh Circuit understood those provisions to "permit[] the bankruptcy court to release third parties from liability to participating creditors if the release is 'appropriate' and not inconsistent with any provision of the bankruptcy code." 519 F.3d at 657.[3]

2. Only two circuits—the Fifth and Tenth—disagree with the majority approach. In those circuits, section 524(e) is interpreted as prohibiting bankruptcy courts from exculpating or releasing most non-

[3] The Fifth Circuit here rejected reliance on those statutory provisions. App., *infra*, 32a. If, however, the majority construction of section 524(e) is correct, and that section does not limit the powers of a bankruptcy court, then the basis for the Fifth Circuit's opinion evaporates without regard to the correct construction of other provisions of the Code.

debtors under chapter 11 plans. *In re Pacific Lumber Co.*, 584 F.3d 229, 252-253 (5th Cir. 2009); *In re Western Real Est. Fund, Inc.*, 922 F.2d 592, 600 (10th Cir. 1990) (per curiam).

In *Pacific Lumber*, the Fifth Circuit held that section 524(e) "broadly * * * foreclose[s] non-consensual non-debtor releases" because it "only releases the debtor, not co-liable third parties." 584 F.3d at 252. The Fifth Circuit thus expressly rejected the "more lenient approach to non-debtor releases taken by other courts" even then—now 14 years ago. *Ibid.*[4] In the decision below, the Fifth Circuit acknowledged the even deeper circuit split that now exists but reaffirmed its view that section 524(e) "categorically bars third-party exculpations." App., *infra*, 30a. The rule in the Tenth Circuit is similar. See *In re Western Real Est. Fund, Inc.*, 922 F.2d at 602

[4] In *Pacific Lumber*, the Fifth Circuit affirmed only a non-debtor release of the "disinterested volunteers" on the creditors' committee, concluding that such a limited non-debtor release was consistent with the committee members' "qualified immunity for actions within the scope of their duties" under 11 U.S.C. § 1103(c). 584 F.3d at 253. The Fifth Circuit applied that same holding in its decision below, and likewise correctly affirmed the non-debtor exculpation of petitioner's disinterested, independent directors as being consistent with the limited liability of a bankruptcy trustee. Respondents have obtained an extension of time until January 16, 2023, to file a petition for a writ of certiorari to challenge that holding. No. 22A303. That holding—reached under a minority view of section 524(e) as being a highly restrictive view of bankruptcy courts' powers—does not implicate the circuit split that the Fifth Circuit acknowledged and is not certworthy. Petitioner will elaborate on the uncertworthiness of the issue in its response to any petition for a writ of certiorari that respondents may file.

(release of non-debtor liability "improperly insulate[s] nondebtors in violation of section 524(e)").

The Fifth Circuit's decision to double down on its minority approach to section 524(e) demonstrates that the circuits will not resolve their diverging approaches of their own accord.

B. The Question Presented Is A Recurring And Important Issue

It is of critical and widespread importance to the bankruptcy laws whether chapter 11 plans can incorporate non-debtor releases and exculpations to facilitate a debtor's successful reorganization. The depth and persistence of the circuit split on this issue demonstrate how often this issue arises in chapter 11 bankruptcies, including some of the most complex and consequential corporate reorganizations managed by the bankruptcy courts.

An exculpation clause, like the one in petitioner's plan, serves to provide only "limited immunity" to certain parties for conduct related to the chapter 11 case. American Bankruptcy Institute, Report of Commission to Study the Reform of Chapter 11, at 250 (2014) ("ABI Study"). In connection with plan confirmation, courts have found such limitations of liability to be reasonable and appropriate in a variety of circumstances, particularly (as here) when an exculpation "was narrowly tailored, exculpated only negligent conduct, and was in the best interests of the estate." *Id.* at 250-251 (citing *In re Enron Corp.*, 326 B.R. 497, 504 (S.D.N.Y. 2005)). Such provisions, where permissible, can have laudatory effects on the success of a bankruptcy case, including "encouraging parties to engage in the process and assist the debtor in achieving a confirmable plan—actions that * * *

estate representatives and their professionals * * * may not be willing to undertake in the face of litigation risk." *Id.* at 251.

Although petitioner's plan did not include a non-debtor release, such releases—which relieve recipients of all liability for specified claims against them, and which are also categorically prohibited under the Fifth Circuit's reading of section 524(e)—can in certain circumstances also provide significant benefits to the debtor's estate. Courts in the majority circuits generally permit such releases only in "rare," "unique," and "truly unusual" cases in which doing so is "important to the success of the plan." *Metromedia*, 416 F.3d at 141-143.

In those exceptional cases, because of their "particular fact patterns," non-debtor releases can be instrumental in "facilitat[ing] a confirmable plan and ultimately benefit[ing] all stakeholders." ABI Study at 255; see also *id.* at 255-256 (recommending context-specific consideration for third-party releases of claims against non-debtors, and disapproving of any "blanket prohibition" on such releases).

Yet, because of the circuits' divergent approaches, debtors' ability to avail themselves of non-debtor exculpations or releases depends on the happenstance of geography. In an area of the law that prizes "uniform[ity]," such a result is untenable. U.S. Const. Art. I, § 8, Cl. 4; see *In re Purdue Pharma*, 635 B.R. at 104 ("conflicting" circuit decisions on non-debtor releases and exculpation have created "a most unfortunate circumstance when dealing with a supposedly uniform and comprehensive nationwide scheme to adjust debtor-creditor relations").

Moreover, these geographic disparities in the availability of non-debtor plan relief have invited forum shopping. Debtors who perceive non-debtor exculpation or releases as a valuable tool to achieve a successful reorganization seek out jurisdictions that allow for such relief to be granted, and avoid those jurisdictions that do not. See, *e.g.*, Robert K. Rasmussen, *COVID-19 Debt and Bankruptcy Infrastructure*, 131 Yale L.J.F. 337, 354 (2021) (noting a debtor's choice to file for bankruptcy in Chicago because it "decided that the law on third-party releases was more favorable in the Seventh Circuit than in other possible venues"). But this Court has emphasized the importance of "discourag[ing] forum shopping * * * to prevent a party from receiving a windfall merely by reason of the happenstance of bankruptcy." *Butner* v. *United States*, 440 U.S. 48, 55 (1979) (quotation marks omitted); see also Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 Yale L.J.F. 960, 991-992 (2022) (noting the "well-known and rapidly escalating phenomenon of unrestricted forum shopping" in chapter 11 cases).

Despite the long-standing circuit split and use of non-debtor exculpations and releases in most circuits, this Court has never specifically considered whether such relief is permitted under the Bankruptcy Code. See *Travelers Indem. Co.* v. *Bailey*, 557 U.S. 137, 155 (2009) (noting that the Court did "not resolve whether a bankruptcy court * * * could properly enjoin claims against nondebtor insurers that are not derivative of the debtor's wrongdoing"). Without this Court's review, there is no reason to think that this three-decade-long division of authority will resolve itself.

Only this Court can establish a uniform rule concerning debtors' ability to use non-debtor releases and exculpation to achieve successful chapter 11 reorganizations.

C. The Fifth Circuit's Approach Is Wrong

The acknowledged circuit split on a recurring and important question would warrant this Court's review even if the decision below were correct. But it is not.

First, neither *Pacific Lumber* nor the decision below engages with the text of section 524(e) itself. As the Seventh Circuit explained, nothing in section 524(e) actually prohibits a bankruptcy court from granting non-debtor relief. *Airadigm Commc'ns*, 519 F.3d at 656. The provision lacks any mandatory language constraining bankruptcy courts' authority in any respect. *Ibid.* It is merely a "saving clause" intended to clarify that a debtor's discharge from its debts has no effect on the liability of others on those same debts. *Ibid.*

Second, other provisions of the Bankruptcy Code do—unlike section 524(e)—expressly address what a court may do rather than what the automatic effect of a discharge is. This Court has underscored, for example, that the Bankruptcy Code "grants the bankruptcy courts residual authority to approve reorganization plans including 'any . . . appropriate provision not inconsistent with the applicable provisions of this title.'" *Energy Res. Co.*, 495 U.S. at 549 (quoting 11 U.S.C. § 1123(b)(6)).

This Court need not resolve any issues concerning the meaning of such other provisions to resolve the question presented by this petition. But Congress's careful attention to courts' authority

elsewhere in the Code shows the stark implausibility of construing the words "discharge * * * does not affect" as if they too were a limitation on courts' powers.

D. This Case Is An Ideal Vehicle For Resolving This Important Question

This case is an ideal vehicle for addressing the question presented. Both the bankruptcy court (App., *infra*, 106a-111a) and the court of appeals (*id.* at 28a-35a) decided the issue following extensive briefing and argument concerning the effect of section 524(e). The Fifth Circuit's decision directly addressed the circuits' competing approaches to section 524(e). *Id.* at 30a-31a.

Furthermore, the Fifth Circuit reversed petitioner's confirmed plan solely as to certain of its non-debtor exculpations; it otherwise affirmed confirmation of the plan in full. App., *infra*, 21a; see also *id.* at 38a ("[T]he Plan violates § 524(e) but only insofar as it exculpates and enjoins certain non-debtors."). The question presented is thus squarely and cleanly presented here.

Finally, this case involves only non-debtor exculpations, not any more comprehensive non-debtor releases. No one has ever identified any basis other than section 524(e) to invalidate exculpation clauses, whereas non-party releases raise a host of other questions as well. See, *e.g.*, *In re Purdue Pharma L.P.*, 633 B.R. 53, 98-101 (Bankr. S.D.N.Y.) (discussing constitutional issues raised by non-debtor releases), rev'd in pertinent part, 635 B.R. 26, 89 (S.D.N.Y. 2021), appeal pending, No. 22-110 (2d Cir.) (argued Apr. 29, 2022).

This Court should accordingly grant certiorari to resolve the deep and entrenched circuit split over the interpretation of section 524(e).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JEFFREY N. POMERANTZ
JOHN A. MORRIS
GREGORY V. DEMO
PACHULSKI STANG ZIEHL
& JONES LLP
10100 Santa Monica Blvd.,
13th Fl.
Los Angeles, CA 90067

ROY T. ENGLERT, JR.
Counsel of Record
MATTHEW M. MADDEN
PAUL BRZYSKI
SHIKHA GARG
KRAMER LEVIN NAFTALIS
& FRANKEL LLP
2000 K Street NW, 4th Fl.
Washington, DC 20006
(202) 775-4500
renglert@kramerlevin.com

Counsel for Petitioner

January 2023

No. 22-669

In the Supreme Court of the United States

NEXPOINT ADVISORS, L.P. AND
NEXPOINT ASSET MANAGEMENT, L.P.,

Petitioners,

v.

HIGHLAND CAPITAL MANAGEMENT, L.P., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

JEFFREY N. POMERANTZ
JOHN A. MORRIS
GREGORY V. DEMO
PACHULSKI STANG ZIEHL & JONES LLP
10100 Santa Monica Blvd., 13th Fl.
Los Angeles, CA 90067

ROY T. ENGLERT, JR.
Counsel of Record
MATTHEW M. MADDEN
PAUL BRZYSKI
SHIKHA GARG
KRAMER LEVIN NAFTALIS & FRANKEL LLP
2000 K Street NW, 4th Fl.
Washington, DC 20006
(202) 775-4500
renglert@kramerlevin.com

Counsel for Respondent Highland Capital Management, L.P.

CORPORATE DISCLOSURE STATEMENT

Highland Capital Management, L.P., has no parent corporation, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES – Continued

Statutes

Miscellaneous

BRIEF IN OPPOSITION

INTRODUCTION

Only one question presented by the decision below divides the courts of appeals and merits this Court's review: whether section 524(e) of the Bankruptcy Code categorically prohibits a chapter 11 plan of reorganization from exculpating or releasing non-debtor liability. Highland's petition (No. 22-631) presents that question and provides a clean vehicle for this Court to resolve the acknowledged, decades-old circuit split on it.[1] NexPoint agrees. 22-631 Resp. Br. (filed Feb. 10, 2023).

By contrast, the two additional questions identified by NexPoint are not even presented in this case. They do not merit review.

NexPoint's first additional question tangles up non-debtor exculpation under a reorganization plan with the legal standard generally governing a bankruptcy trustee's liability. This case did not involve a trustee, and thus the parties had no occasion to litigate the scope of a trustee's "common-law protections" from liability. Pet. 27. NexPoint now suggests that any exculpation granted to any non-debtor under any plan must exactly mirror such common-law limitations on a trustee's liability. Having thus tried to make this case about the common-law standard for a trustee's liability,

[1] We use "Highland" to refer to Highland Capital Management, L.P., which is petitioner in No. 22-631 and respondent in No. 22-669. We use "NexPoint" to refer to all of the petitioners in No. 22-669 and all of the respondents (other than those who have waived response) in No. 22-631.

NexPoint contends that the circuits are split on the metes and bounds of that common-law standard.

But NexPoint never made anything remotely resembling that argument in the courts below. The courts below therefore never addressed that argument. And, forfeiture aside, it is not cleanly presented for this Court's review because this case involves a provision in a bankruptcy plan of reorganization, not the common law.

NexPoint's second additional question likewise does not merit review. First, it is not presented: The reorganization plan in this case does not protect Highland, or anyone else, from "ordinary post-bankruptcy business liabilities." Pet. i. Accordingly, the decision below did not hold that it could. Rather, what the Fifth Circuit actually decided accords with established authority that bankruptcy courts may safeguard the consummation and implementation of a confirmed reorganization plan from unnecessary interference. The decisions cited by NexPoint do not demonstrate any additional circuit split on a legal issue relevant to the actual plan in this case.

STATEMENT

1. Highland is the reorganized debtor following a chapter 11 bankruptcy. NexPoint is a registered investment advisor owned and controlled by Highland's founder, James Dondero. Dondero was ousted as Highland's CEO during the bankruptcy.

Highland's path to bankruptcy was far from typical. It did not suffer a business calamity, have problems with its vendors or landlords, or default on payments to its lenders. Rather, Highland's chapter 11 case was brought on by "a myriad of

massive, unrelated, business litigation claims that it faced * * * after a decade or more of contentious litigation in multiple forums all over the world" instigated by Dondero when he was Highland's CEO. Pet. App. 75a. As the bankruptcy court found, Dondero is a "serial litigator" whose litigiousness caused Highland to file for bankruptcy and strapped it with more than a billion dollars in claims. *Id.* at 75a-77a.

Highland filed for chapter 11 bankruptcy in October 2019. The creditors' committee consisted of three entities holding litigation claims against Highland, and a litigation discovery vendor. Concerned about Dondero's ability to serve as an estate fiduciary, the U.S. Trustee moved to appoint a chapter 11 trustee to manage Highland's estate. Highland ultimately avoided the appointment of a trustee by entering into a settlement with the creditors' committee (the "Governance Settlement").

That Governance Settlement—approved by the bankruptcy court—changed Highland's management and governance during the pendency of the bankruptcy case. It removed Dondero from all control positions at Highland. It appointed three outside, independent directors to manage Highland and its reorganization. The bankruptcy court later approved one of the independent directors, James P. Seery, Jr., to be Highland's new CEO and Chief Restructuring Officer ("CRO").

To induce the independent directors' service, the Governance Settlement (a) limited their and their agents' and advisors' prospective liability to claims asserting willful misconduct or gross negligence, and (b) required the bankruptcy court to act as a

gatekeeper by screening for colorability any claims against the protected parties. The order appointing Seery as CEO and CRO included similar protections for Seery in his additional roles. The bankruptcy court found as fact that, without those exculpation and gatekeeper provisions, "none of the independent directors would have taken on the role" because of the "litigation culture that enveloped Highland historically." Pet. App. 81a-82a.

Neither NexPoint nor anyone else appealed from the Governance Settlement approval order or the subsequent order protecting Seery in his additional roles. The bankruptcy court later explained that the appointment of independent directors, under the Governance Settlement, "changed the entire trajectory of the case and saved the Debtor from the appointment of a trustee." Pet. App. 80a. Once appointed, Seery and the other independent directors began to negotiate settlements with Highland's principal creditors, paving the way for approval of the resulting reorganization plan by creditors holding 99.8% in dollar amount of the claims against Highland.

2. Highland's chapter 11 plan is an "asset monetization plan" in which distributions to creditors will result from the orderly winddown and sale of holdings and other assets over the course of several years. Pet. App. 71a. The bankruptcy court described this plan, and its overwhelming creditor support, as "nothing short of a miracle." *Id.* at 83a.

Dondero, by contrast, had advocated a reorganization plan that would reinstall him as CEO of an ongoing enterprise. After Highland and other stakeholders rejected those proposals, Dondero

explicitly threatened to "burn the place down." Pet. App. 125a.

It was no idle threat. See Pet. iv-vii (identifying 37 related legal proceedings). Dondero and entities under his control have attempted to frustrate Highland's reorganization by, among other things, objecting to nearly every settlement between Highland and its creditors, challenging nearly every motion, appealing from nearly every order, obstructing Highland's trading activity, and threatening Highland's employees. To date, these various obstructions have resulted in two contempt findings against Dondero and one against certain of his controlled entities, including one arising from an attempt to bring a meritless lawsuit against Seery in violation of the order appointing him CEO and CRO, and nine separate appeals by Dondero or his allies to the Fifth Circuit. (Respondent Highland has not had occasion to appeal anything to the Fifth Circuit.)

In recognition that such attacks on Highland and its reorganization were not going to stop, Highland's confirmed chapter 11 plan provided three "Plan Protections" to certain persons and entities whose efforts were going to be vital to the plan's success:

First, extending protections previously granted by two prior orders, the plan exculpates certain persons and entities—defined as the "Exculpated Parties"—from liability for conduct relating to the administration of the case (including the negotiation, consummation, and implementation of the plan) other than bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct. Pet. App. 189a. The Exculpated Parties are, among others, the debtor and its agents, the independent directors, the creditors'

committee and its members, and service professionals retained by Highland and the committee. Pet. App. 168a-169a. Some parties objected to this plan provision, but *not* on the ground that it set the wrong standard of liability for the protected parties.

Second, as is typical with plans of reorganization, the plan enjoins certain persons—the "Enjoined Parties"—from taking actions to interfere with the implementation and consummation of the plan. Pet. App. 168a, 194a-196a. The Enjoined Parties include Dondero and his related entities.

Third, the plan has a gatekeeper provision, which precludes the Enjoined Parties from commencing claims against any "Protected Party" without first obtaining the bankruptcy court's determination that the proposed claim is at least colorable. Pet. App. 169a-170a, 195a. The gatekeeper provision does not itself exculpate or release anyone's liability for anything.

3. The bankruptcy court confirmed the plan, including its three Plan Protections—which the court found as fact were necessary to the success of the plan. The bankruptcy court found "that the proposed Exculpated Parties might expect to incur costs that could swamp them and the reorganization based on the prior litigious conduct of Mr. Dondero and his controlled entities." Pet. App. 125a-126a.

The court rejected a host of confirmation objections pressed by Dondero and entities under his control and "question[ed] the good faith of Mr. Dondero's and the Dondero Related Entities' objections." Pet. App. 85a. The court expressed "good reason to believe that these parties are not objecting to protect economic interests they have in the Debtor but to be disruptors." *Ibid.*

The plan became effective in August 2021. The Fifth Circuit authorized a direct appeal from the confirmation order under 28 U.S.C. § 158(d).

4. On appeal, the parties vigorously debated *who* (under Fifth Circuit precedent) could lawfully receive the benefit of the exculpation clause. But no one raised any challenge to the *standard of liability* (gross negligence) set by the exculpation clause. The appellants raised numerous other issues as well.

The court of appeals affirmed the confirmation order, except for portions of the plan's exculpation provision that the court (erroneously) held were in violation of 11 U.S.C. § 524(e) because of whom they protected. The court held that "§ 524(e) categorically bars third-party exculpations absent express authority in another provision of the Bankruptcy Code." Pet. App. 25a-26a (citing *In re Pacific Lumber Co.*, 584 F.3d 229 (5th Cir. 2009)).

On that basis, the court struck virtually all non-debtors from the Exculpated Parties who benefit from the plan's exculpation clause—including Highland's officers and agents and certain retained service professionals. Pet. App. 29a. The court of appeals acknowledged that "[t]he simple fact of the matter is that there is a circuit split concerning the effect and reach of § 524(e)," and that the Fifth Circuit was applying here the minority position in that split. *Id.* at 25a-26a. The court of appeals had no occasion to address the standard of liability in the exculpation clause, as opposed to whom that clause protected.

The two categories of non-debtors exempted from the court's broad holding on the effect of section 524(e) were the creditors' committee and its members and the independent directors. In the court's view, the

former was properly exculpated consistent with section 1103(c) of the Bankruptcy Code, which provides qualified immunity for creditors' committees performing their statutory duties. Pet. App. 27a (citing *Pacific Lumber*, 584 F.3d at 253, and 11 U.S.C. § 1103(c)). The latter were properly exculpated because the independent directors in this case had a role similar to that of a chapter 11 trustee and were thus "entitled to all the rights and powers of a trustee," who likewise enjoys qualified immunity during the performance of his or her duties. *Id.* at 28a (citing 11 U.S.C. § 1107(a)).

The court of appeals also addressed and upheld the plan's injunction and gatekeeper provisions, which are separate protections from the exculpation clause at issue in No. 22-631 and ostensibly at issue in No. 22-669. Specifically, the court rejected any challenge to the injunction's permanence. Pet. App. 30a. "Even assuming the issue was preserved," despite appellants' failure to challenge it in their briefs, a plan's "otherwise-lawful" injunction is not unlawful merely because it does not automatically expire. *Ibid.*

The court also affirmed the bankruptcy court's ruling that the injunction was not vague because the plan defined what it meant to interfere. Pet. App. 30a. On this point, the bankruptcy court had also concluded "that the terms 'implementation' and 'consummation' are neither vague nor ambiguous." *Id.* at 126a.

As for the gatekeeper provision, the court held that it "need not evaluate whether the bankruptcy court would have jurisdiction under every conceivable claim falling under the widest interpretation of the

gatekeeper provision." Pet. App. 32a. The Fifth Circuit opted to "leave that to the bankruptcy court in the first instance" on a case-by-case basis. *Ibid.*

5. Certain Dondero-controlled entities sought panel rehearing, asking the court to hold that the persons and entities it had struck from the plan's exculpation provision must likewise be left unprotected by the plan's injunction and gatekeeper provisions. In response, the court altered only one sentence of its opinion, without affecting its holding that "the injunction and gatekeeping provisions are sound." Pet. App. 23a.[2]

6. Highland filed a petition asking this Court to resolve a split among the circuits over whether section 524(e) categorically prohibits non-debtor releases and exculpation provisions. No. 22-631. NexPoint has now agreed that Highland's petition should be granted. 22-631 Resp. Br. (filed Feb. 10, 2023). Through its own petition and its acquiescence brief, NexPoint tries to persuade this Court to review issues that are not only not the subject of any circuit conflict acknowledged in the decision below, but also are not even *addressed* by the decision below.

---

[2] NexPoint is mistaken that "[t]he new opinion clarified that the ruling on the exculpatory provision also applied to the injunction and gatekeeping provision." Pet. 13; see *In re Highland Cap. Mgmt., L.P.*, 57 F.4th 494, 498 (5th Cir. 2023) ("In September 2022, we affirmed the Plan in *all respects except one*, concluding that the Plan *exculpated* certain non-debtors beyond the bankruptcy court's authority." (emphasis added)). In any event, the scope of the plan's separate injunction and gatekeeper provisions has no bearing on the scope of the exculpation provision addressed by the petitions.

REASONS FOR DENYING THE PETITION

NexPoint concedes that Highland's separate petition, No. 22-631, squarely presents an important question on which the circuits are deeply divided and that merits this Court's review. The Fifth Circuit held—consistent with one other circuit, but contrary to numerous other circuits—that section 524(e) of the Bankruptcy Code categorically prohibits chapter 11 reorganization plans from including non-debtor releases and exculpations. Pet. App. 25a-26a. On that basis, the Fifth Circuit struck the plan's exculpation provision other than as applied to Highland, its court-appointed creditors' committee (and its members), and its court-approved independent directors. The parties agree that this Court should review the "entrenched circuit conflict" on that important issue, Pet. 16-21; accord 22-631 Resp. Br. 2, 7-11.[3]

---

[3] NexPoint takes at least two mistaken positions with respect to that issue, one pertaining to its merits and one pertaining to its importance. Both issues can be much more fully addressed in merits briefing in No. 22-631. It is worth noting now, however, with regard to the merits, that NexPoint's proposed inference from the text of 11 U.S.C. § 524(g), see 22-631 Resp. Br. 15-16, has been expressly forbidden by Congress; see 11 U.S.C. § 524 note ("Nothing in subsection (a), or in the amendments made by subsection (a) [amending this section], shall be construed to modify, impair, or supersede *any other authority the court h*as to issue injunctions in connection with an order confirming a plan of reorganization." (emphasis added)). This is but one of many reasons why most circuits' construction of section 524(e) is correct and the Fifth and Tenth Circuits' outlier position is wrong. With regard to why the issue is important, it is true that section 524(e) has been cited indiscriminately by the Fifth Circuit and some other courts as a "categorical[]" bar to *both* garden-variety exculpation clauses (like the one contained in Highland's plan of reorganization) and controversial third-party

NexPoint is mistaken, however, in contending that the plan's remaining exculpation provision raises two additional issues that also merit review: (1) the independent directors' exculpation from simple-negligence liability relating to the chapter 11 case and plan, and (2) the plan's supposed protections from post-confirmation liability for "ordinary business conduct."

Neither of those two additional questions merits review—either independently or in conjunction with granting review of the question presented in No. 22-631. Accordingly, this Court should deny the petition in this case and grant No. 22-631.

I. NexPoint's First Question Presented Does Not Merit Review

NexPoint alleges (Pet. 22-26) a longstanding circuit split on the appropriate standard (simple negligence vs. gross negligence vs. intentional wrongdoing) by which a bankruptcy trustee can be held liable for breach of duty in the absence of a confirmed reorganization plan addressing that issue. But this case presents the Court no occasion to review any such division of authority.

This case involves the legality of *plan provisions* that established gross negligence as the standard of

---

releases (a device common in mass-tort bankruptcy cases and used in some other cases). But it is false that they are the same thing. There are numerous legal differences. See generally Am. Bankr. Inst., Report of Comm'n to Study the Reform of Chapter 11, at 250-256 (2014), cited in 22-631 Pet. 18-19. And no one has expressed "outrage" about exculpation clauses as opposed to third-party releases. See 22-631 Resp. Br. 9-11 (trying to elide the distinctions and make this Court believe that exculpation clauses are controversial as a policy matter).

liability for, among others, *independent directors*. The plan provisions did so without *any* objection to that standard of liability either in the bankruptcy court or on appeal.

In the same *Pacific Lumber* case in which the Fifth Circuit erroneously construed section 524(e) to limit a bankruptcy court's power to approve third-party releases and exculpation clauses in a plan of reorganization, the court identified exceptions to that (idiosyncratic) rule. One exception, referenced in passing during a mootness analysis, was that *trustees* could receive liability protection under a plan because they also enjoyed qualified immunity at common law. Citing *In re Hilal*, 534 F.3d 498, 501 (5th Cir. 2008), which in turn cited *In re Smyth*, 207 F.3d 758, 762 (5th Cir. 2000), the court of appeals below merely recognized that its prior cases included "a limited qualified immunity to bankruptcy trustees unless they act with gross negligence." Pet. App. 27a.

No other circuit has addressed—one way or another—whether trustees enjoy an exception to any supposed prohibition in section 524(e). One reason most circuits have not addressed that question is because none, other than the Fifth and Tenth, reads that statute as prohibiting plans from exculpating or releasing non-debtors. With no bar to create an "exception" to, most circuits have had no reason to address whether the only proper standard of liability under any such exception is gross or simple negligence.

In re Smyth, NexPoint claims, conflicts with decisions of other circuits addressing the general standard for overcoming a bankruptcy trustee's common-law qualified immunity in the *absence* of a

plan provision addressing that issue. In this case, however, no party ever cited *In re Smyth* to the Fifth Circuit. There are many reasons why none did.

For starters, this case does not involve common-law qualified immunity, nor does it involve a bankruptcy trustee. Instead, it involves the scope of an exception to a supposed statutory prohibition that was indirectly derived from *In re Smyth*, through *In re Hilal* and *Pacific Lumber*, to a circuit-specific construction of section 524(e). Furthermore, this case involves only the application of that circuit-specific exception, by analogy, to persons and entities that are *not* bankruptcy trustees. Last and certainly not least, it involves the *unobjected-to* setting of the standard as gross negligence. The parties in the Fifth Circuit debated *who* benefits from the exception, not what the standard of liability is for those who benefit.

There is still another reason why no one cited *In re Smyth* below. NexPoint refers again and again to the "common-law" standard of protection for bankruptcy trustees, which in its telling is in "disarray." Pet. 26-28. NexPoint's argument muddles three distinct concepts, only one of which clearly originates in common law.

First, there is the common-law *Barton* doctrine:[4] the principle that, "without leave of the bankruptcy court, no suit may be maintained against a trustee for actions taken in the administration of the estate." 3 *Collier on Bankruptcy* ¶ 323.03 (16th ed. 2023); see *Lawrence* v. *Goldberg*, 573 F.3d 1265, 1270 (11th Cir. 2009); *In re Yellowstone Mountain Club, LLC*, 841 F.3d 1090, 1095 (9th Cir. 2016). That doctrine justifies

[4] See *Barton* v. *Barbour*, 104 U.S. 126 (1881).

the *gatekeeper* provision upheld by the Fifth Circuit, not the partially invalidated *exculpation* provision.

Next, there are cases interpreting section 1103(c) of the Code. These include the other two cases cited by NexPoint as expanding "common-law protections." Pet. 27 (citing *Pacific Lumber*, 584 F.3d at 253, and *In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000)). But section 1103(c) is not common law; it's a statutory provision detailing the powers and duties of *creditors' committees*. Section 1103(c) is not implicated by NexPoint's question.

Finally, there is the issue of the standard governing trustees' liability for breaches of their duties, most of which are defined by statute. Although some courts cast this standard as arising from common law, *Red Carpet Corp. of Panama City Beach* v. *Miller*, 708 F.2d 1576, 1578 (11th Cir. 1983) (per curiam), the standard for trustee liability can also be viewed as flowing from the statutory duties themselves. Indeed, the court of appeals below all but stated that the independent directors were entitled to protection under "express authority in another provision of the Bankruptcy Code." Pet. App. 26a.

Common-law origins aside, the split of authority identified by NexPoint is limited to this narrow issue; the split does not encompass NexPoint's bogeyman of ill-defined "common-law protections." See *In re Smyth*, 207 F.3d at 761-762 (identifying the circuit split in the context of the duties enumerated in section 704 of the Bankruptcy Code). This case does not implicate that split.

II. NexPoint's Second Question Presented Does Not Merit Review

NexPoint contends (Pet. 29-34) that the court of appeals upheld the plan's exculpation of certain liability for Highland's "ordinary business conduct" over an "indefinite[]" post-confirmation period when its assets are being liquidated. Such a holding, NexPoint says, would be contrary to limits on the post-confirmation effect of a reorganization plan as articulated by at least four other circuits.

That contention fundamentally misunderstands the Fifth Circuit's ruling. It also manufactures a circuit split where there is none. Thus, NexPoint's second question is not presented in this case and does not merit this Court's review.

1. NexPoint's second question is based on an incorrect premise. NexPoint argues that the Fifth Circuit allowed exculpation of Exculpated Parties' actions indefinitely, including well beyond the plan's effective date. Pet. 29. Not so.

The Fifth Circuit struck all parties from the exculpation clause except for the debtor, the creditors' committee and its members, and the independent directors. Pet. App. 29a. Those entities cease to exist on the plan's effective date. There no longer is a debtor. There is only a reorganized debtor. Nor are there independent directors because those positions terminated on the plan's effective date.[5] *Id.* at 139a.

---

[5] The independent directors' *pre*-confirmation service to Highland was covered by an exculpation provision in the bankruptcy court's order approving the Governance Settlement before the plan and confirmation order, and that separate order

Nor is there a creditors' committee, because that committee dissolved on the plan's effective date. *Id.* at 165a. There is therefore no post-effective-date exculpation under the Fifth Circuit's decision for this Court to review.

2. To be sure, the Fifth Circuit recognized that the plan's *injunction* continues to have effect beyond the plan's effective date. That provision enjoins a *different* set of individuals and entities "from taking any actions to interfere with the implementation or consummation of the Plan." Pet. App. 194a. To the extent NexPoint argues that the injunction's continued effect during implementation and consummation of the plan is an overreach of the bankruptcy court's authority worthy of this Court's review, it misconstrues the terms "implementation" and "consummation."

"Implementation" and "consummation" have a limited meaning under bankruptcy laws and the plan here. Section 1123(a)(5) of the Bankruptcy Code mandates that "a plan shall * * * provide adequate means for the plan's implementation," and states a non-exclusive list of what such "implementation" covers. Likewise, article IV of Highland's plan carefully describes its "Means for Implementation." The word "consummation" is also found in the Bankruptcy Code. For example, the "substantial consummation" of a plan is defined in section 1101(2) of the Code and is the source of a considerable body of caselaw. See, *e.g.*, *In re Mortgs. Ltd.*, 771 F.3d 623, 628 (9th Cir. 2014); *In re Charter Commc'ns, Inc.*, 691 F.3d

---

is not at issue here. See Pet. App. 29a, n.15 (Governance Settlement is *res judicata*).

476, 482 (2d Cir. 2012); *In re Manges*, 29 F.3d 1034 (5th Cir. 1994).

At the hearing before the bankruptcy court, in response to the same unfounded criticism NexPoint makes in this Court, Highland *confirmed* that those terms have a limited meaning. Other Dondero-controlled entities had complained that, by applying any of the Plan Protections to conduct associated with plan implementation and consummation, the court would be granting an "advance get-out-of-jail free cards for future negligence and ordinary breaches of contract." See Highland Income Fund, *et al.*, C.A. Br. 2-3. Highland assured the bankruptcy court that providing Plan Protections to plan "implementation" and "consummation" would have no effect on the parties' ordinary contractual rights against Highland or any other party. Highland C.A. Br. 35 (citing 2/3/21 Hr'g Tr. 152-153, No. 19-34054, ECF No. 1905 (Bankr. N.D. Tex.)).

As defined and commonly understood, then, neither plan "implementation" nor "consummation" covers the reorganized debtor's post-confirmation "ordinary business conduct." Rather, each term applies only to specific categories of conduct, each associated with causing and facilitating the transactions and other events necessary to put the plan into effect.[6]

Bankruptcy Code section 1141(a) clearly allows the bankruptcy court to issue an injunction ordering

---

[6] Because "implementation" and "consummation" cover only a limited range of post-effective-date conduct, the plan's original exculpation clause—including non-debtor exculpated parties who continue to exist after the effective date—still does not implicate NexPoint's second question.

parties to "refrain from taking actions if those actions interfere with implementation of the plan." 8 *Collier on Bankruptcy* ¶ 1142.03 (16th ed. 2023). And this Court has held that the bankruptcy court's jurisdiction to enforce its prior orders continues even after plan confirmation. *Travelers Indem. Co.* v. *Bailey*, 557 U.S. 137, 151 (2009). There is thus no unsettled question about the bankruptcy court's authority presented by NexPoint's second question.[7]

3. Because the plan does not exculpate any liability for "ordinary business conduct" after plan confirmation, the court of appeals never addressed the hypothetical question whether a chapter 11 plan could lawfully do so. Rather, the court's analysis of the plan's *exculpation provision* is dedicated *entirely* to the propriety of exculpating non-debtors in light of section 524(e). See Pet. App. 24a-29a. And the court's analysis of the *injunction* also does not support NexPoint's claim that the injunction could be applied as broadly as NexPoint asserts. See *id.* at 30a.

Nor is the decision below in conflict with the decisions in other circuits that NexPoint highlights. Two of those cases affirmatively support the decision below. The Eighth Circuit recognized in *In re Fairfield*

---

[7] NexPoint attempts (Pet. 31) to argue that the Fifth Circuit's reference to the "permanency" of the injunction is an error warranting review. The court of appeals' discussion of the plan's injunction addressed NexPoint's "permanency" point in just one sentence, in which the court suggested that NexPoint and the other appellants had likely waived any such challenge by failing to brief it. Pet. App. 30a. Thus, even if the issue were an unsettled question otherwise suitable for this Court's review—which it is not—this case would not be an appropriate vehicle to decide it.

Communities, 142 F.3d 1093 (1998), that "a bankruptcy court may explicitly retain jurisdiction * * * over aspects of a plan related to its administration and interpretation." *Id.* at 1095. The Seventh Circuit stated a similar principle in *Pettibone Corp.* v. *Easley*, 935 F.2d 120 (1991), which held that a tort suit, the prevention of which was not "necessary for the consummation of the plan," could proceed against the reorganized debtor without violating the plan's injunction and releases. *Id.* at 123 (quoting 11 U.S.C. § 1142(b)).

NexPoint's other two cases do not concern any supposed limits on safeguarding the implementation of a confirmed plan. In *Southwest Marine Inc.* v. *Danzig*, 217 F.3d 1128, 1139-1140 (9th Cir. 2000), and *In re Sure-Snap Corp.*, 983 F.2d 1015, 1018 (11th Cir. 1993), the reorganized debtors incurred new liability after plan confirmation on their prepetition contracts. The courts upheld those liabilities based on the proposition that a bankruptcy discharge does not extinguish the debtor's prepetition agreements and obligations, out of which *post*-confirmation liabilities can still arise. In short, there is no circuit split on NexPoint's second question for this Court to resolve.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY N. POMERANTZ
JOHN A. MORRIS
GREGORY V. DEMO
PACHULSKI STANG ZIEHL & JONES LLP
10100 Santa Monica Blvd., 13th Fl.
Los Angeles, CA 90067

ROY T. ENGLERT, JR.
Counsel of Record
MATTHEW M. MADDEN
PAUL BRZYSKI
SHIKHA GARG
KRAMER LEVIN NAFTALIS & FRANKEL LLP
2000 K Street NW, 4th Fl.
Washington, DC 20006
(202) 775-4500
renglert@kramerlevin.com

Counsel for Respondent
Highland Capital Management, L.P.

February 2023

No.

IN THE

Supreme Court of the United States

NEXPOINT ADVISORS, L.P. AND
NEXPOINT ASSET MANAGEMENT, L.P.,

Petitioners,

v.

HIGHLAND CAPITAL MANAGEMENT, L.P., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

BENOIT QUARMBY
MOLOLAMKEN LLP
430 Park Ave.
New York, NY 10022

JEFFREY A. LAMKEN
Counsel of Record
ROBERT K. KRY
EUGENE A. SOKOLOFF
MOLOLAMKEN LLP
The Watergate, Suite 500
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTIONS PRESENTED

Section 524(e) of the Bankruptcy Code provides that the "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e). Consistent with that provision, the Fifth Circuit held below that the Bankruptcy Code generally prohibits courts from exculpating *third parties* from liability. Nonetheless, the court approved provisions in a reorganization plan that exculpated the debtor's "Independent Directors" for any misconduct short of gross negligence, on the theory that those provisions merely tracked the common-law immunity of bankruptcy trustees. Other circuits have adopted different standards for common-law immunity, with some allowing claims for ordinary negligence and others limiting liability to intentional misconduct. The Fifth Circuit in this case also approved provisions exculpating both the debtor and other parties from ordinary business liabilities arising *after* confirmation of the reorganization plan, contrary to the holdings of other courts of appeals. The questions presented are:

1. Whether a bankruptcy court may exculpate third-party misconduct that falls short of gross negligence, on the theory that bankruptcy trustees have common-law immunity for such misconduct.

2. Whether a bankruptcy court may exculpate parties from ordinary post-bankruptcy business liabilities.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners NexPoint Advisors, L.P. and NexPoint Asset Management, L.P. (formerly known as Highland Capital Management Fund Advisors, L.P.) were appellants in the court of appeals.

Respondent Highland Capital Management, L.P., was the debtor in the bankruptcy court and the appellee in the court of appeals.

Respondents Highland Income Fund; NexPoint Strategic Opportunities Fund; Highland Global Allocation Fund; NexPoint Capital, Incorporated; James Dondero; The Dugaboy Investment Trust; and Get Good Trust were appellants in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioners state that NexPoint Advisors, L.P.'s majority owner is the Dugaboy Investment Trust, that NexPoint Asset Management, L.P.'s majority owner is Highland Capital Management Services, Inc., and that no publicly held company owns 10% or more of any of those entities' ownership interests.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

United States Court of Appeals (5th Cir.):

- *Dondero* v. *Highland Capital Management, L.P.*, No. 21-10219 (dismissed May 18, 2021)
- *NexPoint Advisors, L.P.* v. *Highland Capital Management, L.P.*, No. 21-10449 (judgment entered Aug. 19, 2022)
- *Highland Capital Management Fund Advisors, L.P.* v. *Highland Capital Management, L.P.*, No. 22-10189 (judgment entered Jan. 11, 2023)
- *NexPoint Advisors, L.P.* v. *Pachulski Stang Ziehl & Jones, L.L.P.*, No. 22-10575 (pending)
- *Dugaboy Investment Trust* v. *Highland Capital Management, L.P.*, No. 22-10831 (pending)
- *Dondero* v. *Highland Capital Management, L.P.*, No. 22-10889 (pending)
- *Dugaboy Investment Trust* v. *Highland Capital Management, L.P.*, No. 22-10960 (pending)
- *Dugaboy Investment Trust* v. *Highland Capital Management, L.P.*, No. 22-10983 (pending)
- *Charitable DAF Fund, L.P.* v. *Highland Capital Management, L.P.*, No. 22-11036 (pending)

United States District Court (N.D. Tex.):

- *Dondero* v. *Highland Capital Management, L.P.*, No. 3:20-cv-03390-X (dismissed Mar. 8, 2022)
- *UBS Securities LLC* v. *Highland Capital Management, L.P.*, No. 3:20-cv-03408-G (dismissed June 14, 2021)

v

- *Dondero* v. *Highland Capital Management, L.P.*, No. 3:21-cv-00132-E (leave to appeal denied Feb. 11, 2021)
- *Dugaboy Investment Trust* v. *Highland Capital Management, L.P.*, No. 3:21-cv-00261-L (judgment entered Sept. 26, 2022)
- *Highland Capital Management Fund Advisors L.P.* v. *Highland Capital Management L.P.*, Nos. 3:21-cv-00538-N, 3:21-cv-00539-N, 3:21-cv-00546-N, 3:21-cv-00550-N (administratively closed July 12, 2022)
- *Charitable DAF Fund, L.P.* v. *Highland Capital Management, L.P.*, No. 3:21-cv-00842-B (administratively closed Oct. 18, 2021)
- *Dondero* v. *Jernigan*, No. 3:21-cv-00879-K (dismissed Feb. 9, 2022)
- *Highland Capital Management, L.P.* v. *Highland Capital Management Fund Advisors, L.P.*, Nos. 3:21-cv-881-X, 3:21-cv-880-X, 3:21-cv-1010-X, 3:21-cv-1378-X, 3:21-cv-1379-X, 3:21-cv-03160-X, 3:21-cv-3162-X, 3:21-cv-3179-X, 3:21-cv-3207-X, 3:22-cv-00789-X (pending)
- *Official Committee of Unsecured Creditors* v. *CLO Holdco Ltd.*, No. 3:21-cv-01112-C (pending)
- *PCMG Trading Partners XXIII, L.P.* v. *Highland Capital Management, L.P.*, No. 3:21-cv-01169-N (administratively closed July 6, 2022)
- *Official Committee of Unsecured Creditors* v. *CLO Holdco Ltd.*, No. 3:21-cv-01173-X (dismissed May 6, 2022)
- *Official Committee of Unsecured Creditors* v. *CLO Holdco Ltd.*, No. 3:21-cv-01174-S (pending)

- *Dugaboy Investment Trust* v. *Highland Capital Management, L.P.*, No. 3:21-cv-01295-X (judgment entered Sept. 22, 2022)
- *Charitable DAF Fund, L.P.* v. *Highland Capital Management, L.P.*, No. 3:21-cv-1585 (administratively closed Oct. 6, 2021)
- *Dondero* v. *Highland Capital Management, L.P.*, No. 3:21-cv-01590-N (judgment entered Aug. 18, 2022)
- *Charitable DAF Fund, L.P.* v. *Highland Capital Management, L.P.*, No. 3:21-cv-01710-N (administratively closed July 6, 2022)
- *Highland Capital Management Fund Advisors, L.P.* v. *Highland Capital Management, L.P.*, No. 3:21-cv-01895-D (judgment entered Jan. 28, 2022)
- *Charitable DAF Fund, L.P.* v. *Highland Capital Management, L.P.*, Nos. 3:21-cv-01974-X, 3:21-cv-01979-S (judgment entered Sept. 28, 2022)
- *NexPoint Advisors, L.P.* v. *Highland Capital Management, L.P.*, No. 3:22-cv-02170-S (pending)
- *Dugaboy Investment Trust* v. *Highland Capital Management, L.P.*, No. 3:21-cv-02268-S (dismissed Aug. 8, 2022)
- *NexPoint Advisors, L.P.* v. *Pachulski Stang Ziehl & Jones, L.L.P.*, Nos. 3:21-cv-03086-K, 3:21-cv-3088-K, 3:21-cv-3094-K, 3:21-cv-3096-K, 3:21-cv-3104-K (judgment entered May 9, 2022)
- *Charitable DAF Fund, L.P.* v. *Highland Capital Management, L.P.*, Nos. 3:21-cv-03129-B, 3:22-cv-00695-B (judgment entered Sept. 2, 2022)
- *Kirschner* v. *Okada*, Nos. 3:22-cv-00203-S, 3:22-cv-229-S, 3:22-cv-253-S, 3:22-cv-367-S, 3:22-cv-369-S, 3:22-cv-370-S (pending)

- *NexPoint Advisors, L.P.* v. *Kirschner*, No. 3:22-cv-00335-L (pending)
- *CLO Holdco Ltd.* v. *Kirschner*, No. 3:22-cv-02051-B (pending)
- *Charitable DAF Fund, L.P.* v. *Highland Capital Management, L.P.*, No. 3:22-cv-02280-S (pending)
- *Charitable DAF Fund, L.P.* v. *Highland Capital Management, L.P.*, No. 3:22-cv-02802-S (pending)

United States Bankruptcy Court (N.D. Tex.):

- *In re Highland Capital Management, L.P.*, No. 19-34054 (confirmation order entered Feb. 22, 2021)

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

STATUTES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

NEXPOINT ADVISORS, L.P. AND
NEXPOINT ASSET MANAGEMENT, L.P.,
Petitioners,

v.

HIGHLAND CAPITAL MANAGEMENT, L.P., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

NexPoint Advisors, L.P. and NexPoint Asset Management, L.P. (formerly known as Highland Capital Management Fund Advisors, L.P.) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1a-32a) is reported at 48 F.4th 419. The bankruptcy court's order confirming the plan of reorganization (App., *infra*, 65a-166a) is unpublished.

STATEMENT OF JURISDICTION

The court of appeals issued its original opinion on August 19, 2022. App., *infra*, 33a. On September 7, 2022,

the court granted rehearing and issued an amended opinion. *Id.* at 1a. On October 12, 2022, Justice Alito extended the time to file this petition to January 5, 2023; and on December 21, 2022, Justice Alito further extended the time to file to January 16, 2023. No. 22A303. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of Titles 11 and 28 of the U.S. Code are set forth in the appendix. App., *infra*, 197a-220a.

PRELIMINARY STATEMENT

This case presents multiple circuit conflicts over recurring and important questions. Section 524(e) of the Bankruptcy Code makes clear that the "discharge of a debt of the debtor *does not affect the liability of any other entity* on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e) (emphasis added). Yet the reorganization plan the bankruptcy court approved in this case exculpated a host of *non*-debtor parties. The Fifth Circuit correctly held most of those exculpations unlawful under Section 524(e).

The Fifth Circuit, however, stopped short of what the law requires—and exacerbated two circuit conflicts as a result. The court upheld the plan's sweeping exculpations for certain "Independent Directors" for misconduct short of gross negligence. The court also upheld provisions that shielded both the debtor and third parties from claims arising *after* the bankruptcy discharge. Thus, while the court of appeals correctly ruled that the Bankruptcy Code generally prohibits third-party exculpations, it permitted certain categories of exculpations anyway. Those rulings raise two questions worthy of the Court's review.

The first concerns whether a bankruptcy court may exculpate third parties like the Independent Directors for misconduct short of gross negligence. The court of appeals reasoned that such exculpations are consistent with Section 524(e) because they track common-law protections the Fifth Circuit accords to bankruptcy trustees. But the circuits are in disarray over the scope of those common-law protections. The Fourth, Sixth, Seventh, and Tenth Circuits hold that bankruptcy trustees have common-law immunity for all misconduct other than *willful violations*. By contrast, the First, Second, Ninth, and Eleventh Circuits allow suits for *simple negligence*. In *In re Smyth*, 207 F.3d 758 (5th Cir. 2000), the Fifth Circuit adopted an "intermediate position" and held that "the proper standard is gross negligence." *Id.* at 761. The court applied that standard here to uphold the plan's exculpatory provisions for the Independent Directors. App., *infra*, 27a-28a. That square circuit conflict warrants review.

The second question concerns whether a bankruptcy court may prospectively exculpate the debtor and other parties for claims arising out of ordinary *post-bankruptcy* business operations. The Fifth Circuit approved provisions that granted the debtor and other parties broad, indefinite protections while carrying on the debtor's business. That holding conflicts with decisions of the Seventh, Eighth, Ninth, and Eleventh Circuits, which have all held that bankruptcy protection ends once the debtor exits from bankruptcy. The consequences are particularly serious for a registered investment adviser like Highland, which owes fiduciary duties to investors—important statutory duties that the plan purports to render unenforceable.

STATEMENT

I. Statutory Framework

A. The Bankruptcy Code's "Fresh Start" Policy

"The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" *Marrama* v. *Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007). To that end, the Code provides for the discharge of the debtor's *own* liabilities. Confirmation of a Chapter 11 bankruptcy plan "discharges the debtor from any debt that arose before the date of such confirmation." 11 U.S.C. §1141(d)(1)(A). That discharge "voids any judgment" against the debtor for a discharged debt. *Id.* §524(a)(1). It also "operates as an injunction against the commencement or continuation of an action" to recover a discharged debt from the debtor. *Id.* §524(a)(2).

Section 524(e) makes clear that such discharges are personal to the debtor itself. The "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. §524(e).

Section 524(g) contains a narrow exception for certain asbestos-related claims. See 11 U.S.C. §524(g). Under that provision, "[n]otwithstanding the provisions of section 524(e), * * * an injunction may bar any action directed *against a third party* who * * * is alleged to be directly or indirectly liable" for the claim. *Id.* §524(g)(4)(A)(ii) (emphasis added).

B. Bankruptcy Protections for Trustees

In a typical Chapter 11 case, once the debtor files a bankruptcy petition, it continues to operate its business under the bankruptcy court's supervision as a "debtor-in-possession" while stakeholders devise a plan of reorganization. See 11 U.S.C. §§1107(a), 1108, 1121; 5 Wil-

liam L. Norton, *Norton Bankruptcy Law and Practice* §91:4 (3d ed. rev. 2022). Ordinarily, the debtor-in-possession operates its business without the involvement of a trustee. See 5 Norton, *supra*, §91:3. Nonetheless, the bankruptcy court may appoint a trustee either "for cause" or "if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate." 11 U.S.C. §1104(a). Where the court does not appoint a trustee, the debtor-in-possession has "all the rights * * * and powers, and shall perform all the functions and duties, * * * of a trustee." *Id.* §1107(a).

Courts have recognized common-law protections for trustees designed to ensure the integrity of the bankruptcy process. Over a century ago, in *Barton* v. *Barbour*, 104 U.S. 126 (1881), this Court held that plaintiffs could not sue an equity receiver without permission of the court that appointed him. *Id.* at 127. Since then, courts have applied *Barton*'s holding to bankruptcy trustees on the theory that they are "statutory successor[s]" to equity receivers. See *In re Linton*, 136 F.3d 544, 545 (7th Cir. 1998) (citing "unbroken line of cases"). Debtors-in-possession enjoy the same protections by virtue of Section 1107(a).

Although Congress has not formally codified the *Barton* doctrine, it has implicitly acknowledged the doctrine's existence. Section 959(a) of Title 28 provides that "[t]rustees, receivers or managers of any property, including debtors in possession, may be sued, *without* leave of the court appointing them," in certain circumstances. 28 U.S.C. §959(a) (emphasis added). That provision presupposes that a plaintiff ordinarily needs court permission before suing a bankruptcy trustee.

II. PROCEEDINGS BELOW

The debtor in this case, Highland Capital Management, L.P. ("Highland"), is a multibillion-dollar investment management firm co-founded by James Dondero. App., *infra*, 72a-73a. In 2019, Highland filed a bankruptcy petition under Chapter 11. *Id.* at 73a, 90a.

A. The Bankruptcy Court's Appointment of the Independent Directors

Highland initially operated as a debtor-in-possession under Mr. Dondero's control. App., *infra*, 73a, 90a. But Mr. Dondero's relationship with the Unsecured Creditors' Committee proved contentious. *Id.* at 78a-79a. The Committee initially sought the appointment of a Chapter 11 trustee to replace him. *Id.* at 79a. The U.S. Trustee similarly sought appointment of a Chapter 11 trustee. Bankr. Ct. Dkt. 271. After "substantial and lengthy negotiations," the parties reached a compromise under which Mr. Dondero agreed to give up control over the company. App., *infra*, at 79a.

Under that agreement, the bankruptcy court appointed three "Independent Directors" to manage the company. App., *infra*, 124a. Those Independent Directors were "analogous to a creditors' committee rather than an incumbent board of directors." *Id.* at 125a.

B. Highland's Submission of a Reorganization Plan with Broad Exculpatory Provisions

Highland eventually submitted a Fifth Amended Plan of Reorganization for court approval. App., *infra*, 167a-196a. That plan contemplates that, following confirmation, Highland will "continue to manage funds and conduct its business in the same manner" as before. *Id.* at 117a; see *id.* at 187a § IV.C.6. Highland will monetize

assets to pay off certain creditors and gradually wind down operations. *Id.* at 71a-72a; *id.* at 187a-188a § IV.C.7.

The plan's wind-down process was projected to take two years, although the bankruptcy court acknowledged that "there is no specified time frame by which this process must conclude." App., *infra*, 117a. The plan requires the debtor to complete distributions within "three years from the Effective Date," but permits the court to extend that period indefinitely. *Id.* at 183a-184a § IV.B.14. Except as otherwise specified, the plan discharges Highland from all liabilities that arose before the plan's effective date. App., *infra*, 188a-189a § IX.B.

1. The plan includes a sweeping exculpatory provision that extends to "nearly all bankruptcy participants." App., *infra*, 7a; see *id.* at 189a-190a § IX.C. That provision applies to all "Exculpated Parties," defined as "(i) the Debtor and its successors and assigns, (ii) the Employees, (iii) [the Debtor's general partner] Strand, (iv) the Independent Directors, (v) the Committee, (vi) the members of the Committee (in their official capacities), (vii) the Professionals retained by the Debtor and the Committee in the Chapter 11 Case, (viii) the CEO/CRO; and (ix) the Related Persons of each." *Id.* at 168a-169a § I.B.62. "Related Persons" include all "present, future, or former officers, directors, employees, managers, managing members, members, financial advisors, attorneys, accountants, investment bankers, consultants, professionals, advisors, shareholders, principals, partners, subsidiaries, divisions, management companies, heirs, agents, and other representatives." *Id.* at 170a § I.B.112.

The exculpatory provision bars "any claim * * * for conduct occurring on or after the Petition Date in connection with," among other things, "the implementation of the Plan," "the funding or consummation of the Plan,"

or "the offer, issuance, and Plan Distribution of any securities issued or to be issued pursuant to the Plan, * * * whether or not such Plan Distributions occur following the Effective Date." App., *infra*, 189a § IX.C. Because the plan contemplates that Highland will continue to operate its business for three years or longer, that exculpation sweeps in a broad range of post-discharge conduct. The provision excludes "bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct." *Ibid.* But it prohibits claims for ordinary negligence or other misconduct short of gross negligence. *Ibid.*

2. The plan also includes a permanent injunction and gatekeeping provision. That provision prohibits "Enjoined Parties"—defined to include creditors and other bankruptcy participants—from asserting claims, without prior court approval, against any "Protected Party"—a category similar to, but broader than, the list of Exculpated Parties. App., *infra*, 194a-196a § IX.F; *id.* at 168a § I.B.56; *id.* at 169a-170a § I.B.105. Like the exculpatory provision, that provision expressly applies to Highland's three Independent Directors. *Id.* at 169a-170a § I.B.105.

Under that provision, "no Enjoined Party may commence or pursue a claim or cause of action of any kind against any Protected Party" that relates to, among other things, "the administration of the Plan or property to be distributed under the Plan" or "the wind down of the business of the Debtor or Reorganized Debtor," unless the bankruptcy court "first determin[es] * * * that such claim or cause of action represents a colorable claim." App., *infra*, 195a § IX.F. Again, because the plan contemplates that Highland will carry on business for another three years or longer, that provision sweeps in a broad range of post-bankruptcy conduct.

C. The Bankruptcy Court's Confirmation Order

The bankruptcy court confirmed the plan. App., *infra*, 65a-166a. Petitioners argued that Fifth Circuit law prohibited the third-party exculpation and injunction. Bankr. Ct. Dkt. 1670 at 36. Dozens of other interested parties, including the U.S. Trustee, echoed those objections. App., *infra*, 84a-85a, 88a.

The bankruptcy court overruled the objections. The court recognized that, in *In re Pacific Lumber Co.*, 584 F.3d 229 (5th Cir. 2009), the Fifth Circuit had rejected third-party exculpations on the ground that "section 524(e) of the Bankruptcy Code 'only releases the debtor, not co-liable third parties.'" App., *infra*, 123a. But the court asserted that it could exculpate "other parties in a particular chapter 11 case that perform similar roles to a creditors' committee." *Id.* at 124a. The court also asserted that Mr. Dondero's "litigious conduct" justified the third-party exculpations. *Id.* at 126a. The bankruptcy court upheld the injunction and gatekeeping provision on similar grounds. *Id.* at 126a-131a.

The bankruptcy court granted permission to appeal directly to the Fifth Circuit under 28 U.S.C. §158(d). App., *infra*, 10a. The Fifth Circuit accepted the appeals. *Id.* at 10a-11a.

D. The Court of Appeals' Opinion

The Fifth Circuit affirmed in part and reversed in part. App., *infra*, 1a-32a.

1. The court of appeals first denied Highland's motion to dismiss the appeal as equitably moot. App., *infra*, 11a. Although the plan had already been substantially consummated, the court held that "the legality of a reorganization plan's non-consensual non-debtor release is conse-

quential to the Chapter 11 process and so should not escape appellate review." *Id.* at 16a.

2. On the merits, the court of appeals "agree[d] with Appellants that the bankruptcy court exceeded its statutory authority under §524(e) by exculpating certain nondebtors." App., *infra*, 18a. The court "reverse[d] and vacate[d] the Plan * * * to that extent." *Ibid.*

Section 524(e), the Fifth Circuit observed, states that the "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." App., *infra*, 24a. Citing the Fifth Circuit's prior decision in *Pacific Lumber*, 584 F.3d at 251-253, the court held that "the exculpation here partly runs afoul of that statutory bar on non-debtor discharge by reaching beyond Highland Capital, the Committee, and the Independent Directors." App., *infra*, 24a.

The court acknowledged that "there is a circuit split concerning the effect and reach of §524(e)." App., *infra*, 25a; see *id.* at 25a n.14 (noting "clear circuit split"). "Our court along with the Tenth Circuit hold §524(e) categorically bars third-party exculpations absent express authority in another provision of the Bankruptcy Code." *Id.* at 25a-26a. "By contrast, the Ninth Circuit joins the Second, Third, Fourth, Sixth, Seventh, and Eleventh Circuits in reading §524(e) to allow varying degrees of limited third-party exculpations." *Id.* at 26a. The court explained that *Pacific Lumber* "was not blind to the countervailing view, as it twice cites the Third Circuit's contrary holding." *Ibid.* But "[w]e are obviously bound to apply our own precedent." *Ibid.*

Pacific Lumber had identified only "two sources of authority to exculpate nondebtors." App., *infra*, 27a. One is "to channel asbestos claims (not present here)."

Ibid. (citing 11 U.S.C. § 524(g)). The other is "to provide a limited qualified immunity to creditors' committee members for actions within the scope of their statutory duties." *Ibid.* The court of appeals noted that it had also "recognized a limited qualified immunity [for] bankruptcy trustees unless they act with gross negligence," citing its prior decision in *In re Smyth*, 207 F.3d 758 (5th Cir. 2000). App., *infra*, 27a. "If other sources exist, Highland Capital failed to identify them." *Ibid.* The court thus saw "no statutory authority for the full extent of the exculpation here." *Ibid.* It rejected the bankruptcy court's theory that the mere prospect of additional litigation was sufficient to justify third-party exculpations. *Id.* at 28a.

3. The court perceived "one remaining question: whether the bankruptcy court can exculpate the Independent Directors." App., *infra*, 28a. The court held that it could. The Independent Directors were "appointed to act together as the bankruptcy trustee for Highland Capital." *Ibid.* In *Smyth*, the Fifth Circuit had "recognized a limited qualified immunity [for] bankruptcy trustees unless they act with gross negligence." *Id.* at 27a. The Independent Directors were therefore "entitled to the limited qualified immunity for any actions short of gross negligence." *Id.* at 28a.

In *Smyth*, the Fifth Circuit acknowledged that "a circuit split [had] developed on the question of the proper standard of care to which a trustee should be held." 207 F.3d at 761. "A number of Circuit Courts of Appeals have adopted the intentional and deliberate standard, holding that a trustee in bankruptcy should not be held personally liable unless he acts willfully and deliberately in violation of his fiduciary duties." *Ibid.* (citing Sixth, Seventh, and Tenth Circuit cases). "On the other hand," the Ninth Circuit "imposes liability upon a trustee for

mere negligence." *Ibid.* The court adopted "an intermediate position" and held that "the proper standard is gross negligence." *Ibid.*

Applying *Smyth*'s gross negligence standard, the panel below upheld the exculpation of the Independent Directors. App., *infra*, 28a. Because the plan's exculpatory provision allowed claims for "bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct," the court held that it was consistent with *Smyth*'s interpretation of a trustee's common-law immunity. *Id.* at 8a, 27a-28a (quoting App., *infra*, 189a § IX.C).

4. The court then turned to the plan's injunction and gatekeeping provision. App., *infra*, 30a-32a. Addressing petitioners' objection that those provisions impermissibly "releas[ed] non-debtors in violation of § 524(e)," the court deemed the objection "resolved by [its] striking the impermissibly exculpated parties." *Id.* at 30a.

Petitioners had urged that "what is most problematic * * * is that the Exculpation Provision and Injunction both apply to future, post-confirmation liabilities—a perpetual 'get out of jail free' card." NexPoint C.A. Br. 26; see also *id.* at 27-28 (provisions "apply to, and exculpate, potential *prospective* liability incurred after the confirmation of the Plan"); *id.* at 35-36 (similar argument against injunction). In the court's view, however, "permanency alone is no reason to alter a bankruptcy court's otherwise-lawful injunction on appeal." App., *infra*, 30a.

"Under the '*Barton* doctrine,'" the court explained, "the bankruptcy court may require a party to 'obtain leave of the bankruptcy court before initiating an action in district court when the action is against the trustee or other bankruptcy-court-appointed officer, for acts done in the actor's official capacity.'" App., *infra*, 31a. The

court held that it "need not evaluate whether the bankruptcy court would have jurisdiction [over] every conceivable claim falling under the widest interpretation of the gatekeeper provision." *Id.* at 32a. The court "le[ft] that to the bankruptcy court in the first instance." *Ibid.*

5. The court issued its original opinion on August 19, 2022. App., *infra*, 33a-64a. On September 7, 2022, the court granted rehearing, withdrew its original opinion, and issued an amended opinion. *Id.* at 1a-32a. The new opinion clarified that the ruling on the exculpatory provision also applied to the injunction and gatekeeping provision. Compare *id.* at 61a with *id.* at 30a.[1]

6. On January 5, 2023, Highland filed a petition for a writ of certiorari seeking review of the court of appeals' decision. No. 22-631. Highland's petition argues that the court erred in striking the exculpatory provisions from the plan and that Section 524(e) imposes no limitations whatsoever on a bankruptcy court's authority to exculpate third parties. *Id.* at 21-22.

REASONS FOR GRANTING THE PETITION

Section 524 of the Bankruptcy Code discharges Chapter 11 *debtors* from claims arising from *pre-confirmation conduct*. That discharge does not extend to third parties who have not entered bankruptcy themselves. Nor does it shield debtors from the consequences of their *post-bankruptcy* actions.

The Fifth Circuit recognized those principles in part. The court ruled that Section 524(e) limits the discharge to the debtor itself and thus generally prohibits third-

[1] This petition is timely under 28 U.S.C. § 2101(c) whether one calculates the deadline, including extensions, from August 19, 2022 (the original opinion) or September 7, 2022 (the amended opinion).

party exculpations. The court correctly struck most of the parties protected by the exculpatory and injunction provisions. It acknowledged that its decision implicated a circuit conflict over the scope of Section 524(e). But it chose the correct side of that conflict.

The Fifth Circuit, however, upheld the plan's exculpatory provisions to the extent they shielded the Independent Directors from claims short of gross negligence. It also upheld provisions that applied even to claims arising out of conduct that post-dates the confirmation of the bankruptcy plan. Those rulings likewise raise questions that divide the courts of appeals and warrant review.

The Fifth Circuit justified the plan's exculpation of the Independent Directors on the ground that it tracked the common-law protections for bankruptcy trustees under *In re Smyth*, 207 F.3d 758 (5th Cir. 2000). *Smyth* permits claims against trustees for gross negligence but not for lesser misconduct. *Id.* at 761. As *Smyth* acknowledged, the circuits are divided over that standard. The division is even deeper than *Smyth* recognized. The Fifth Circuit's ruling reaffirming *Smyth* in this case threatens to undermine the Bankruptcy Code's limitations on non-debtor exculpations, allowing courts to immunize a broad range of third-party misconduct.

The Fifth Circuit's decision also creates a circuit conflict over the temporal scope of the discharge and exculpations. The plan in this case broadly exculpates the debtor and other parties for acts taken in the "implementation" or "administration" of the plan. App., *infra*, 189a § IX.C; *id.* at 195a § IX.F. Because the plan contemplates that the debtor will continue to operate its business for years, those provisions effectively amount to a perpetual

grant of immunity for ordinary post-bankruptcy business operations. The Fifth Circuit's ruling upholding those provisions conflicts with decisions in the Seventh, Eighth, Ninth, and Eleventh Circuits, all of which have rejected the notion that bankruptcy courts can immunize post-bankruptcy conduct.

The Fifth Circuit's decision defies bankruptcy's "fresh start" policy. It expands a provision that relieves debtors from their pre-confirmation liabilities, so they can start anew, into one that immunizes them for future misconduct as well. That is not a "fresh start." It is a *head* start that gives the debtor protections outside bankruptcy that other industry participants do not enjoy. The court's ruling improperly enables parties to benefit from the bankruptcy court's protection without the burden of the court's supervision.

Those additional rulings are important in their own right. But this Court's review is particularly imperative if the Court is inclined to grant Highland's petition challenging the Fifth Circuit's general prohibition on third-party exculpations. See No. 22-631. A ruling prohibiting third-party exculpations may do little to settle the disarray in this area if courts continue to grant broad protections to third parties based on purported common-law immunities or exculpate parties even for ordinary *post-bankruptcy* business liabilities. Review that fails to consider the full range of exculpation issues that have divided the courts of appeals would protract the confusion and undermine the Court's ability to provide clear guidance based on a full understanding of the relevant context.

I. THERE IS AN ENTRENCHED CIRCUIT CONFLICT OVER WHETHER A BANKRUPTCY COURT MAY EXCULPATE THIRD PARTIES

The Fifth Circuit held below that a bankruptcy court generally may not exculpate non-debtor third parties. Highland has sought this Court's review of that ruling. See No. 22-631. Although that holding implicates a circuit conflict, the Fifth Circuit's resolution was correct.

1. Section 524(e) provides that the "discharge of a debt of the debtor does not affect the liability of any other entity on * * * such debt." 11 U.S.C. § 524(e). That provision limits the effect of the discharge to the debtor in bankruptcy, expressly excluding other parties.

Consistent with that provision's plain language, the Fifth and Tenth Circuits hold that "§ 524(e) categorically bars third-party exculpations absent express authority in another provision of the Bankruptcy Code." App., *infra*, 26a; see *In re Pac. Lumber Co.*, 584 F.3d 229, 251-253 (5th Cir. 2009); *In re Zale Corp.*, 62 F.3d 746 (5th Cir. 1995); *In re W. Real Estate Fund, Inc.*, 922 F.2d 592, 600 (10th Cir. 1990), modified on other grounds, 932 F.2d 898 (10th Cir. 1991). Those courts read Section 524(e) as a clear signal that "Congress did not intend to extend" the benefits of a bankruptcy discharge "to third-party bystanders." *W. Real Estate*, 922 F.2d at 600. They find further support in Section 524(g)'s express authorization for third-party releases in asbestos cases. See *Pac. Lumber*, 584 F.3d at 252.

The Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits disagree. They hold that Section 524(e) "does not foreclose a third-party release from a creditor's claims." *In re Airadigm Commc'ns, Inc.*, 519 F.3d 640, 656 (7th Cir. 2008); see also *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070, 1078 (11th Cir. 2015), cert. denied,

577 U.S. 823 (2015); *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002), cert. denied, 537 U.S. 816 (2015); *In re A.H. Robins Co.*, 880 F.2d 694, 702 (4th Cir. 1989), cert. denied, 493 U.S. 959 (1989); cf. *Blixseth* v. *Credit Suisse*, 961 F.3d 1074, 1084 (9th Cir. 2020) (similar for post-petition conduct), cert. denied, 141 S. Ct. 1394 (2021). The Second and Third Circuits have likewise held that a bankruptcy court may shield third parties by releasing or enjoining claims. See, *e.g.*, *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 293 (2d Cir. 1992) (approving injunction without addressing Section 524(e)), cert. dismissed, 506 U.S. 1088 (1993); *In re Millennium Lab Holdings II, LLC*, 945 F.3d 126, 139 (3d Cir. 2019) (similar), cert. denied, 140 S. Ct. 2805 (2020); cf. *In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000) (qualified immunity "outside the scope of § 524(e)").

Given those conflicting views, it is no surprise that courts have called attention to this circuit conflict for years. The Ninth Circuit recently noted that "[t]here is a long-running circuit split on this issue." *Blixseth*, 961 F.3d at 1082 n.4. Other courts agree. See, *e.g.*, *Seaside*, 780 F.3d at 1077 ("Other circuits are split as to whether a bankruptcy court has the authority to issue a non-debtor release * * * ."); *Airadigm*, 519 F.3d at 655-556 (circuits have "set out a variety of approaches"); *Dow Corning*, 280 F.3d at 657 (reviewing conflict); *In re Cont'l Airlines*, 203 F.3d 203, 212 (3d Cir. 2000) (same).

2. The question is important. "Third-party releases are among the most controversial issues in Chapter 11 bankruptcy." Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 Tex. L. Rev. 1079, 1106 (2022). A spate of high-profile bankruptcies underscores that such releases are

"a device that lends itself to abuse." *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 142 (2d Cir. 2005).

In recent years, third parties have used releases to avoid liability for everything from the opioid crisis to sex-abuse scandals without actually declaring bankruptcy themselves. See Lindsey D. Simon, *Bankruptcy Grifters*, 131 Yale L.J. 1154 (2022) (examining phenomenon and collecting examples). The Sackler family, for example, used broad third-party releases in Purdue's Chapter 11 plan to avoid personal liability for the opioid crisis. See *In re Purdue Pharma, L.P.*, 635 B.R. 26, 90 (S.D.N.Y. 2021) (partly invalidating releases), appeal pending, No. 22-110 (2d Cir.). The United States Olympic and Paralympic Committee used third-party releases to avoid liability in the USA Gymnastics bankruptcy arising out of the Larry Nassar sex-abuse scandal. See *In re USA Gymnastics*, No. 18-09108, Dkt. 1776 at 15-16, 23-26 (Bankr. S.D. Ind. Dec. 16, 2021), appeal dismissed, No. 1:21-cv-03065, Dkt. 52 (S.D. Ind. Dec. 9, 2022).

Widespread outrage over those decisions has sparked renewed debate over bankruptcy courts' authority to grant such releases. See, *e.g.*, Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 Yale L.J. Forum 960, 967 (2022) (arguing that "nothing in the Bankruptcy Code can plausibly be read to authorize nonconsensual nondebtor releases"); Adam J. Levitin, *The Constitutional Problem of Nondebtor Releases in Bankruptcy*, 91 Fordham L. Rev. 429 (2022) (arguing that nonconsensual nondebtor releases are unconstitutional). Those controversies have also led to the introduction of multiple bills in Congress that would "prohibit nonconsensual release of a nondebtor entity's liability." Nondebtor Release Prohibition Act of 2021, H.R. 4777, 117th Cong. pmbl. (July 28, 2021); Nondebtor

Release Prohibition Act of 2021, S. 2497, 117th Cong. pmbl. (July 28, 2021); see also Maurice VerStandig, *Senate Legislation Looks To Upend Nondebtor Releases, Stays*, Am. Bankr. Inst. J., Oct. 2021, at 8.

3. The Fifth and Tenth Circuits' interpretation is correct. Section 524 describes the effect of a discharge in bankruptcy. Section 524(a) provides that the discharge bars any effort to collect "a personal liability *of the debtor*." 11 U.S.C. §524(a) (emphasis added). Section 524(e) then explains that the "discharge of a debt of the debtor *does not affect the liability of any other entity* on, or the property of any other entity for, such debt." *Id.* §524(e) (emphasis added). That provision makes clear that "Congress did not intend to extend such benefits to third-party bystanders." *W. Real Estate*, 922 F.2d at 600; see also *In re Lowenschuss*, 67 F.3d 1394, 1401 (9th Cir. 1995) (Section 524 "does not * * * provide for the release of *third parties* from liability"), cert. denied, 517 U.S. 1243 (1996).

Bankruptcy courts have no freestanding equitable authority to grant what are effectively discharges to third parties. "[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington* v. *Ahlers*, 485 U.S. 197, 206 (1988); see also *Off. Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp.* v. *Chinery*, 330 F.3d 548, 580 (3d Cir. 2003) (en banc) (Fuentes, J., dissenting, joined by Sloviter, Alito & Smith, JJ.) (rejecting argument that bankruptcy court's "equitable powers" authorized non-statutory remedies).

Nor do other generic provisions of the Code, such as Section 105(a) or Section 1123(b)(6), authorize third-party exculpations. See 11 U.S.C. §105 ("The court may

issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."); *id.* § 1123(b)(6) (authorizing Chapter 11 plan to "include any other appropriate provision not inconsistent with the applicable provisions of this title"). As the Fifth and Tenth Circuits explain, "a bankruptcy court's supplementary equitable powers * * * may not be exercised in a manner that is inconsistent with the other, more specific provisions of the Code." *W. Real Estate*, 922 F.2d at 601; see also App., *infra*, 27a (Section 1123(b)(6) allows only provisions "*not inconsistent with*" the Code). The "specific provisions of section 524 displace the court's equitable powers under section 105 to order * * * permanent relief against a non-debtor." *Lowenschuss*, 67 F.3d at 1402 (brackets omitted); see also Brubaker, *supra*, at 979 (Section 105 "is too weak a reed upon which to rest [delegation of] so weighty a power").

Section 524(g) buttresses that reading in two ways. First, it provides that an injunction in an asbestos-related bankruptcy "may bar any action directed against a third party" liable for the debtor's conduct "*[n]otwithstanding the provisions of section 524(e)*." 11 U.S.C. § 524(g)(4)(A)(ii) (emphasis added). That provision would make no sense unless Section 524(e) otherwise prohibited such releases. See Jonathan M. Seymour, *Against Bankruptcy Exceptionalism*, 89 U. Chi. L. Rev. 1925, 2008 (2022) (deeming this "the best reading of the statute").

Second, this Court has held that where "a general authorization and a more limited, specific authorization exist side-by-side," the "terms of the specific authorization must be complied with." *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012) (interpreting another provision of the Bankruptcy Code). Section 524(g)'s specific authorization for third-party pro-

tections in asbestos cases implies that other generic provisions such as Sections 105(a) or 1123(b)(6) do not already authorize such relief.

4. Highland has filed a petition for a writ of certiorari seeking review of the Fifth Circuit's decision. See No. 22-631. It urges that the permissibility of third-party exculpations is a question of "critical and widespread importance to the bankruptcy laws." *Id.* at 18. The same considerations support review of the two questions this petition presents. The Fifth Circuit correctly held that Section 524(e) generally prohibits third-party exculpations. But it failed to give full effect to that principle, instead allowing broad third-party exculpations for the debtor's Independent Directors and exculpations that cover even post-bankruptcy conduct.

The courts of appeals have divided over those issues too. They openly disagree over the extent to which they can exculpate third parties based on common-law principles. And they have divided over whether they can immunize ordinary post-bankruptcy business operations. As explained below, the Court should grant this petition so it has the full range of relevant issues before it.

II. The Fifth Circuit's Exculpation Of The Independent Directors For Any Misconduct Short Of Gross Negligence Warrants Review

The Fifth Circuit correctly recognized that Section 524(e) generally precludes non-debtor exculpations. But the court nonetheless upheld plan provisions exculpating Highland's Independent Directors for all claims short of gross negligence. The court did so on the ground that those provisions allegedly track common-law protections for bankruptcy trustees. That ruling implicates another widely acknowledged circuit conflict that raises important and unsettled questions.

A. The Circuits Have Diverged over the Scope of a Trustee's Common-Law Protections

There is an entrenched and well-recognized circuit conflict over the standard that governs claims against bankruptcy trustees.

1. The First, Second, Ninth, and Eleventh Circuits all permit suits against trustees for simple negligence. In *In re Mailman Steam Carpet Cleaning Corp.*, 196 F.3d 1 (1st Cir. 1999), cert. denied, 530 U.S. 1230 (2000), the First Circuit acknowledged that conflict. "[T]he courts of appeals," it observed, "have split almost evenly on the question of whether a bankruptcy trustee can be held personally liable for negligence (as opposed to deliberate misconduct)." *Id.* at 7. Joining the Second, Ninth, and Eleventh Circuits, the court held that a trustee could be held liable for negligence. Even "in the absence of deliberate misconduct," it held, "negligence suffices." *Ibid.* "[T]here is simply no principled way * * * to avoid the conclusion that a bankruptcy trustee can be personally liable for negligent breach of fiduciary duty." *Ibid.*

That decision followed entrenched rulings from other circuits. In *Bennett* v. *Williams*, 892 F.2d 822 (9th Cir. 1989), the Ninth Circuit held that "a trustee may be liable for 'intentional *or negligent* violations of duties imposed upon him by law.'" *Id.* at 823 (emphasis added). In that court's view, "[a] trustee has a duty to preserve the assets of an estate and must 'exercise that measure of care and diligence that an ordinarily prudent person would exercise under similar circumstances.'" *Id.*

In *In re Gorski*, 766 F.2d 723 (2d Cir. 1985), the Second Circuit held that "liability may attach as the result of negligent, as well as knowing or intentional, breaches." *Id.* at 727. And in *Red Carpet Corp. of Panama City Beach* v. *Miller*, 708 F.2d 1576 (11th Cir. 1983), the

Eleventh Circuit stated that "[a] bankruptcy trustee is liable for wrongful conduct or negligence." *Id.* at 1578.

2. By contrast, the Fourth, Sixth, Seventh, and Tenth Circuits all require intentional misconduct. In *Sherr* v. *Winkler*, 552 F.2d 1367 (10th Cir. 1977), the Tenth Circuit held that "a trustee in bankruptcy is not [to] be held personally liable unless he acts willfully and deliberately in violation of his fiduciary duties." *Id.* at 1375. "[A] reorganization trustee would not be liable personally except for willful and deliberate acts." *Ibid.*

In *United States* v. *Sapp*, 641 F.2d 182 (4th Cir. 1981), the Fourth Circuit held that, "[w]hen acting within the discretionary bounds of this authority, it is settled that the trustee may not be held liable for any mistake of judgment; that his liability personally is 'only for acts determined to be willful and deliberate in violation of his duties.'" *Id.* at 184-185. In *Ford Motor Credit Co.* v. *Weaver*, 680 F.2d 451 (6th Cir. 1982), the Sixth Circuit held that "[a] bankruptcy trustee is liable personally only for acts willfully and deliberately in violation of his fiduciary duties." *Id.* at 462. And in *In re Chicago Pacific Corp.*, 773 F.2d 909 (7th Cir. 1985), the Seventh Circuit agreed that "[a] trustee may be held personally liable only for a willful and deliberate violation of his fiduciary duties." *Id.* at 915.

3. The Fifth Circuit has adopted a middle ground. In *In re Smyth*, 207 F.3d 758 (5th Cir. 2000), the court observed that "a circuit split [has] developed on the question of the proper standard of care to which a trustee should be held." *Id.* at 761. "A number of Circuit Courts of Appeals have adopted the intentional and deliberate standard, holding that a trustee in bankruptcy should not be held personally liable unless he acts willfully and deliberately in violation of his fiduciary duties." *Ibid.*

(citing Sixth, Seventh, and Tenth Circuit cases). "On the other hand," the Ninth Circuit "imposes liability upon a trustee for mere negligence." *Ibid.* *Smyth* adopted an "intermediate position" and held that "the proper standard is gross negligence." *Ibid.*

4. The conflict is thus open, entrenched, and acknowledged. Courts have continued to recognize the conflict since *Smyth*. In *Maxwell* v. *KPMG, LLP*, No. 07-2819, 2008 WL 6140730 (7th Cir. Aug. 19, 2008) (motion order), for example, the Seventh Circuit observed that "[a] circuit split has developed on the question of the proper standard to which a trustee should be held before he is held personally liable." *Id.* at *4. The court cited *Smyth* for the point that the Fifth Circuit permits claims for gross negligence, but held that "in this circuit [a trustee] is personally liable only if he willfully and deliberately violated his fiduciary duties." *Ibid.*

In *In re Schooler*, 725 F.3d 498 (5th Cir. 2013), the Fifth Circuit again highlighted "the morass surrounding the standard of care required of bankruptcy trustees." *Id.* at 512-513 n.10. "[A] circuit split," it observed, "emerged whereby some courts had concluded that a bankruptcy trustee could not be held personally liable unless he acted willfully and deliberately, whereas others had concluded that a trustee could be held liable for mere negligence." *Ibid.* It "again acknowledge[d] the tension in this area of the law." *Ibid.*

District and bankruptcy courts note this conflict too. See, *e.g.*, *Alonso* v. *Weiss*, 98 F. Supp. 3d 956, 967 (N.D. Ill. 2015) ("[A] circuit split developed on the question of the proper standard of care to which a trustee or receiver should be held."); *In re Hunter*, 553 B.R. 866, 873-874 & n.6 (Bankr. D.N.M. 2016) (contrasting "the majority rule in other circuits" with Second and Eleventh Circuit

cases); *In re Cutright*, No. 08-70160, 2012 WL 1945703, at *12 n.13 (Bankr. E.D. Va. May 30, 2012) (noting the "split in authority among the circuit courts as to the extent of a trustee's liability"); *In re Wilhoite*, No. 3:11-06339, 2014 WL 1922846, at *4 n.2 (Bankr. M.D. Tenn. May 14, 2014) (contrasting approaches).

Secondary sources routinely note the conflict as well. See, *e.g.*, 1 Hon. Joan N. Feeney *et al.*, *Bankruptcy Law Manual* § 4:16 (5th ed. rev. 2022) (noting the "split in the circuits regarding the standard of care when a trustee is personally sued"); David W. Allard, *Personal Liability of Trustees and Debtors in Possession*, 106 Com. L.J. 415, 415-416 (2001) (urging "the legislature to create a uniform statute * * * which would resolve the split of authority that exists in the circuit courts"); Thomson Reuters, Practical Law Practice Note, *Serving as a Chapter 11 Trustee* (rev. 2023) ("Courts are split on the standard of care to apply when a Chapter 11 trustee is personally sued for breach of fiduciary duties * * * ."").

5. That circuit conflict was outcome-determinative in this case. The court of appeals justified the plan's provisions exculpating the Independent Directors from all claims short of gross negligence on the ground that they tracked common-law protections for bankruptcy trustees. App., *infra*, 27a-28a. The plan's exculpatory provision exempts "acts or omissions that constitute bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct." App., *infra*, 189a § IX.C. That standard is consistent with the Fifth Circuit's holding in *Smyth* that common-law immunity permits only claims for gross negligence (or worse). 207 F.3d at 761. It is also consistent with the Fourth, Sixth, Seventh, and Tenth Circuits' even narrower rule requiring willful misconduct. But it is inconsistent with the rule in the First, Second, Ninth, and

Eleventh Circuits, all of which permit claims for ordinary negligence. Had this case arisen in one of those four circuits, the court could not have upheld the exculpatory provision on the ground that it merely tracked the common-law standard for trustees.

B. The Question Is Important

The disarray over the scope of common-law protections is important. A standard that shields bankruptcy trustees from all claims short of gross negligence—or worse still, one that requires a showing of intentional misconduct—severely restricts the rights of injured parties.

As this Court has made clear, there is a world of difference between gross and ordinary negligence. "Gross negligence is substantially and appreciably higher in magnitude and more culpable than ordinary negligence. Gross negligence is equivalent to the failure to exercise even a slight degree of care." *Conway* v. *O'Brien*, 312 U.S. 492, 495 (1941). A standard that shields trustees from ordinary negligence claims thus goes far toward releasing them from liability altogether.

Recognizing the importance of the issue, the U.S. Trustee has advocated for the broader rule permitting claims for ordinary negligence. In *In re Schooler*, 725 F.3d 498 (5th Cir. 2013), the U.S. Trustee filed an amicus brief "tak[ing] issue with [the Fifth Circuit's] conclusion in *Smyth*, asserting that the opinion overlooked contrary, binding authority, and that a 'gross negligence standard is not easily reconciled with the Supreme Court decisions holding that trustees, generally, and bankruptcy trustees, specifically, may be sued for simple negligence.'" *Id.* at 512-513 n.10 (quoting U.S. Trustee Br. in No. 12-10677 (5th Cir. July 12, 2013)). According to the U.S. Trustee, precedent "support[s] the proposition that a bankruptcy trustee may be sued for mere negligence."

Ibid. The Fifth Circuit recognized that "the government has advanced a persuasive argument challenging our holding in *Smyth*," but held that it was "bound" by that prior panel decision. *Ibid.* The U.S. Trustee's opposition to *Smyth*'s gross negligence standard (and, *a fortiori*, the willful misconduct standard that prevails in four other circuits) confirms the issue's importance.

The common-law standard for claims against bankruptcy trustees is also important in view of the broader dispute over third-party exculpations. As explained above, third-party exculpations are controversial. Parties have used them to avoid liability for everything from the opioid crisis to sex-abuse scandals. They have provoked an outpouring of critical commentary and even bills in Congress. See pp. 17-19, *supra*. A rule that bars third-party exculpations, however, may accomplish little if courts take an expansive view of common-law protections. As the decision below illustrates, even courts that ordinarily prohibit third-party exculpations may endorse them if they adopt expansive interpretations of common-law standards and then assert that the exculpatory provisions merely track those common-law standards.

Although common-law protections originally applied only to trustees, moreover, courts have expanded them to a wide range of other bankruptcy participants. In *Lawrence* v. *Goldberg*, 573 F.3d 1265 (11th Cir. 2009), the Eleventh Circuit extended them to an ad hoc group of creditors who helped pay for a private investigator. *Id.* at 1270. Several courts have extended them to members of creditors' committees. See *Pac. Lumber,* 584 F.3d at 253; *In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000); *In re Yellowstone Mountain Club, LLC*, 841 F.3d 1090, 1094-1095 (9th Cir. 2016). In *Yellowstone Mountain*, the court perceived "good reason" to treat creditors

like trustees for those purposes because both have an interest in "increasing the size of the estate." 841 F.3d at 1095. For that reason too, the open circuit conflict on this issue affects a wide array of cases and warrants this Court's review.

C. The Fifth Circuit's Decision Is Incorrect

The Fifth Circuit's gross negligence standard is incorrect. This Court's cases make clear that a trustee may be held liable for ordinary negligence. Nothing in the Bankruptcy Code departs from that settled standard.

In *United States ex rel. Willoughby* v. *Howard*, 302 U.S. 445 (1938), this Court held that a trustee could be sued under an ordinary negligence standard for depositing funds at a bank that became insolvent. "By the common law," the Court held, "every trustee or receiver of an estate has the duty of exercising reasonable care in the custody of the fiduciary estate unless relieved of such duty by agreement, statute, or order of court." *Id.* at 450. "As the exercise of ordinary care in making and maintaining deposits * * * was part of [the trustee's] official duties, he and his surety are liable on the bonds if he failed in this respect." *Id.* at 454.

In *Mosser* v. *Darrow*, 341 U.S. 267 (1951), this Court held a trustee personally liable for allowing employees to trade in securities in which the trusts had an interest. The Court held that "[t]he liability here is not created by a failure to detect defalcations, *in which case negligence might be required to surcharge [i.e., hold liable] the trustee*, but is a case of a willful and deliberate setting up of an interest in employees adverse to that of the trust." *Id.* at 272 (emphasis added). The clear implication is that negligence is a sufficient basis to hold a trustee liable.

Negligence has thus been a traditional basis for trustee liability. Nothing in the Bankruptcy Code prescribes a different approach. The First Circuit therefore correctly relied on *Mosser* to conclude that bankruptcy trustees have no common-law immunity from ordinary negligence claims. See *Mailman*, 196 F.3d at 7 ("In our view, *Mosser*, properly construed, strongly indicates that parties interested in the administration of a bankruptcy estate can seek to surcharge the trustee for negligence."). And the U.S. Trustee correctly relied on *Willoughby*, among other cases, when it urged the Fifth Circuit to repudiate *Smyth*'s gross negligence standard. See *Schooler*, 725 F.3d at 512-513 n.10 ("According to the government, these cases support the proposition that a bankruptcy trustee may be sued for mere negligence."). The Fifth Circuit erred by adopting a stricter standard.

III. The Plan's Exculpation Of Post-Confirmation Conduct Warrants Review

The Fifth Circuit also upheld exculpations for ordinary business conduct that occurs after the bankruptcy is consummated. The reorganization plan's exculpatory provision, as well as the plan's injunction and gatekeeping provision, apply to acts taken in "the implementation of the Plan" or "the administration of the Plan." App., *infra*, 189a § IX.C; *id.* at 195a § IX.F. The plan, however, contemplates that the debtor will continue to operate its business for three years or longer. *Id.* at 187a-188a § IV.C.6-.7; *id.* at 183a-184a § IV.B.14. The plan thus immunizes Highland and other parties indefinitely for ordinary post-bankruptcy business operations. The Fifth Circuit nonetheless ruled that "permanency alone is no reason to alter a bankruptcy court's otherwise-lawful injunction on appeal." App., *infra*, 30a. That holding conflicts with the

decisions of other circuits and warrants the Court's review as well.

A. The Fifth Circuit's Decision Conflicts with Decisions of Other Circuits

The Fifth Circuit's decision granting immunity for ordinary post-confirmation business operations conflicts with myriad decisions of other courts of appeals. Those decisions make clear that bankruptcy relieves a debtor only from *pre*-confirmation liabilities. It is not a grant of immunity for future business operations.

1. The Eighth Circuit, for example, has held that "there is no basis for bankruptcy court jurisdiction" over claims based on "conduct after the confirmation date." *In re Fairfield Cmtys., Inc.*, 142 F.3d 1093, 1095 (8th Cir. 1998). Claims arising after confirmation are "outside the scope of the plan." *Ibid.* "The debtor is not entitled to a permanent umbrella shielding it from all law suits." *Ibid.*

The Ninth Circuit has likewise explained that, "once the bankruptcy court confirms a plan of reorganization, the debtor is free to go about its business without further supervision or approval of the court, and concomitantly, without further protection of the court." *Sw. Marine Inc.* v. *Danzig*, 217 F.3d 1128, 1140 (9th Cir. 2000), cert. denied, 532 U.S. 1007 (2001). Confirmation frees the debtor from *pre*-confirmation claims, but "it does not bind *post*-confirmation creditors." *Id.* (emphasis added).

The Eleventh Circuit confirmed that rule in *In re Sure-Snap Corp.*, 983 F.2d 1015 (11th Cir. 1993). There, the debtor filed a post-confirmation appeal challenging a *pre*-confirmation order upholding a contract. *Id.* at 1017. The debtor lost, and the prevailing party sought attorney's fees under the contract. *Ibid.* The Eleventh Circuit rejected the debtor's claim that confirmation termi-

nated the contract's fee-shifting clause. Although confirmation barred enforcement of *pre*-confirmation debts, it did not relieve the debtor from the consequences of its *post*-confirmation appeal. *Id.* at 1018. "[B]ankruptcy was intended to protect the debtor from the continuing costs of pre-bankruptcy acts but not to insulate the debtor from the costs of post-bankruptcy acts." *Ibid.*

Finally, in *Pettibone Corp.* v. *Easley*, 935 F.2d 120 (7th Cir. 1991), the Seventh Circuit held that a bankruptcy court lacked jurisdiction after confirmation to enjoin tort claims the plan had not discharged. *Id.* at 122. "Once the bankruptcy court confirms a plan of reorganization," it explained, "the debtor may go about its business without further supervision or approval." *Ibid.* But the debtor "also is without the *protection* of the bankruptcy court. It may not come running to the bankruptcy judge every time something unpleasant happens." *Ibid.* "A firm that has emerged from bankruptcy is just like any other defendant" and must defend itself under the "applicable non-bankruptcy law." *Ibid.*

2. The Fifth Circuit's decision cannot be squared with those cases. By exculpating the debtor and other parties from liability from the "implementation" and "administration" of a plan that involves operating the debtor's business for another three years or longer, the Fifth Circuit effectively granted a *prospective* discharge from ordinary future business obligations. The Fifth Circuit declared that "permanency alone" was not a problem. App., *infra*, 30a. But permanency *is* a problem when a reorganization plan extends protections beyond confirmation to shield a debtor's ordinary business operations indefinitely. That extension gives debtors the protections of the bankruptcy process without the rigors of ongoing bankruptcy court supervision.

Some courts have approved plan terms that grant trustees limited post-confirmation protections while recovering assets or carrying out other discrete functions under the plan. See, *e.g.*, *In re Crown Vantage, Inc.*, 421 F.3d 963, 972-973 (9th Cir. 2005) (applying *Barton*). But this case goes well beyond such limited protections. The plan calls for the *debtor* to operate its business for another three years or longer. App., *infra*, 187a-188a § IV.C.6-.7; *id.* at 183a-184a § IV.B.14. Highland will "continue to manage funds and conduct business in the same manner" as it did before. *Id.* at 117a. Unlike a trustee or other court-appointed officer, Highland will carry on those operations just like any other business, free from the court's supervision. The plan's protections cannot reasonably be viewed as an incident of the bankruptcy process. They are a broad prospective grant of immunity from ordinary future business liabilities.

B. The Decision Below Dramatically Expands the Consequences of a Bankruptcy Discharge

The issue is important. Debtors in the Fifth Circuit can now insulate themselves indefinitely from liability following a bankruptcy so long as their reorganization plan calls for them to continue doing business and exculpates them for "implementing" or "administering" that plan. That holding works a sea change in the way businesses traditionally emerge from bankruptcy.

Those consequences are particularly striking for an entity like Highland that is a registered investment adviser under the Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1 *et seq.* App., *infra*, 73a. Under that statute, Highland is a fiduciary of its clients. See *SEC* v. *Cap. Gains Rsch. Bureau, Inc.*, 375 U.S. 180, 191 (1963) (recognizing the "delicate fiduciary nature of an investment advisory relationship"). It owes strict fiduciary

duties of care and loyalty. See generally Sec. & Exch. Comm'n, *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, 84 Fed. Reg. 33,669 (July 12, 2019). The decision below seemingly exculpates advisors like Highland even for violations of those important statutory duties.

The decision below also threatens an outsized impact. The Fifth Circuit led the Nation last year in Chapter 11 cases featuring predominantly business debt. See Admin. Off. of U.S. Courts, *Federal Judicial Caseload Statistics* tbl. F-2 (Mar. 31, 2022). It was tied with the Ninth Circuit for the most Chapter 11 cases overall. *Ibid.* Without this Court's intervention, the decision below could reshape the basic terms of the bankruptcy bargain for a sizeable portion of the Nation's docket.

C. The Fifth Circuit's Decision Is Incorrect

The Fifth Circuit's decision defies the Bankruptcy Code's text and purpose. The confirmation of a Chapter 11 plan binds the debtor's "creditors," defined as persons with *pre*-confirmation claims against the debtor. 11 U.S.C. §§101(10), 1141(a), (c). A Chapter 11 discharge therefore cannot "bind * * * [a] creditor with respect to *postconfirmation* claims." *Holywell Corp.* v. *Smith*, 503 U.S. 47, 58 (1992) (emphasis added); see also 8 *Collier on Bankruptcy* §1141.02[1] (16th ed. 2009) (similar). The Fifth Circuit's decision ignores that limitation. The plan in this case purports to bind as-yet-unknown parties with respect to conduct that might not occur for *years* after Highland's exit from bankruptcy.

The decision below also offends bankruptcy's animating purpose. "The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" *Marrama* v. *Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007). That "fresh start" allows a reorganized

debtor to resume its business free from its pre-bankruptcy debts and the bankruptcy court's supervision. Under the plan, Highland will "continue to manage funds and conduct its business in the same manner" as it did before. App., *infra*, 117a. Yet the plan exempts Highland and other parties from liability for "implementing" or "administering" the plan, granting indefinite protections from ordinary business liabilities that no other company enjoys. That is not a "fresh start"—it is a *head* start over competitors who must honor the ordinary obligations of conducting business. Nothing in the Bankruptcy Code permits that counterintuitive result.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

BENOIT QUARMBY
MOLOLAMKEN LLP
430 Park Ave.
New York, NY 10022

JEFFREY A. LAMKEN
Counsel of Record
ROBERT K. KRY
EUGENE A. SOKOLOFF
MOLOLAMKEN LLP
The Watergate, Suite 500
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

Counsel for Petitioners

JANUARY 2023

APPENDIX

APPENDIX – TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 21-10449

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.

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

OPINION ON PETITION FOR REHEARING

September 7, 2022

(1a)

Before WIENER, GRAVES,
and DUNCAN, *Circuit Judges*.

STUART KYLE DUNCAN, *Circuit Judge*:

The petition for panel rehearing is GRANTED. We withdraw our previous opinion, reported at 2022 WL 3571094, and substitute the following:

Highland Capital Management, L.P., a Dallas-based investment firm, managed billion-dollar, publicly traded investment portfolios for nearly three decades. By 2019, however, myriad unpaid judgments and liabilities forced Highland Capital to file for Chapter 11 bankruptcy. This provoked a nasty breakup between Highland Capital and its co-founder James Dondero. Under those trying circumstances, the bankruptcy court successfully mediated with the largest creditors and ultimately confirmed a reorganization plan amenable to most of the remaining creditors.

Dondero and other creditors unsuccessfully objected to the confirmation order and then sought review in this court. In turn, Highland Capital moved to dismiss their appeal as equitably moot. First, we hold that equitable mootness does not bar our review of any claim. Second, we affirm the confirmation order in large part. We reverse only insofar as the plan exculpates certain nondebtors in violation of 11 U.S.C. § 524(e), strike those few parties from the plan's exculpation, and affirm on all remaining grounds.

I. BACKGROUND

A. Parties

In 1993, Mark Okada and appellant James Dondero co-founded Highland Capital Management, L.P. ("Highland Capital") in Dallas. Highland Capital managed portfolios and assets for other investment advisers and funds

through a complex of entities under the Highland umbrella. Highland Capital's ownership-interest holders included Hunter Mountain Investment Trust (99.5%); appellant The Dugaboy Investment Trust, Dondero's family trust (0.1866%);[1] Okada, personally and through trusts (0.0627%); and Strand Advisors, Inc. (0.25%), the only general partner, which Dondero wholly owned.

Dondero also manages two of Highland Capital's clients—appellants Highland Capital Management Fund Advisors, L.P. and NexPoint Advisors, L.P. (the "Advisors"). Both the Advisors and Highland Capital serviced and advised billion-dollar, publicly traded investment funds for appellants Highland Income Fund, NexPoint Strategic Opportunities Fund, Highland Global Allocation Fund, and NexPoint Capital, Inc. (collectively, the "Funds"), among others. For example, on behalf of the Funds, Highland Capital managed certain investment vehicles known as collateral loan obligations ("CLOs") under individualized servicing agreements.

B. Bankruptcy Proceedings

Strapped with a series of unpaid judgments, Highland Capital filed for Chapter 11 bankruptcy in the District of Delaware in October 2019. The creditors included Highland Capital's interest holders, business affiliates, contractors, former partners, employees, defrauded investors, and unpaid law firms. Among those creditors, the Office of the United States Trustee appointed a four-member Unsecured Creditors' Committee (the "Committee").[2] See 11 U.S.C. § 1102(a)(1), (b)(1). Throughout the

---

[1] The Dugaboy Investment Trust appeals alongside Dondero's other family trust Get Good Trust (collectively, the "Trusts").

[2] First, Redeemer Committee of the Highland Crusader Fund had obtained a $191 million arbitration award after a decade of litigation against Highland Capital. Second, Acis Capital Management, L.P.

bankruptcy proceedings, the Committee investigated Highland Capital's past and current operations, oversaw its continuing operations, and negotiated the reorganization plan. See *id.* §1103(c). Upon the Committee's request, the court transferred the case to the Northern District of Texas in December 2019.

Highland Capital's reorganization did not proceed under the governance of a traditional Chapter 11 trustee. Instead, the Committee reached a corporate governance settlement agreement to displace Dondero, which the bankruptcy court approved in January 2020. Under the agreed order, Dondero stepped down as director and officer of Highland Capital and Strand to be an unpaid portfolio manager and "agreed not to cause any Related Entity . . . to terminate any agreements" with Highland Capital. The Committee selected a board of three independent directors to act as a quasi-trustee and to govern Strand and Highland Capital: James Seery Jr., John Dubel, and retired Bankruptcy Judge Russell Nelms (collectively, the "Independent Directors"). The order also barred any claim against the Independent Directors in their official roles without the bankruptcy court's authorizing the claim as a "colorable claim[] of willful misconduct or gross negligence." Six months later, at the behest of the creditors, the bankruptcy court appointed Seery as Highland Capital's Chief Executive Officer, Chief Restructuring Officer, and Foreign Representa-

---

and Acis Capital Management GP, LLC had sued Highland Capital after facing an adverse $8 million arbitration award, arising in part from its now-extinguished affiliation. Third, UBS Securities LLC and UBS AG London Branch had received a $1 billion judgment against Highland Capital following a 2019 bench trial in New York. Fourth, discovery vendor Meta-E Discovery had $779,000 in unpaid invoices. The Committee members are not parties on appeal.

tive. The order contained an identical bar on claims against Seery acting in these roles. Neither order was appealed.

Throughout summer 2020, Dondero proposed several reorganization plans, each opposed by the Committee and the Independent Directors. Unpersuaded by Dondero, the Committee and Independent Directors negotiated their own plan. When Dondero's plans failed, he and other creditors began to frustrate the 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. See *Highland Cap. Mgmt., L.P.* v. *Dondero (In re Highland Cap. Mgmt., L.P.),* Ch. 11 Case No. 19-34054-SGJ11, Adv. No. 20-03190-SGJ11, 2021 WL 2326350, at *1, *26 (Bankr. N.D. Tex. June 7, 2021) (holding Dondero in civil contempt, sanctioning him $100,000, and comparing this case to a "nasty divorce"). In Seery's words, Dondero wanted to "burn the place down" because he did not get his way. The Independent Directors insisted Dondero resign from Highland Capital, which he did in October 2020.

Highland Capital, meanwhile, proceeded toward confirmation of its reorganization plan—the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (the "Plan"). In August 2020, the Independent Directors filed the Plan and an accompanying disclosure statement with the support of the Committee. See 11 U.S.C. §§ 1121, 1125. The bankruptcy court approved the statement as well as proposed notice and voting procedures for creditors, teeing up confirmation. Leading up to the confirmation hearing, the Advisors and the Funds asked the court to bar Highland Capital from trading or disposing of CLO assets pending confirmation. The

bankruptcy court denied the request, and Highland Capital declined to voluntarily abstain and continued to manage the CLO assets.

Before confirmation, Dondero and other creditors (including several non-appellants) filed over a dozen objections to the Plan. Like Dondero, the United States Trustee primarily objected to the Plan's exculpation of certain non-debtors as unlawful. Highland Capital voluntarily modified the Plan to resolve six such objections. The Plan proposed to create eleven classes of creditors and equity holders and three classes of administrative claimants. See 11 U.S.C. § 1122. Of the voting-eligible classes, classes 2, 7, and 9 voted to accept the Plan while classes 8, 10, and 11 voted to reject it.

C. Reorganization Plan

The Plan works like this: It dissolves the Committee, and creates four entities—the Claimant Trust, the Reorganized Debtor, HCMLP GP LLC,[3] and the Litigation Sub-Trust. Administered by its trustee Seery, the Claimant Trust "wind[s]-down" Highland Capital's estate over approximately three years by liquidating its assets and issuing distributions to class-8 and -9 claimants as trust beneficiaries. Highland Capital vests its ongoing servicing agreements with the Reorganized Debtor, which "among other things" continues to manage the CLOs and other investment portfolios. The Reorganized Debtor's only general partner is HCMLP GP LLC. And the Litigation Sub-Trust resolves pending claims against

[3] The Plan calls this entity "New GP LLC," but according to the motion to dismiss as equitably moot, the new general partner was later named HCMLP GP LLC. For the sake of clarity, we use HCMLP GP LLC.

Highland Capital under the direction of its trustee Marc Kirschner.

The whole operation is overseen by a Claimant Trust Oversight Board (the "Oversight Board") comprised of four creditor representatives and one restructuring advisor. The Claimant Trust wholly owns the limited partnership interests in the Reorganized Debtor, HCMLP GP LLC, and the Litigation Sub-Trust. The Claimant Trust (and its interests) will dissolve either at the soonest of three years after the effective date (August 2024) or (1) when it is unlikely to obtain additional proceeds to justify further action, (2) all claims and objections are resolved, (3) all distributions are made, and (4) the Reorganized Debtor is dissolved.

Anticipating Dondero's continued litigiousness, the Plan shields Highland Capital and bankruptcy participants from lawsuits through an exculpation provision, which is enforced by an injunction and a gatekeeper provision (collectively, "protection provisions"). The protection provisions extend to nearly all bankruptcy participants: Highland Capital and its employees and CEO; Strand; the Independent Directors; the Committee; the successor entities and Oversight Board; professionals retained in this case; and all "Related Persons"[4] (collectively, "protected parties").[5]

---

[4] The Plan generously defines "Related Persons" to include all former, present, and future officers, directors, employees, managers, members, financial advisors, attorneys, accountants, investment bankers, consultants, professionals, advisors, shareholders, principals, partners, heirs, agents, other representatives, subsidiaries, divisions, and managing companies.

[5] The Plan expressly excludes from the protections Dondero and Okada; NexPoint Advisors, L.P.; Highland Capital Management Fund Advisors, L.P; their subsidiaries, managed entities, managed

The Plan exculpates the protected parties from claims based on any conduct "in connection with or arising out of" (1) the filing and administration of the case, (2) the negotiation and solicitation of votes preceding the Plan, (3) the consummation, implementation, and funding of the Plan, (4) the offer, issuance, and distribution of securities under the Plan before or after the filing of the bankruptcy, and (5) any related negotiations, transactions, and documentation. But it excludes "acts or omissions that constitute bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct" *and* actions by Strand and its employees predating the appointment of the Independent Directors.

Under the Plan, bankruptcy participants are enjoined "from taking any actions to interfere with the implementation or consummation of the Plan" or filing any claim related to the Plan or proceeding. Should a party seek to bring a claim against any of the protected parties, it must go to the bankruptcy court to "first determin[e], after notice and a hearing, that such claim or cause of action represents a colorable claim of any kind." Only then may the bankruptcy court "specifically authoriz[e]" the party to bring the claim. The Plan reserves for the bankruptcy court the "sole and exclusive jurisdiction to determine whether a claim or cause of action is colorable" and then to adjudicate the claim if the court has jurisdiction over the merits.

D. Confirmation Order

At a February 2021 hearing, the bankruptcy court confirmed the Plan from the bench over several remaining objections. See Fed. R. Bankr. P. 3017-18; 11 U.S.C.

---

entities, and members; and the Dugaboy Investment Trust and its trustees, among others.

§§1126, 1128, 1129. In its later-written decision, the bankruptcy court observed that Highland Capital's bankruptcy was "not a garden variety chapter 11 case." The type of debtor, the reason for the bankruptcy filing, the kinds of creditor claims, the corporate governance structure, the unusual success of the mediation efforts, and the small economic interests of the current objectors all make this case unique.

The confirmation order criticized Dondero's behavior before and during the bankruptcy proceedings. The court could not "help but wonder" if Highland Capital's deficit "was necessitated because of enormous litigation fees and expenses incurred" due to Highland Capital's "culture of litigation." Recounting Highland Capital's litigation history, it deduced that Dondero is a "serial litigator." It reasoned that, while "Dondero wants his company back," this "is not a good faith basis to lob objections to the Plan." It attributed Dondero's bad faith to the Advisors, the Trusts, and the Funds, given the "remoteness of their economic interests." For example, the bankruptcy court "was not convinced of the[ ] [Funds'] independence" from Dondero because the Funds' board members did not testify and had "engaged with the Highland complex for many years." And so the bankruptcy court "consider[ed] them all to be marching pursuant to the orders of Mr. Dondero." The court, meanwhile, applauded the members of the Committee for their "wills of steel" for fighting "hard before and during this Chapter 11 Case" and "represent[ing] their constituency . . . extremely well."

On the merits of the Plan, the bankruptcy court again approved the Plan's voting and confirmation procedures as well as the fairness of the Plan's classes. See 11 U.S.C. §§1122, 1125(a)-(c). The court held the Plan com-

plied with the statutory requirements for confirmation. See *id.* §§1123(a)(1)-(7), 1129(a)(1)-(7), (9)-(13). Because classes 8, 10, and 11 had voted to reject the Plan, it was confirmable only by cramdown.[6] See *id.* §1129(b). The bankruptcy court found that the Plan treated the dissenting classes fairly and equitably and satisfied the absolute-priority rule, so the Plan was confirmable. See *id.* §1129(b)(2)(B)-(C). The court also concluded that the protection provisions were fair, equitable, and reasonable, as well as "integral elements" of the Plan under the circumstances, and were within both the court's jurisdiction and authority. The court confirmed the Plan as proposed and discharged Highland Capital's debts. *Id.* §1141(d)(1). After confirmation and satisfaction of several conditions precedent, the Plan took effect August 11, 2021.

E. The Appeal

Dondero, the Advisors, the Funds, and the Trusts (collectively, "Appellants") timely appealed, objecting to the Plan's legality and some of the bankruptcy court's factual findings.[7] Together with Highland Capital, Appellants moved to directly appeal the confirmation order to this court, which the bankruptcy court granted. See 28

---

[6] The bankruptcy court must proceed by nonconsensual confirmation, or "cramdown," 11 U.S.C. §1129(b), when a class of unsecured creditors rejects a Chapter 11 reorganization plan, *id.* §1129(a)(8), but at least one impaired class accepts it, *id.* §1129(a)(10). A cramdown requires that the plan be "fair and equitable" to dissenting classes and satisfy the absolute priority rule—that is, dissenting classes are paid in full before any junior class can retain any property. *Id.* §1129(b)(2)(B); see *Bank of Am. Nat'l Tr. & Sav. Ass'n* v. *203 N. LaSalle St. P'ship*, 526 U.S. 434, 441-42 (1999).

[7] The Trusts adopt the Funds' and the Advisors' briefs in full, and Dondero adopts the Funds' brief in full and the Advisors' brief in part. Fed. R. App. P. 28(i).

U.S.C. §158(d). A motions panel certified and consolidated the direct appeals. See *ibid.* Both the bankruptcy court and the motions panel declined to stay the Plan's confirmation pending appeal. Given the Plan's substantial consummation since its confirmation, Highland Capital moved to dismiss the appeal as equitably moot, a motion the panel ordered carried with the case.

* * *

We first consider equitable mootness and decline to invoke it here. We then turn to the merits, conclude the Plan exculpates certain non-debtors beyond the bankruptcy court's authority, and affirm in all other respects.

II. Standard of Review

A confirmation order is an appealable final order, over which we have jurisdiction. *Bullard* v. *Blue Hills Bank*, 575 U.S. 496, 502 (2015); see 28 U.S.C. §§158(d), 1291. This court reviews a bankruptcy court's factual findings for clear error and legal conclusions de novo. *Evolve Fed. Credit Union* v. *Barragan-Flores (In re Barragan-Flores)*, 984 F.3d 471, 473 (5th Cir. 2021) (citation omitted).

III. Equitable Mootness

Highland Capital moved to dismiss this appeal as equitably moot. It argues we should abstain from appellate review because clawing back the implemented Plan "would generate untold chaos." We disagree and deny the motion.

The judge-made doctrine of equitable mootness allows appellate courts to abstain from reviewing bankruptcy orders confirming "complex plans whose implementation has substantial secondary effects." *New Indus., Inc.* v. *Byman (In re Sneed Shipbuilding, Inc.)*, 916 F.3d 405, 409 (5th Cir. 2019) (citing *In re Trib. Media Co.*, 799 F.3d

272, 274, 281 (3d Cir. 2015)). It seeks to balance "the equitable considerations of finality and good faith reliance on a judgment" and "the right of a party to seek review of a bankruptcy order adversely affecting him." *In re Manges*, 29 F.3d 1034, 1039 (5th Cir. 1994) (quoting *First Union Real Estate Equity & Mortg. Inv.* v. *Club Assocs. (In re Club Assocs.)*, 956 F.3d 1065, 1069 (11th Cir. 1992)); see *In re Hilal*, 534 F.3d 498, 500 (5th Cir. 2008); see also 7 Collier on Bankruptcy ¶1129.09 (16th ed.), LexisNexis (database updated June 2022) (observing "the equitable mootness doctrine is embraced in every circuit").[8]

This court uses equitable mootness as a "scalpel rather than an axe," applying it claim-by-claim, instead of appeal-by-appeal. *In re Pac. Lumber Co. (Pacific Lumber)*, 584 F.3d 229, 240-41 (5th Cir. 2009). For each claim, we analyze three factors: "(i) whether a stay has been obtained, (ii) whether the plan has been 'substantially consummated,' and (iii) whether the relief requested would affect either the rights of parties not before the court or the success of the plan." *In re Manges*, 29 F.3d at 1039 (citing *In re Block Shim Dev. Co.*, 939 F.2d 289,

[8] The doctrine's atextual balancing act has been criticized. See *In re Pac. Lumber Co.*, 584 F.3d 229, 240 (5th Cir. 2009) ("Despite its apparent virtues, equitable mootness is a judicial anomaly."); *In re One2One Commc'ns, LLC*, 805 F.3d 428, 438-54 (3rd Cir. 2015) (Krause, J., concurring); *In re UNR Indus.*, Inc., 20 F.3d 766, 769 (7th Cir. 1994) (banishing the term "equitable mootness" as a misnomer); *In re Cont'l Airlines*, 91 F.3d 553, 569 (3d Cir. 1996) (en banc) (Alito, J., dissenting); see also Bruce A. Markell, *The Needs of the Many: Equitable Mootness' Pernicious Effects*, 93 Am. Bankr. L.J. 377, 393-96 (2019) (addressing the varying applications between circuits). But see *In re Trib. Media*, 799 F.3d at 287-88 (Ambro, J., concurring) (highlighting some benefits of the equitable mootness doctrine).

291 (5th Cir. 1991); and *Cleveland, Barrios, Kingsdorf & Casteix* v. *Thibaut*, 166 B.R. 281, 286 (E.D. La. 1994)); see also, *e.g.*, *In re Blast Energy Servs.*, 593 F.3d 418, 424-25 (5th Cir. 2010); *In re Ultra Petroleum Corp.*, No. 21-20049, 2022 WL 989389, at *5 (5th Cir. Apr. 1, 2022). No one factor is dispositive. See *In re Manges*, 29 F.3d at 1039.

Here, the bankruptcy court and this court declined to stay the Plan pending appeal, and it took effect August 11, 2021. Given the months of progress, no party meaningfully argues the Plan has not been substantially consummated.[9] See *Pacific Lumber*, 584 F.3d at 242 (observing "consummation includes transferring all or sub-

[9] Since the Plan's effectuation, Highland Capital paid $2.2 million in claims to a committee member and $525,000 in "cure payments" to other counterparties. The independent directors resigned. The Reorganized Debtor, the Claimant Trust, HCMLP GP LLC, and the Litigation Sub-Trust were created and organized in accordance with the Plan. The bankruptcy court appointed the Oversight Board members, the Litigation Sub-Trust trustee, and the Claimant Trust trustee. Highland Capital assumed certain service contracts, including management of twenty CLOs with approximately $700 million in assets, and transferred its assets and estate claims to the successor entities. Highland Capital's pre-petition partnership interests were cancelled and cease to exist. A third party, Blue Torch Capital, infused $45 million in exit financing, fully guaranteed by the Reorganized Debtor, its operating subsidiaries, the Claimant Trust, and most of their assets. From the exit financing, an Indemnity Trust was created to indemnify claims that arise against the Reorganized Debtor, Claimant Trust, Ligation Sub-Trust, Claimant Trustee, Litigation Trustee, or Oversight Board members. The lone class-1 creditor withdrew its claim against Highland Capital. The lone class-2 creditor has been fully paid approximately $500,000 and issued a note of $5.2 million secured by $23 million of the Reorganized Debtor's assets. Classes 3 and 4 have been paid $165,412. Class 7 has received $5.1 million in distributions from the Claimant Trust, totaling 77% of class-7 claims filed.

stantially all of the property covered by the plan, the assumption of business by the debtors' successors, and the commencement of plan distributions" (citing 11 U.S.C. §1141; and *In re Manges*, 29 F.3d at 1041 n.10)). But that alone does not trigger equitable mootness. See *In re SCOPAC*, 624 F.3d 274, 281-82 (5th Cir. 2010). Instead, for each claim, the inquiry turns on whether the court can craft relief for that claim that would not have significant adverse consequences to the reorganization. Highland Capital highlights four possible disruptions: (1) the unraveling of the Claimant Trust and its entities, (2) the expense of disgorging disbursements, (3) the threat of defaulting on exit-financing loans, and (4) the exposure to vexatious litigation.

Each party first suggests its own all-or-nothing equitable mootness applications. To Highland Capital, Appellants' broad requested remedy with only a minor economic stake demands mooting the entire appeal. To Appellants, the type of reorganization plan categorially bars equitable mootness, or, alternatively, Highland Capital's joining the motion to certify the appeal estops it from asserting equitable mootness. These arguments are unpersuasive and foreclosed by *Pacific Lumber*.

First, Highland Capital contends the entire appeal is equitably moot because Appellants, with only a minor economic stake and questionable good faith, "seek[] nothing less than a complete unravelling of the confirmed Plan." It claims the court cannot "surgically excise[]" certain provisions, as the Funds request, because the Bankruptcy Code prohibits "modifications to confirmed plans after substantial consummation." See 11 U.S.C. §1127(b). Not so.

"Although the Bankruptcy Code ... restricts post-confirmation plan modifications, it does not expressly

limit appellate review of plan confirmation orders." *Pacific Lumber*, 584 F.3d at 240 (footnote omitted) (citing 11 U.S.C. § 1127). This court may fashion "fractional relief" to minimize an appellate disturbance's effect on the rights of third parties. *In re Tex. Grand Prairie Hotel Realty, L.L.C.*, 710 F.3d 324, 328 (5th Cir. 2013) (denying dismissal on equitable mootness grounds because the court "could grant partial relief . . . without disturbing the reorganization"); cf. *In re Cont'l Airlines*, 91 F.3d 553, 571-72 (3d Cir. 1996) (en banc) (Alito, J., dissenting) (observing "a remedy could be fashioned in the present case to ensure that the [debtor's] reorganization is not undermined"). In short, Highland Capital's speculations are farfetched, as the court may fashion the remedy it sees fit without upsetting the reorganization.

Second, Appellants contend that equitable mootness cannot apply—full-stop—because this appeal concerns a liquidation plan, not a reorganization plan. We reject that premise. See *infra* Part IV.A. Even if it were correct, however, this court has conducted the equitable-mootness inquiry for a Chapter 11 liquidation plan in the past. See *In re Superior Offshore Int'l, Inc.*, 591 F.3d 350, 353–54 (5th Cir. 2009). And other circuits have squarely rejected the categorical bar proposed by Appellants. See *In re Abengoa Bioenergy Biomass of Kan., LLC*, 958 F.3d 949, 956-57 (10th Cir. 2020); *In re BGI, Inc.*, 772 F.3d 102, 107-09 (2d Cir. 2014). We do the same.

Finally, Appellants assert that because Highland Capital and NexPoint Advisors, L.P. jointly moved to certify the appeal, it should be estopped from arguing the appeal is equitably moot. They cite no legal support for that approach. We decline to adopt it.

Instead, we proceed with a claim-by-claim analysis, as our precedent requires. Highland Capital suggests

only two claims are equitably moot: (1) the protection-provisions challenge and (2) the absolute-priority-rule challenge. Neither provides a basis for equitable mootness.

For the protection provisions, Highland Capital anticipates that, without the provisions, its officers, employees, trustees, and Oversight Board members would all resign rather than be exposed to Dondero-initiated litigation. Those resignations would disrupt the Reorganized Debtor's operation, "significant[ly] deteriorat[ing] asset values due to uncertainty." Appellants disagree, offering several instances when this court has reviewed release, exculpation, and injunction provisions over calls for equitable mootness. See, *e.g.*, *In re Hilal*, 534 F.3d at 501; *Pacific Lumber*, 584 F.3d at 252; *In re Thru Inc.*, 782 F. App'x 339, 341 (5th Cir. 2019) (per curiam). In response, Highland Capital distinguishes this case because the provisions are "integral to the consummated plans." See *In re Charter Commc'ns, Inc.*, 691 F.3d 476, 486 (2d Cir. 2012). We again reject that premise. See *infra* Part IV.E.1. In any event, Appellants have the better argument.

We have before explained that "equity strongly supports appellate review of issues consequential to the integrity and transparency of the Chapter 11 process." *In re Hilal*, 534 F.3d 498, 500 (5th Cir. 2008). That is so because "the goal of finality sought in equitable mootness analysis does not outweigh a court's duty to protect the integrity of the process." *Pacific Lumber*, 584 F.3d at 252. As in *Pacific Lumber*, the legality of a reorganization plan's non-consensual non-debtor release is consequential to the Chapter 11 process and so should not escape appellate review in the name of equity. *Ibid.* The same is true here. Equitable mootness does not bar our review of the protection provisions.

For the absolute-priority-rule challenge,[10] Highland Capital contends our review requires us to "rejigger class recoveries." *Pacific Lumber* is again instructive. There, the court declined to apply equitable mootness to a secured creditor's absolute-priority-rule challenge, as no other panel had extended the doctrine so far. *Id.* at 243. Similarly, Highland Capital fails to identify a single case in which this court has declined review of the treatment of a class of creditor's claims resulting from a cramdown. See *id.* at 252. Regardless, Appellants challenge the distributions to classes 8, 10, and 11. According to Highland Capital's own declaration, "Class 8 General Unsecured Claims have received their Claimant Trust Interests." But there is no evidence that classes 10 or 11 have received any distributions. Contra *Pacific Lumber*, 584 F.3d at 251 (holding certain claims equitably moot where "the smaller unsecured creditors" had already "received payment for their claims"). As a result, the relief requested would not affect third parties or the success of the Plan. See *In re Manges*, 29 F.3d at 1039. The doctrine of equitable mootness does not bar our review of the cramdown and treatment of class-8 creditors.

We DENY Highland Capital's motion to dismiss the appeal as equitably moot.

IV. Discussion

As to the merits, Appellants fire a bankruptcy-law blunderbuss. They contest the Plan's classification as a reorganization plan, the Plan's satisfaction of the absolute priority rule, the Plan's confirmation despite Highland Capital's noncompliance with Bankruptcy Rule

[10] While the issue is nearly forfeited for inadequate briefing, it fails on the merits regardless. See *Roy* v. *City of Monroe*, 950 F.3d 245, 251 (5th Cir. 2020).

2015.3, and the sufficiency of the evidence supporting the court's factual finding that the Funds are "owned/controlled" by Dondero. For each, we disagree and affirm. We do, however, agree with Appellants that the bankruptcy court exceeded its statutory authority under § 524(e) by exculpating certain nondebtors, and so we reverse and vacate the Plan only to that extent.

A. Discharge of Debt

We begin with the Plan's classification as a reorganization plan, allowing for automatic discharge of the debts. The confirmation of a Chapter 11 restructuring plan "discharges the debtor from any [pre-confirmation] debt" unless, under the plan, the debtor liquidates its assets, stops "engag[ing] in [its] business after consummation of the plan," and would be denied discharge in a Chapter 7 case. 11 U.S.C. § 1141(d)(1), (3); see *In re Sullivan*, No. 99-11107, 2000 WL 1597984, at *2 (5th Cir. Sept. 26, 2000) (per curiam). The bankruptcy court concluded Highland Capital continued to engage in business after plan consummation, so its debts are automatically discharged. The Trusts call foul because, in their view, Highland Capital's "wind down" of its portfolio management is not a continuation of its business. We disagree.

Whether a corporate debtor "engages in business" is "relatively straightforward." *Um* v. *Spokane Rock I, LLC*, 904 F.3d 815, 819 (9th Cir. 2018) (contrasting the more complex question for individual debtors); see *Grausz* v. *Sampson (In re Grausz)*, 63 F. App'x 647, 650 (4th Cir. 2003) (per curiam) (same). That is, "a business entity will not engage in business postbankruptcy when its assets are liquidated and the entity is dissolved." *Um*,

904 F.3d at 819 (collecting cases).[11] But even a temporary continuation of business after a plan's confirmation is sufficient to discharge a Chapter 11 debtor's debt. See *In re T-H New Orleans Ltd. P'ship*, 116 F.3d 790, 804 n.15 (5th Cir. 1997) (recognizing a debtor's "conducting business for two years following Plan confirmation satisfies §1141(d)(3)(B)" (citation omitted)). That is the case here.

By the plain terms of the Plan, Highland Capital has and will continue its business as the Reorganized Debtor for several years. Indeed, much of this appeal concerns objections to Highland Capital's "continu[ing] to manage the assets of others." Because the Plan contemplates Highland Capital "engag[ing] in business after consummation," 11 U.S.C. §1141(d)(1), the bankruptcy court correctly held Highland Capital was eligible for automatic discharge of its debts.[12]

B. Absolute Priority Rule

Next, we consider the Plan's compliance with the absolute-priority rule. When assessing whether a plan is "fair and equitable" in a cramdown scenario, courts must invoke the absolute-priority rule. 11 U.S.C. §1129(b)(1); see 7 Collier on Bankruptcy ¶1129.04. Under that rule, if a class of unsecured claimants rejects a plan, the plan must provide that those claimants be paid in full on the

---

[11] See, *e.g., In re W. Asbestos Co.*, 313 B.R. 832, 853 (Bankr. N.D. Cal. 2003) (holding corporate debtor was not engaging in business by merely having directors and officers, rights under an insurance policy, and claims against it); *In re Wood Fam. Ints., Ltd.*, 135 B.R. 407, 410 (Bankr. D. Colo. 1989) (holding corporate debtor was not engaging in business when the plan called for liquidation and discontinuation of its business upon confirmation).

[12] For the same reasons, we reject the Trusts' follow-on argument extending the same logic to the protection provisions.

effective date or any junior interest "will not receive or retain under the plan . . . any property." 11 U.S.C. § 1129(b)(2)(B).[13]

Because class-8 claimants voted against the Plan, the bankruptcy court proceeded by nonconsensual confirmation. The court concluded the Plan was fair and equitable to class 8 and its distributions were in line with the absolute-priority rule. 11 U.S.C. § 1129(b)(2)(B). The Advisors claim the Plan violates the absolute priority rule by giving class-10 and -11 claimants a "Contingent Claimant Trust Interest" without fully satisfying class-8 claimants. We agree the absolute-priority rule applies, and the Plan plainly satisfies it.

The Plan proposed to pay 71% of class-8 creditors' claims with pro rata distributions of interest generated by the Claimant Trust and then pro rata distributions from liquidated Claimant Trust assets. Classes 10 and 11 received a pro rata share of "Contingent Claimant Trust Interests," defined as a Claimant Trust Interest vesting only when the Claimant Trustee certifies that all class-8 claimants have been paid indefeasibly in full and all disputed claims in class 8 have been resolved. Voilà: no interest junior to class 8 will receive any property until class-8 claimants are paid.

But the Advisors point to Highland Capital's testimony and briefs to suggest the Contingent Claimant Trust Interests (received by classes 10 and 11) are prop-

---

[13] See *Pacific Lumber*, 584 F.3d at 244 (noting the rule "enforces a strict hierarchy of [creditor classes'] rights defined by state and federal law" to protect dissenting creditor classes); see also *In re Geneva Steel Co.*, 281 F.3d 1173, 1180 n.4 (10th Cir. 2002) ("[U]nsecured creditors stand ahead of investors in the receiving line and their claims must be satisfied before any investment loss is compensated." (citations omitted)).

erty in some sense because they have value. That argument is specious. Of course, the Contingent Claimant Trust Interests have some small probability of vesting in the future and, thus, has some de minimis present value. See *Norwest Bank Worthington* v. *Ahlers*, 485 U.S. 197, 207-08 (1988) (holding a junior creditor's receipt of a presently valueless equity interest is receipt of property). But the absolute-priority rule has never required us to bar junior creditors from ever receiving property. By the Plan's terms, no trust property vests with class-10 or -11 claimants "unless and until" class-8 claims "have been paid indefeasibly in full." See 11 U.S.C. § 1129(b)(2)(B)(ii). That plainly comports with the absolute-priority rule.

C. Bankruptcy Rule 2015.3

We turn to whether the failure to comply with Bankruptcy Rule of Procedure 2015.3 bars the Plan's confirmation. The Independent Directors failed to file periodic financial reports per Federal Rule of Bankruptcy Procedure 2015.3(a) about entities "in which the [Highland Capital] estate holds a substantial or controlling interest." The Advisors claim the failure dooms the Plan's confirmation because the Plan proponent failed to comply "with the applicable provisions of this title." 11 U.S.C. § 1129(a)(2). We disagree.

Rule 2015.3 cannot be an applicable provision of Title 11 because the Federal Rules of Bankruptcy Procedure are not provisions of the Bankruptcy Code. See *Bonner* v. *Adams (In re Adams)*, 734 F.2d 1094, 1101 (5th Cir. 1984) ("The Bankruptcy Rules Enabling Act, 28 U.S.C. § 2075, provides that the Supreme Court may prescribe 'by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure' in bankruptcy courts."); cf. *In re Mandel*, No. 20-40026, 2021 WL 3642331, at *6 n.7 (5th Cir. Aug. 17, 2021) (per curiam)

(noting "Rule 2015.3 implements section 419 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005," which amended 28 U.S.C. § 2073). The Advisors' attempt to tether the rule to the bankruptcy trustee's general duties lacks any legal basis. See 11 U.S.C. §§ 704(a)(8), 1106(a)(1), 1107(a). The bankruptcy court, therefore, correctly overruled the Advisors' objection.

D. Factual Findings

One factual finding is in dispute, but we see no clear error. The bankruptcy court found that, despite their purported independence, the Funds are entities "owned and/or controlled by [Dondero]." The Funds ask the court to vacate the factual finding because it threatens the Funds' compliance with federal law and damages their reputations and values. According to the Funds, the characterization is unfair, as they are not litigious like Dondero and are completely independent from him. Highland Capital maintains Dondero has sole discretion over the Funds as their portfolio manager and through his control of the Advisors, so the finding is supported by the record.

"Clear error is a formidable standard: this court disturbs factual findings only if left with a firm and definite conviction that the bankruptcy court made a mistake." *In re Krueger*, 812 F.3d 365, 374 (5th Cir. 2016) (cleaned up). We defer to the bankruptcy court's credibility determinations. See *Randall & Blake, Inc.* v. *Evans (In re Canion)*, 196 F.3d 579, 587-88 (5th Cir. 1999).

Here, the bankruptcy court drew its factual finding from the testimony of Jason Post, the Advisors' chief compliance officer, and Dustin Norris, an executive vice president for the Funds and the Advisors. Post testified that the Funds have independent board members that run them. But the bankruptcy court found Post not cred-

ible because "he abruptly resigned" from Highland Capital at the same time as Dondero and is currently employed by Dondero. Norris testified that Dondero "owned and/or controlled" the Funds and Advisors. The bankruptcy court found Norris credible and relied on his testimony. The bankruptcy court also observed that none of the Funds' board members testified in the bankruptcy case and all "engaged with the Highland complex for many years." Because nothing in this record leaves us with a firm and definite conviction that the bankruptcy court made a mistake in finding that the Funds are "owned and/or controlled by [Dondero]," we leave the bankruptcy court's factual finding undisturbed.

E. The Protection Provisions

Finally, we address the legality of the Plan's protection provisions. As discussed, the Plan exculpates certain non-debtor third parties supporting the Plan from post-petition lawsuits not arising from gross negligence, bad faith, or willful or criminal misconduct. It also enjoins certain parties "from taking any actions to interfere with the implementation or consummation of the Plan." The injunction requires that, before any lawsuit is filed, the plaintiff must seek the bankruptcy court's approval of the claim as "colorable"—*i.e.*, the bankruptcy court acts as a gatekeeper. Together, the provisions screen and prevent bad-faith litigation against Highland Capital, its successors, and other bankruptcy participants that could disrupt the Plan's effectiveness.

The bankruptcy court deemed the provisions legal, necessary under the circumstances, and in the best interest of all parties. We agree, but only in part. Though the injunction and gatekeeping provisions are sound, the exculpation of certain non-debtors exceeds the bankruptcy

court's authority. We reverse and vacate that limited portion of the Plan.

1. *Non-Debtor Exculpation*

We start with the scope of the non-debtor exculpation. In a Chapter 11 bankruptcy proceeding, "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. §524(e). Contrary to the bankruptcy court's holding, the exculpation here partly runs afoul of that statutory bar on non-debtor discharge by reaching beyond Highland Capital, the Committee, and the Independent Directors. See *Pacific Lumber*, 584 F.3d 251-53. We must reverse and strike the few unlawful parts of the Plan's exculpation provision.

The parties agree that *Pacific Lumber* controls and also that the bankruptcy court had the power to exculpate both Highland Capital and the Committee members. Appellants, however, submit the bankruptcy court improperly stretched *Pacific Lumber* to shield other non-debtors from breach-of-contract and negligence claims, in violation of §524(e). Highland Capital counters that the exculpation provision is a commonplace Chapter 11 term, is appropriate given Dondero's litigious nature, does not implicate §524(e), and merely provides a heightened standard of care.

To support that argument, Highland Capital highlights the distinction between a concededly unlawful release of all non-debtor liability and the Plain's limited exculpation of non-debtor post-petition liability. See, *e.g.*, *In re PWS Holding Corp.*, 228 F.3d 224, 246-47 (3d Cir. 2000) (describing releases as "eliminating" a covered party's liability "altogether" while exculpation provisions "set[ ] forth the applicable standard of liability" in future litigation). According to Highland Capital, the Third and

Ninth Circuits have adopted that distinction when applying §524(e). See *Blixseth v. Credit Suisse*, 961 F.3d 1074, 1084 (9th Cir. 2020), cert. denied, 141 S. Ct. 1394 (2021); *In re PWS Holding*, 228 F.3d at 246-47. Under those cases, narrow exculpations of post-petition liability for certain critical third-party non-debtors are lawful "appropriate" or "necessary" actions for the bankruptcy court to carry out the proceeding through its statutory authority under §1123(b)(6) and §105(a). See 11 U.S.C. §1123(b)(6) ("[A] plan may . . . include any other appropriate provision not inconsistent with the applicable provisions of this title."); *id* §105(a) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.").

Highland Capital reads *Pacific Lumber* as "in step with the law in [those] other circuits" by allowing a limited exculpation of post-petition liability. Cf. *Blixseth*, 961 F.3d at 1084. We disagree. As the Ninth Circuit acknowledged, our court in *Pacific Lumber* arrived at "a conclusion opposite [the Ninth Circuit's]." 961 F.3d at 1085 n.7. Moreover, the Ninth Circuit expressly disavowed *Pacific Lumber*'s rationale—that an exculpation provision provides a "fresh start" to a non-debtor in violation of §524(e)—because, in the Ninth Circuit's view, the post-petition exculpation "affects only claims arising from the bankruptcy proceedings themselves." *Ibid.* We are not persuaded, as Highland Capital contends, that the Ninth Circuit was "sloppy" and simply "misread *Pacific Lumber*." See O.A. Rec. 19:45-21:38.

The simple fact of the matter is that there is a circuit split concerning the effect and reach of §524(e).[14] Our

[14] Amicus's contention that failing to adopt the Ninth Circuit's holding "would generate a clear circuit split" is wrong. There already is one. See Petition for Writ of Certiorari, *Blixseth* v. *Credit Suisse*,

court along with the Tenth Circuit hold § 524(e) categorically bars third-party exculpations absent express authority in another provision of the Bankruptcy Code. *Pacific Lumber*, 584 F.3d at 252-53; *Landsing Diversified Props.* v. *First Nat'l Bank & Tr. Co. of Tulsa (In re W. Real Estate Fund, Inc.)*, 922 F.2d 592, 600 (10th Cir. 1990) (per curiam). By contrast, the Ninth Circuit joins the Second, Third, Fourth, Sixth, Seventh, and Eleventh Circuits in reading § 524(e) to allow varying degrees of limited third-party exculpations. *Blixseth*, 961 F.3d at 1084; accord *In re PWS Holding*, 228 F.3d at 246-47 (allowing third-party releases for "fairness, necessity to the reorganization, and specific factual findings to support these conclusions"); *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 143 (2d Cir. 2005); *In re A.H. Robins Co.*, 880 F.2d 694, 702 (4th Cir. 1989); *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002); *In re Airadigm Commc'ns., Inc.*, 519 F.3d 640, 657 (7th Cir. 2008); *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070, 1078 (11th Cir. 2015).

Our *Pacific Lumber* decision was not blind to the countervailing view, as it twice cites the Third Circuit's contrary holding in other contexts. See 584 F.3d at 241, 253 (citing *In re PWS Holding*, 228 F.3d at 236-37, 246). But we rejected the parsing between limited exculpations and full releases that Highland Capital now requests. We are obviously bound to apply our own precedent. See *Hidalgo Cnty. Emergency Serv. Found.* v. *Carranza (In re Hidalgo Cnty. Emergency Serv. Found.)*, 962 F.3d 838, 841 (5th Cir. 2020) ("Under our well-recognized rule of orderliness, . . . a panel of this court is bound by circuit precedent." (citation omitted)).

---

141 S. Ct. 1394 (No. 20-1028) (highlighting the circuits' divergent approaches to the non-debtor discharge bar under § 524(e)).

Under *Pacific Lumber*, §524(e) does not permit "absolv[ing] the [non-debtor] from any negligent conduct that occurred during the course of the bankruptcy" absent another source of authority. 584 F.3d at 252-53; see also *In re Zale Corp.*, 62 F.3d 746, 760 (5th Cir. 1995). At oral argument, Highland Capital pointed only to §1123(b)(6) and §105(a) as footholds. See O.A. Rec. 16:45-17:28. But in this circuit, §105(a) provides no statutory basis for a nondebtor exculpation. *In re Zale*, 62 F.3d at 760 (noting "[a] §105 injunction cannot alter another provision of the code" (citing *In re Oxford Mgmt., Inc.*, 4 F.3d 1329, 1334 (5th Cir. 1993))). And the same logic extends to §1123(b)(6), which allows a plan to "include any other appropriate provision *not inconsistent with the applicable provisions of this title*." 11 U.S.C. §1123(b)(6) (emphasis added).

Pacific Lumber identified two sources of authority to exculpate nondebtors. See 584 F.3d at 252-53. The first is to channel asbestos claims (not present here). *Id.* at 252 (citing 11 U.S.C. §524(g)). The second is to provide a limited qualified immunity to creditors' committee members for actions within the scope of their statutory duties. *Pacific Lumber*, 584 F.3d at 253 (citing 11 U.S.C. §1103(c)); see *In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1069 (5th Cir. 2012). And, though not before the court in *Pacific Lumber*, we have also recognized a limited qualified immunity to bankruptcy trustees unless they act with gross negligence. *In re Hilal*, 534 F.3d at 501 (citing *In re Smyth*, 207 F.3d 758, 762 (5th Cir. 2000)); accord *Baron* v. *Sherman (In re Ondova Ltd.)*, 914 F.3d 990, 993 (5th Cir. 2019) (per curiam). If other sources exist, Highland Capital failed to identify them. So we see no statutory authority for the full extent of the exculpation here.

The bankruptcy court read *Pacific Lumber* differently. In its view, *Pacific Lumber* created an additional ground to exculpate non-debtors: when the record demonstrates that "costs [a party] might incur defending against suits alleging such negligence are likely to swamp either [it] or the consummated reorganization." 584 F.3d at 252. We do not read the decision that way. The bankruptcy court's underlying factual findings do not alter whether it has statutory authority to exculpate a non-debtor. That is the holding of *Pacific Lumber*.

That leaves one remaining question: whether the bankruptcy court can exculpate the Independent Directors under *Pacific Lumber*. We answer in the affirmative. As the bankruptcy court's governance order clarified, nontraditional as it may be, the Independent Directors were appointed to act together as the bankruptcy trustee for Highland Capital. Like a debtor-in-possession, the Independent Directors are entitled to all the rights and powers of a trustee. See 11 U.S.C. §1107(a); 7 Collier on Bankruptcy ¶1101.01. It follows that the Independent Directors are entitled to the limited qualified immunity for any actions short of gross negligence. See *In re Hilal*, 534 F.3d at 501. Under this unique governance structure, the bankruptcy court legally exculpated the Independent Directors.

In sum, our precedent and §524(e) require any exculpation in a Chapter 11 reorganization plan be limited to the debtor, the creditors' committee and its members for conduct within the scope of their duties, 11 U.S.C. §1103(c), and the trustees within the scope of their duties, see *Baron*, 914 F.3d at 993. And so, excepting the Independent Directors and the Committee members, the exculpation of non-debtors here was unlawful. Accord-

ingly, the other non-debtor exculpations must be struck from the Plan. See *Pacific Lumber*, 584 F.3d at 253.[15]

As it stands, the Plan's exculpation provision extends to Highland Capital and its employees and CEO; Strand; the Reorganized Debtor and HCMLP GP LLC; the Independent Directors; the Committee and its members; the Claimant Trust, its trustee, and the members of its Oversight Board; the Litigation Sub-Trust and its trustee; professionals retained by the Highland Capital and the Committee in this case; and all "Related Persons." Consistent with § 524(e), we strike all exculpated parties from the Plan except Highland Capital, the Committee and its members, and the Independent Directors.

---

[15] Highland Capital, like the bankruptcy court, claims the *res judicata* effect of the January and July 2020 orders appointing the independent directors and appointing Seery as CEO binds the court to include the protection provisions here. We lack jurisdiction to consider collateral attacks on final bankruptcy orders even when it concerns whether the court properly exercised jurisdiction or authority at the time. See *Travelers Indem. Co.* v. *Bailey*, 557 U.S. 137 (2009); *In re Linn Energy, L.L.C.*, 927 F.3d 862, 866-67 (5th Cir. 2019) (quoting *Bailey*, 557 U.S. at 152). To the extent Appellants seek to roll back the protections in the bankruptcy court's January 2020 and July 2020 orders (which is not clear from their briefing), such a collateral attack is precluded.

As a result, the bankruptcy court was correct insofar as *those* orders have the effect of exculpating the Independent Directors and Seery in his executive capacities, but it was incorrect that *res judicata* mandates their inclusion in the Plan's new exculpation provision. Despite removal from the exculpation provision in the confirmation order, the Independent Directors' agents, advisors, and employees, as well as Seery in his official capacities are all exculpated to the extent provided in the January and July 2020 orders, given the orders' ongoing *res judicata* effects and our lack of jurisdiction to review those orders. But that says nothing of the effect of the Plan's exculpation provision.

2. *Injunction & Gatekeeper Provisions*

We now turn to the Plan's injunction and gatekeeper provisions. Appellants object to the bankruptcy court's injunction as vague and the gatekeeper provision as overbroad. We are unpersuaded.

First, Appellants' primary contention—that the Plan's injunction "is broad" by releasing non-debtors in violation of § 524(e)—is resolved by our striking the impermissibly exculpated parties. See *supra* Part IV.E.1.

Second, Appellants dispute the permanency of the injunction for the legally exculpated parties by enjoining conduct "on and after the Effective Date." Even assuming the issue was preserved,[16] permanency alone is no reason to alter a bankruptcy court's otherwise-lawful injunction on appeal. See *In re Zale*, 62 F.3d at 759-60 (recognizing the bankruptcy court's jurisdiction to issue an injunction in the first place allowed it to issue a permanent injunction).

Third, the Advisors argue that the injunction is "overbroad and vague" because it does not define what it means to "interfere" with the "implementation or consummation of the Plan." That is unsupported by the record. As the bankruptcy court recognized, the Plan defined what constitutes interference: (i) filing a lawsuit, (ii) enforcing judgments, (iii) enforcing security interests, (iv) asserting setoff rights, or (v) acting "in any manner" not conforming with the Plan. The injunction is not unlawfully overbroad or vague.

Finally, Appellants maintain that the gatekeeper provision impermissibly extends to unrelated claims over which the bankruptcy court lacks subject-matter jurisdic-

[16] See *Roy*, 950 F.3d at 251 ("Failure adequately to brief an issue on appeal constitutes waiver of that argument." (citation omitted)).

tion. See *In re Craig's Stores of Tex., Inc.*, 266 F.3d 388, 390 (5th Cir. 2001) (noting a bankruptcy court retains jurisdiction post-confirmation only over "matters pertaining to the implementation or execution of the plan" (citations omitted)). While that may be the case, our precedent requires we leave that determination to the bankruptcy court in the first instance.

Courts have long recognized bankruptcy courts can perform a gatekeeping function. Under the "*Barton* doctrine," the bankruptcy court may require a party to "obtain leave of the bankruptcy court before initiating an action in district court when the action is against the trustee or other bankruptcy-court-appointed officer, for acts done in the actor's official capacity." *Villegas* v. *Schmidt*, 788 F.3d 156, 159 (5th Cir. 2015) (emphasis added) (quoting *Carter v. Rodgers*, 220 F.3d 1249, 1252 (11th Cir. 2000)); accord *Barton* v. *Barbour*, 104 U.S. 126 (1881).[17] In *Villegas*, we held "that a party must continue to file with the relevant bankruptcy court for permission to proceed with a claim against the trustee." 788 F.3d at 158. Relevant here, we left to the bankruptcy court, faced with pre-approval of a claim, to determine whether it had subject matter jurisdiction over that claim in the first instance. *Id.* at 158-59; see, *e.g.*, *Carroll* v. *Abide*, 788 F.3d 502, 506-07 (5th Cir. 2015) (noting *Villegas* "rejected an argument that the *Barton* doctrine does not

[17] The Advisors also maintain that Highland Capital is neither a receiver nor a trustee, so *Barton* has no application here. We disagree. Highland Capital, for all practical purposes, was a debtor in possession entitled to the rights of a trustee. See 7 Collier on Bankruptcy ¶1101.01 ("The debtor in possession is generally vested with all of the rights and powers of a trustee as set forth in section 1106 . . . ."); see also *Carter*, 220 F.3d at 1252 n.4 (finding no distinction between bankruptcy court "approved" and bankruptcy court "appointed" officers).

apply when the bankruptcy court lacked jurisdiction"). In other words, we need not evaluate whether the bankruptcy court would have jurisdiction under every conceivable claim falling under the widest interpretation of the gatekeeper provision. We leave that to the bankruptcy court in the first instance.[18]

* * *

In sum, the Plan violates § 524(e) but only insofar as it exculpates and enjoins certain non-debtors. The exculpatory order is therefore vacated as to all parties except Highland Capital, the Committee and its members, and the Independent Directors for conduct within the scope of their duties. We otherwise affirm the inclusion of the injunction and the gatekeeper provisions in the Plan.[19]

V. Conclusion

Highland Capital's motion to dismiss the appeal as equitably moot is DENIED. The bankruptcy court's judgment is AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

---

[18] For the same reasons, we also leave the applicability of *Barton's* limited statutory exception to the bankruptcy and district courts in the first instance. See 28 U.S.C. § 959(a) (allowing suit, without leave of the appointing court, if the challenged acts relate to the trustee or debtor in possession "carrying on business connected with [their] property").

[19] Nothing in this opinion should be construed to hinder the bankruptcy court's power to enjoin and impose sanctions on Dondero and other entities by following the procedures to designate them vexatious litigants. See *In re Carroll*, 850 F.3d 811, 815 (5th Cir. 2017) (per curiam). But non-debtor exculpation within a reorganization plan is not a lawful means to impose vexatious litigant injunctions and sanctions.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 21-10449

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.

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

OPINION

August 19, 2022

Before WIENER, GRAVES,
and DUNCAN, *Circuit Judges*.

STUART KYLE DUNCAN, *Circuit Judge*:

Highland Capital Management, L.P., a Dallas-based investment firm, managed billion-dollar, publicly traded investment portfolios for nearly three decades. By 2019, however, myriad unpaid judgments and liabilities forced Highland Capital to file for Chapter 11 bankruptcy. This provoked a nasty breakup between Highland Capital and its co-founder James Dondero. Under those trying circumstances, the bankruptcy court successfully mediated with the largest creditors and ultimately confirmed a reorganization plan amenable to most of the remaining creditors.

Dondero and other creditors unsuccessfully objected to the confirmation order and then sought review in this court. In turn, Highland Capital moved to dismiss their appeal as equitably moot. First, we hold that equitable mootness does not bar our review of any claim. Second, we affirm the confirmation order in large part. We reverse only insofar as the plan exculpates certain nondebtors in violation of 11 U.S.C. § 524(e), strike those few parties from the plan's exculpation, and affirm on all remaining grounds.

I. BACKGROUND

A. Parties

In 1993, Mark Okada and appellant James Dondero co-founded Highland Capital Management, L.P. ("Highland Capital") in Dallas. Highland Capital managed portfolios and assets for other investment advisers and funds through a complex of entities under the Highland umbrella. Highland Capital's ownership-interest holders included Hunter Mountain Investment Trust (99.5%);

appellant The Dugaboy Investment Trust, Dondero's family trust (0.1866%);[1] Okada, personally and through trusts (0.0627%); and Strand Advisors, Inc. (0.25%), the only general partner, which Dondero wholly owned.

Dondero also manages two of Highland Capital's clients—appellants Highland Capital Management Fund Advisors, L.P. and NexPoint Advisors, L.P. (the "Advisors"). Both the Advisors and Highland Capital serviced and advised billion-dollar, publicly traded investment funds for appellants Highland Income Fund, NexPoint Strategic Opportunities Fund, Highland Global Allocation Fund, and NexPoint Capital, Inc. (collectively, the "Funds"), among others. For example, on behalf of the Funds, Highland Capital managed certain investment vehicles known as collateral loan obligations ("CLOs") under individualized servicing agreements.

B. Bankruptcy Proceedings

Strapped with a series of unpaid judgments, Highland Capital filed for Chapter 11 bankruptcy in the District of Delaware in October 2019. The creditors included Highland Capital's interest holders, business affiliates, contractors, former partners, employees, defrauded investors, and unpaid law firms. Among those creditors, the Office of the United States Trustee appointed a four-member Unsecured Creditors' Committee (the "Committee").[2] See 11 U.S.C. § 1102(a)(1), (b)(1). Throughout the

---

[1] The Dugaboy Investment Trust appeals alongside Dondero's other family trust Get Good Trust (collectively, the "Trusts").

[2] First, Redeemer Committee of the Highland Crusader Fund had obtained a $191 million arbitration award after a decade of litigation against Highland Capital. Second, Acis Capital Management, L.P. and Acis Capital Management GP, LLC had sued Highland Capital after facing an adverse $8 million arbitration award, arising in part from its now-extinguished affiliation. Third, UBS Securities LLC

bankruptcy proceedings, the Committee investigated Highland Capital's past and current operations, oversaw its continuing operations, and negotiated the reorganization plan. See *id.* §1103(c). Upon the Committee's request, the court transferred the case to the Northern District of Texas in December 2019.

Highland Capital's reorganization did not proceed under the governance of a traditional Chapter 11 trustee. Instead, the Committee reached a corporate governance settlement agreement to displace Dondero, which the bankruptcy court approved in January 2020. Under the agreed order, Dondero stepped down as director and officer of Highland Capital and Strand to be an unpaid portfolio manager and "agreed not to cause any Related Entity . . . to terminate any agreements" with Highland Capital. The Committee selected a board of three independent directors to act as a quasi-trustee and to govern Strand and Highland Capital: James Seery Jr., John Dubel, and retired Bankruptcy Judge Russell Nelms (collectively, the "Independent Directors"). The order also barred any claim against the Independent Directors in their official roles without the bankruptcy court's authorizing the claim as a "colorable claim[] of willful misconduct or gross negligence." Six months later, at the behest of the creditors, the bankruptcy court appointed Seery as Highland Capital's Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative. The order contained an identical bar on claims against Seery acting in these roles. Neither order was appealed.

---

and UBS AG London Branch had received a $1 billion judgment against Highland Capital following a 2019 bench trial in New York. Fourth, discovery vendor Meta-E Discovery had $779,000 in unpaid invoices. The Committee members are not parties on appeal.

Throughout summer 2020, Dondero proposed several reorganization plans, each opposed by the Committee and the Independent Directors. Unpersuaded by Dondero, the Committee and Independent Directors negotiated their own plan. When Dondero's plans failed, he and other creditors began to frustrate the 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. See *Highland Cap. Mgmt., L.P.* v. *Dondero* (*In re Highland Cap. Mgmt., L.P.*), Ch. 11 Case No. 19-34054-SGJ11, Adv. No. 20-03190-SGJ11, 2021 WL 2326350, at *1, *26 (Bankr. N.D. Tex. June 7, 2021) (holding Dondero in civil contempt, sanctioning him $100,000, and comparing this case to a "nasty divorce"). In Seery's words, Dondero wanted to "burn the place down" because he did not get his way. The Independent Directors insisted Dondero resign from Highland Capital, which he did in October 2020.

Highland Capital, meanwhile, proceeded toward confirmation of its reorganization plan—the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (the "Plan"). In August 2020, the Independent Directors filed the Plan and an accompanying disclosure statement with the support of the Committee. See 11 U.S.C. §§ 1121, 1125. The bankruptcy court approved the statement as well as proposed notice and voting procedures for creditors, teeing up confirmation. Leading up to the confirmation hearing, the Advisors and the Funds asked the court to bar Highland Capital from trading or disposing of CLO assets pending confirmation. The bankruptcy court denied the request, and Highland Capital declined to voluntarily abstain and continued to manage the CLO assets.

Before confirmation, Dondero and other creditors (including several non-appellants) filed over a dozen objections to the Plan. Like Dondero, the United States Trustee primarily objected to the Plan's exculpation of certain non-debtors as unlawful. Highland Capital voluntarily modified the Plan to resolve six such objections. The Plan proposed to create eleven classes of creditors and equity holders and three classes of administrative claimants. See 11 U.S.C. § 1122. Of the voting-eligible classes, classes 2, 7, and 9 voted to accept the Plan while classes 8, 10, and 11 voted to reject it.

C. Reorganization Plan

The Plan works like this: It dissolves the Committee, and creates four entities—the Claimant Trust, the Reorganized Debtor, HCMLP GP LLC,[3] and the Litigation Sub-Trust. Administered by its trustee Seery, the Claimant Trust "wind[s]-down" Highland Capital's estate over approximately three years by liquidating its assets and issuing distributions to class-8 and -9 claimants as trust beneficiaries. Highland Capital vests its ongoing servicing agreements with the Reorganized Debtor, which "among other things" continues to manage the CLOs and other investment portfolios. The Reorganized Debtor's only general partner is HCMLP GP LLC. And the Litigation Sub-Trust resolves pending claims against Highland Capital under the direction of its trustee Marc Kirschner.

The whole operation is overseen by a Claimant Trust Oversight Board (the "Oversight Board") comprised of

[3] The Plan calls this entity "New GP LLC," but according to the motion to dismiss as equitably moot, the new general partner was later named HCMLP GP LLC. For the sake of clarity, we use HCMLP GP LLC.

four creditor representatives and one restructuring advisor. The Claimant Trust wholly owns the limited partnership interests in the Reorganized Debtor, HCMLP GP LLC, and the Litigation Sub-Trust. The Claimant Trust (and its interests) will dissolve either at the soonest of three years after the effective date (August 2024) or (1) when it is unlikely to obtain additional proceeds to justify further action, (2) all claims and objections are resolved, (3) all distributions are made, and (4) the Reorganized Debtor is dissolved.

Anticipating Dondero's continued litigiousness, the Plan shields Highland Capital and bankruptcy participants from lawsuits through an exculpation provision, which is enforced by an injunction and a gatekeeper provision (collectively, "protection provisions"). The protection provisions extend to nearly all bankruptcy participants: Highland Capital and its employees and CEO; Strand; the Independent Directors; the Committee; the successor entities and Oversight Board; professionals retained in this case; and all "Related Persons"[4] (collectively, "protected parties").[5]

The Plan exculpates the protected parties from claims based on any conduct "in connection with or arising out of" (1) the filing and administration of the case, (2) the

[4] The Plan generously defines "Related Persons" to include all former, present, and future officers, directors, employees, managers, members, financial advisors, attorneys, accountants, investment bankers, consultants, professionals, advisors, shareholders, principals, partners, heirs, agents, other representatives, subsidiaries, divisions, and managing companies.

[5] The Plan expressly excludes from the protections Dondero and Okada; NexPoint Advisors, L.P.; Highland Capital Management Fund Advisors, L.P; their subsidiaries, managed entities, managed entities, and members; and the Dugaboy Investment Trust and its trustees, among others.

negotiation and solicitation of votes preceding the Plan, (3) the consummation, implementation, and funding of the Plan, (4) the offer, issuance, and distribution of securities under the Plan before or after the filing of the bankruptcy, and (5) any related negotiations, transactions, and documentation. But it excludes "acts or omissions that constitute bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct" *and* actions by Strand and its employees predating the appointment of the Independent Directors.

Under the Plan, bankruptcy participants are enjoined "from taking any actions to interfere with the implementation or consummation of the Plan" or filing any claim related to the Plan or proceeding. Should a party seek to bring a claim against any of the protected parties, it must go to the bankruptcy court to "first determin[e], after notice and a hearing, that such claim or cause of action represents a colorable claim of any kind." Only then may the bankruptcy court "specifically authoriz[e]" the party to bring the claim. The Plan reserves for the bankruptcy court the "sole and exclusive jurisdiction to determine whether a claim or cause of action is colorable" and then to adjudicate the claim if the court has jurisdiction over the merits.

D. Confirmation Order

At a February 2021 hearing, the bankruptcy court confirmed the Plan from the bench over several remaining objections. See Fed R. Bankr. P. 3017-18; 11 U.S.C. §§1126, 1128, 1129. In its later-written decision, the bankruptcy court observed that Highland Capital's bankruptcy was "not a garden variety chapter 11 case." The type of debtor, the reason for the bankruptcy filing, the kinds of creditor claims, the corporate governance structure, the unusual success of the mediation efforts, and

the small economic interests of the current objectors all make this case unique.

The confirmation order criticized Dondero's behavior before and during the bankruptcy proceedings. The court could not "help but wonder" if Highland Capital's deficit "was necessitated because of enormous litigation fees and expenses incurred" due to Highland Capital's "culture of litigation." Recounting Highland Capital's litigation history, it deduced that Dondero is a "serial litigator." It reasoned that, while "Dondero wants his company back," this "is not a good faith basis to lob objections to the Plan." It attributed Dondero's bad faith to the Advisors, the Trusts, and the Funds, given the "remoteness of their economic interests." For example, the bankruptcy court "was not convinced of the[ ] [Funds'] independence" from Dondero because the Funds' board members did not testify and had "engaged with the Highland complex for many years." And so the bankruptcy court "consider[ed] them all to be marching pursuant to the orders of Mr. Dondero." The court, meanwhile, applauded the members of the Committee for their "wills of steel" for fighting "hard before and during this Chapter 11 Case" and "represent[ing] their constituency . . . extremely well."

On the merits of the Plan, the bankruptcy court again approved the Plan's voting and confirmation procedures as well as the fairness of the Plan's classes. See 11 U.S.C. §§ 1122, 1125(a)-(c). The court held the Plan complied with the statutory requirements for confirmation. See *id.* §§ 1123(a)(1)-(7), 1129(a)(1)-(7), (9)-(13). Because classes 8, 10, and 11 had voted to reject the Plan, it was

confirmable only by cramdown.[6] See *id.* § 1129(b). The bankruptcy court found that the Plan treated the dissenting classes fairly and equitably and satisfied the absolute-priority rule, so the Plan was confirmable. See *id.* § 1129(b)(2)(B)-(C). The court also concluded that the protection provisions were fair, equitable, and reasonable, as well as "integral elements" of the Plan under the circumstances, and were within both the court's jurisdiction and authority. The court confirmed the Plan as proposed and discharged Highland Capital's debts. *Id.* § 1141(d)(1). After confirmation and satisfaction of several conditions precedent, the Plan took effect August 11, 2021.

E. The Appeal

Dondero, the Advisors, the Funds, and the Trusts (collectively, "Appellants") timely appealed, objecting to the Plan's legality and some of the bankruptcy court's factual findings.[7] Together with Highland Capital, Appellants moved to directly appeal the confirmation order to this court, which the bankruptcy court granted. See 28 U.S.C. § 158(d). A motions panel certified and consolidated the direct appeals. See *ibid.* Both the bankruptcy court and the motions panel declined to stay the Plan's

---

[6] The bankruptcy court must proceed by nonconsensual confirmation, or "cramdown," 11 U.S.C. § 1129(b), when a class of unsecured creditors rejects a Chapter 11 reorganization plan, *id.* § 1129(a)(8), but at least one impaired class accepts it, *id.* § 1129(a)(10). A cramdown requires that the plan be "fair and equitable" to dissenting classes and satisfy the absolute priority rule—that is, dissenting classes are paid in full before any junior class can retain any property. *Id.* § 1129(b)(2)(B); see *Bank of Am. Nat'l Tr. & Sav. Ass'n* v. *203 N. LaSalle St. P'ship*, 526 U.S. 434, 441-42 (1999).

[7] The Trusts adopt the Funds' and the Advisors' briefs in full, and Dondero adopts the Funds' brief in full and the Advisors' brief in part. Fed. R. App. P. 28(i).

confirmation pending appeal. Given the Plan's substantial consummation since its confirmation, Highland Capital moved to dismiss the appeal as equitably moot, a motion the panel ordered carried with the case.

* * *

We first consider equitable mootness and decline to invoke it here. We then turn to the merits, conclude the Plan exculpates certain non-debtors beyond the bankruptcy court's authority, and affirm in all other respects.

II. Standard of Review

A confirmation order is an appealable final order, over which we have jurisdiction. *Bullard* v. *Blue Hills Bank*, 575 U.S. 496, 502 (2015); see 28 U.S.C. §§158(d), 1291. This court reviews a bankruptcy court's factual findings for clear error and legal conclusions *de novo*. *Evolve Fed. Credit Union* v. *Barragan-Flores* (*In re Barragan-Flores*), 984 F.3d 471, 473 (5th Cir. 2021) (citation omitted).

III. Equitable Mootness

Highland Capital moved to dismiss this appeal as equitably moot. It argues we should abstain from appellate review because clawing back the implemented Plan "would generate untold chaos." We disagree and deny the motion.

The judge-made doctrine of equitable mootness allows appellate courts to abstain from reviewing bankruptcy orders confirming "complex plans whose implementation has substantial secondary effects." *New Indus., Inc.* v. *Byman* (*In re Sneed Shipbuilding, Inc.*), 916 F.3d 405, 409 (5th Cir. 2019) (citing *In re Trib. Media Co.*, 799 F.3d 272, 274, 281 (3d Cir. 2015)). It seeks to balance "the equitable considerations of finality and good faith reliance on a judgment" and "the right of a party to seek re-

view of a bankruptcy order adversely affecting him." *In re Manges*, 29 F.3d 1034, 1039 (5th Cir. 1994) (quoting *First Union Real Estate Equity & Mortg. Inv.* v. *Club Assocs.* (*In re Club Assocs.*), 956 F.3d 1065, 1069 (11th Cir. 1992)); see *In re Hilal*, 534 F.3d 498, 500 (5th Cir. 2008); see also 7 Collier on Bankruptcy ¶1129.09 (16th ed.), LexisNexis (database updated June 2022) (observing "the equitable mootness doctrine is embraced in every circuit").[8]

This court uses equitable mootness as a "scalpel rather than an axe," applying it claim-by-claim, instead of appeal-by-appeal. *In re Pac. Lumber Co.* (*Pacific Lumber*), 584 F.3d 229, 240-41 (5th Cir. 2009). For each claim, we analyze three factors: "(i) whether a stay has been obtained, (ii) whether the plan has been 'substantially consummated,' and (iii) whether the relief requested would affect either the rights of parties not before the court or the success of the plan." *In re Manges*, 29 F.3d at 1039 (citing *In re Block Shim Dev. Co.*, 939 F.2d 289, 291 (5th Cir. 1991); and *Cleveland, Barrios, Kingsdorf & Casteix* v. *Thibaut*, 166 B.R. 281, 286 (E.D. La. 1994)); see also, *e.g.*, *In re Blast Energy Servs.*, 593 F.3d 418, 424-25 (5th

---

[8] The doctrine's atextual balancing act has been criticized. See *In re Pac. Lumber Co.*, 584 F.3d 229, 240 (5th Cir. 2009) ("Despite its apparent virtues, equitable mootness is a judicial anomaly."); *In re One2One Commc'ns, LLC*, 805 F.3d 428, 438-54 (3rd Cir. 2015) (Krause, J., concurring); *In re UNR Indus.*, Inc., 20 F.3d 766, 769 (7th Cir. 1994) (banishing the term "equitable mootness" as a misnomer); *In re Cont'l Airlines*, 91 F.3d 553, 569 (3d Cir. 1996) (en banc) (Alito, J., dissenting); see also Bruce A. Markell, *The Needs of the Many: Equitable Mootness' Pernicious Effects*, 93 Am. Bankr. L.J. 377, 393-96 (2019) (addressing the varying applications between circuits). But see *In re Trib. Media*, 799 F.3d at 287-88 (Ambro, J., concurring) (highlighting some benefits of the equitable mootness doctrine).

Cir. 2010); *In re Ultra Petroleum Corp.*, No. 21-20049, 2022 WL 989389, at *5 (5th Cir. Apr. 1, 2022). No one factor is dispositive. See *In re Manges*, 29 F.3d at 1039.

Here, the bankruptcy court and this court declined to stay the Plan pending appeal, and it took effect August 11, 2021. Given the months of progress, no party meaningfully argues the Plan has not been substantially consummated.[9] See *Pacific Lumber*, 584 F.3d at 242 (observing "consummation includes transferring all or substantially all of the property covered by the plan, the assumption of business by the debtors' successors, and the commencement of plan distributions" (citing 11 U.S.C. §1141; and *In re Manges*, 29 F.3d at 1041 n.10)). But

[9] Since the Plan's effectuation, Highland Capital paid $2.2 million in claims to a committee member and $525,000 in "cure payments" to other counterparties. The independent directors resigned. The Reorganized Debtor, the Claimant Trust, HCMLP GP LLC, and the Litigation Sub-Trust were created and organized in accordance with the Plan. The bankruptcy court appointed the Oversight Board members, the Litigation Sub-Trust trustee, and the Claimant Trust trustee. Highland Capital assumed certain service contracts, including management of twenty CLOs with approximately $700 million in assets, and transferred its assets and estate claims to the successor entities. Highland Capital's pre-petition partnership interests were cancelled and cease to exist. A third party, Blue Torch Capital, infused $45 million in exit financing, fully guaranteed by the Reorganized Debtor, its operating subsidiaries, the Claimant Trust, and most of their assets. From the exit financing, an Indemnity Trust was created to indemnify claims that arise against the Reorganized Debtor, Claimant Trust, Ligation Sub-Trust, Claimant Trustee, Litigation Trustee, or Oversight Board members. The lone class-1 creditor withdrew its claim against Highland Capital. The lone class-2 creditor has been fully paid approximately $500,000 and issued a note of $5.2 million secured by $23 million of the Reorganized Debtor's assets. Classes 3 and 4 have been paid $165,412. Class 7 has received $5.1 million in distributions from the Claimant Trust, totaling 77% of class-7 claims filed.

that alone does not trigger equitable mootness. See *In re SCOPAC*, 624 F.3d 274, 281-82 (5th Cir. 2010). Instead, for each claim, the inquiry turns on whether the court can craft relief for that claim that would not have significant adverse consequences to the reorganization. Highland Capital highlights four possible disruptions: (1) the unraveling of the Claimant Trust and its entities, (2) the expense of disgorging disbursements, (3) the threat of defaulting on exit-financing loans, and (4) the exposure to vexatious litigation.

Each party first suggests its own all-or-nothing equitable mootness applications. To Highland Capital, Appellants' broad requested remedy with only a minor economic stake demands mooting the entire appeal. To Appellants, the type of reorganization plan categorially bars equitable mootness, or, alternatively, Highland Capital's joining the motion to certify the appeal estops it from asserting equitable mootness. These arguments are unpersuasive and foreclosed by *Pacific Lumber*.

First, Highland Capital contends the entire appeal is equitably moot because Appellants, with only a minor economic stake and questionable good faith, "seek[] nothing less than a complete unravelling of the confirmed Plan." It claims the court cannot "surgically excise[]" certain provisions, as the Funds request, because the Bankruptcy Code prohibits "modifications to confirmed plans after substantial consummation." See 11 U.S.C. §1127(b). Not so.

"Although the Bankruptcy Code . . . restricts post-confirmation plan modifications, it does not expressly limit appellate review of plan confirmation orders." *Pacific Lumber*, 584 F.3d at 240 (footnote omitted) (citing 11 U.S.C. §1127). This court may fashion "fractional relief" to minimize an appellate disturbance's effect on the

rights of third parties. *In re Tex. Grand Prairie Hotel Realty, L.L.C.*, 710 F.3d 324, 328 (5th Cir. 2013) (denying dismissal on equitable mootness grounds because the court "could grant partial relief . . . without disturbing the reorganization"); cf. *In re Cont'l Airlines*, 91 F.3d 553, 571-72 (3d Cir. 1996) (en banc) (Alito, J., dissenting) (observing "a remedy could be fashioned in the present case to ensure that the [debtor's] reorganization is not undermined"). In short, Highland Capital's speculations are farfetched, as the court may fashion the remedy it sees fit without upsetting the reorganization.

Second, Appellants contend that equitable mootness cannot apply—full-stop—because this appeal concerns a liquidation plan, not a reorganization plan. We reject that premise. See *infra* Part IV.A. Even if it were correct, however, this court has conducted the equitable-mootness inquiry for a Chapter 11 liquidation plan in the past. See *In re Superior Offshore Int'l, Inc.*, 591 F.3d 350, 353-54 (5th Cir. 2009). And other circuits have squarely rejected the categorical bar proposed by Appellants. See *In re Abengoa Bioenergy Biomass of Kan., LLC*, 958 F.3d 949, 956-57 (10th Cir. 2020); *In re BGI, Inc.*, 772 F.3d 102, 107-09 (2d Cir. 2014). We do the same.

Finally, Appellants assert that because Highland Capital and NexPoint Advisors, L.P. jointly moved to certify the appeal, it should be estopped from arguing the appeal is equitably moot. They cite no legal support for that approach. We decline to adopt it.

Instead, we proceed with a claim-by-claim analysis, as our precedent requires. Highland Capital suggests only two claims are equitably moot: (1) the protection-provisions challenge and (2) the absolute-priority-rule challenge. Neither provides a basis for equitable mootness.

For the protection provisions, Highland Capital anticipates that, without the provisions, its officers, employees, trustees, and Oversight Board members would all resign rather than be exposed to Dondero-initiated litigation. Those resignations would disrupt the Reorganized Debtor's operation, "significant[ly] deteriorat[ing] asset values due to uncertainty." Appellants disagree, offering several instances when this court has reviewed release, exculpation, and injunction provisions over calls for equitable mootness. See, *e.g.*, *In re Hilal*, 534 F.3d at 501; *Pacific Lumber*, 584 F.3d at 252; *In re Thru Inc.*, 782 F. App'x 339, 341 (5th Cir. 2019) (per curiam). In response, Highland Capital distinguishes this case because the provisions are "integral to the consummated plans." See *In re Charter Commc'ns, Inc.*, 691 F.3d 476, 486 (2d Cir. 2012). We again reject that premise. See *infra* Part IV.E.1. In any event, Appellants have the better argument.

We have before explained that "equity strongly supports appellate review of issues consequential to the integrity and transparency of the Chapter 11 process." *In re Hilal*, 534 F.3d 498, 500 (5th Cir. 2008). That is so because "the goal of finality sought in equitable mootness analysis does not outweigh a court's duty to protect the integrity of the process." *Pacific Lumber*, 584 F.3d at 252. As in *Pacific Lumber*, the legality of a reorganization plan's non-consensual non-debtor release is consequential to the Chapter 11 process and so should not escape appellate review in the name of equity. *Ibid.* The same is true here. Equitable mootness does not bar our review of the protection provisions.

For the absolute-priority-rule challenge,[10] Highland

[10] While the issue is nearly forfeited for inadequate briefing, it fails on the merits regardless. See *Roy* v. *City of Monroe*, 950 F.3d 245, 251 (5th Cir. 2020).

Capital contends our review requires us to "rejigger class recoveries." *Pacific Lumber* is again instructive. There, the court declined to apply equitable mootness to a secured creditor's absolute-priority-rule challenge, as no other panel had extended the doctrine so far. *Id.* at 243. Similarly, Highland Capital fails to identify a single case in which this court has declined review of the treatment of a class of creditor's claims resulting from a cramdown. See *id.* at 252. Regardless, Appellants challenge the distributions to classes 8, 10, and 11. According to Highland Capital's own declaration, "Class 8 General Unsecured Claims have received their Claimant Trust Interests." But there is no evidence that classes 10 or 11 have received any distributions. Contra *Pacific Lumber*, 584 F.3d at 251 (holding certain claims equitably moot where "the smaller unsecured creditors" had already "received payment for their claims"). As a result, the relief requested would not affect third parties or the success of the Plan. See *In re Manges*, 29 F.3d at 1039. The doctrine of equitable mootness does not bar our review of the cramdown and treatment of class-8 creditors.

We DENY Highland Capital's motion to dismiss the appeal as equitably moot.

IV. Discussion

As to the merits, Appellants fire a bankruptcy-law blunderbuss. They contest the Plan's classification as a reorganization plan, the Plan's satisfaction of the absolute priority rule, the Plan's confirmation despite Highland Capital's noncompliance with Bankruptcy Rule 2015.3, and the sufficiency of the evidence supporting the court's factual finding that the Funds are "owned/controlled" by Dondero. For each, we disagree and affirm. We do, however, agree with Appellants that the bankruptcy court exceeded its statutory authority under

§ 524(e) by exculpating certain non-debtors, and so we reverse and vacate the Plan only to that extent.

A. Discharge of Debt

We begin with the Plan's classification as a reorganization plan, allowing for automatic discharge of the debts. The confirmation of a Chapter 11 restructuring plan "discharges the debtor from any [pre-confirmation] debt" unless, under the plan, the debtor liquidates its assets, stops "engag[ing] in [its] business after consummation of the plan," and would be denied discharge in a Chapter 7 case. 11 U.S.C. § 1141(d)(1), (3); see *In re Sullivan*, No. 99-11107, 2000 WL 1597984, at *2 (5th Cir. Sept. 26, 2000) (per curiam). The bankruptcy court concluded Highland Capital continued to engage in business after plan consummation, so its debts are automatically discharged. The Trusts call foul because, in their view, Highland Capital's "wind down" of its portfolio management is not a continuation of its business. We disagree.

Whether a corporate debtor "engages in business" is "relatively straightforward." *Um* v. *Spokane Rock I, LLC*, 904 F.3d 815, 819 (9th Cir. 2018) (contrasting the more complex question for individual debtors); see *Grausz* v. *Sampson* (*In re Grausz*), 63 F. App'x 647, 650 (4th Cir. 2003) (per curiam) (same). That is, "a business entity will not engage in business post-bankruptcy when its assets are liquidated and the entity is dissolved." *Um*, 904 F.3d at 819 (collecting cases).[11] But even a tempo-

[11] See, *e.g.*, *In re W. Asbestos Co.*, 313 B.R. 832, 853 (Bankr. N.D. Cal. 2003) (holding corporate debtor was not engaging in business by merely having directors and officers, rights under an insurance policy, and claims against it); *In re Wood Fam. Ints., Ltd.*, 135 B.R. 407, 410 (Bankr. D. Colo. 1989) (holding corporate debtor was not engaging in business when the plan called for liquidation and discontinuation of its business upon confirmation).

rary continuation of business after a plan's confirmation is sufficient to discharge a Chapter 11 debtor's debt. See *In re T-H New Orleans Ltd. P'ship*, 116 F.3d 790, 804 n.15 (5th Cir. 1997) (recognizing a debtor's "conducting business for two years following Plan confirmation satisfies §1141(d)(3)(B)" (citation omitted)). That is the case here.

By the plain terms of the Plan, Highland Capital has and will continue its business as the Reorganized Debtor for several years. Indeed, much of this appeal concerns objections to Highland Capital's "continu[ing] to manage the assets of others." Because the Plan contemplates Highland Capital "engag[ing] in business after consummation," 11 U.S.C. §1141(d)(1), the bankruptcy court correctly held Highland Capital was eligible for automatic discharge of its debts.[12]

B. Absolute Priority Rule

Next, we consider the Plan's compliance with the absolute-priority rule. When assessing whether a plan is "fair and equitable" in a cramdown scenario, courts must invoke the absolute-priority rule. 11 U.S.C. §1129(b)(1); see 7 Collier on Bankruptcy ¶1129.04. Under that rule, if a class of unsecured claimants rejects a plan, the plan must provide that those claimants be paid in full on the effective date or any junior interest "will not receive or retain under the plan . . . any property." 11 U.S.C. §1129(b)(2)(B).[13]

---

[12] For the same reasons, we reject the Trusts' follow-on argument extending the same logic to the protection provisions.

[13] See *Pacific Lumber*, 584 F.3d at 244 (noting the rule "enforces a strict hierarchy of [creditor classes'] rights defined by state and federal law" to protect dissenting creditor classes); see also *In re Geneva Steel Co.*, 281 F.3d 1173, 1180 n.4 (10th Cir. 2002) ("[U]nsecured creditors stand ahead of investors in the receiving line and their

Because class-8 claimants voted against the Plan, the bankruptcy court proceeded by nonconsensual confirmation. The court concluded the Plan was fair and equitable to class 8 and its distributions were in line with the absolute-priority rule. 11 U.S.C. §1129(b)(2)(B). The Advisors claim the Plan violates the absolute priority rule by giving class-10 and -11 claimants a "Contingent Claimant Trust Interest" without fully satisfying class-8 claimants. We agree the absolute-priority rule applies, and the Plan plainly satisfies it.

The Plan proposed to pay 71% of class-8 creditors' claims with pro rata distributions of interest generated by the Claimant Trust and then pro rata distributions from liquidated Claimant Trust assets. Classes 10 and 11 received a pro rata share of "Contingent Claimant Trust Interests," defined as a Claimant Trust Interest vesting only when the Claimant Trustee certifies that all class-8 claimants have been paid indefeasibly in full and all disputed claims in class 8 have been resolved. Voilà: no interest junior to class 8 will receive any property until class-8 claimants are paid.

But the Advisors point to Highland Capital's testimony and briefs to suggest the Contingent Claimant Trust Interests (received by classes 10 and 11) are property in some sense because they have value. That argument is specious. Of course, the Contingent Claimant Trust Interests have some small probability of vesting in the future and, thus, has some *de minimis* present value. See *Norwest Bank Worthington* v. *Ahlers*, 485 U.S. 197, 207-08 (1988) (holding a junior creditor's receipt of a presently valueless equity interest is receipt of property).

---

claims must be satisfied before any investment loss is compensated." (citations omitted)).

But the absolute-priority rule has never required us to bar junior creditors from ever receiving property. By the Plan's terms, no trust property vests with class-10 or -11 claimants "unless and until" class-8 claims "have been paid indefeasibly in full." See 11 U.S.C. § 1129(b)(2)(B)(ii). That plainly comports with the absolute-priority rule.

C. Bankruptcy Rule 2015.3

We turn to whether the failure to comply with Bankruptcy Rule of Procedure 2015.3 bars the Plan's confirmation. The Independent Directors failed to file periodic financial reports per Federal Rule of Bankruptcy Procedure 2015.3(a) about entities "in which the [Highland Capital] estate holds a substantial or controlling interest." The Advisors claim the failure dooms the Plan's confirmation because the Plan proponent failed to comply "with the applicable provisions of this title." 11 U.S.C. § 1129(a)(2). We disagree.

Rule 2015.3 cannot be an applicable provision of Title 11 because the Federal Rules of Bankruptcy Procedure are not provisions of the Bankruptcy Code. See *Bonner* v. *Adams* (*In re Adams*), 734 F.2d 1094, 1101 (5th Cir. 1984) ("The Bankruptcy Rules Enabling Act, 28 U.S.C. § 2075, provides that the Supreme Court may prescribe 'by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure' in bankruptcy courts."); cf. *In re Mandel*, No. 20-40026, 2021 WL 3642331, at *6 n.7 (5th Cir. Aug. 17, 2021) (per curiam) (noting "Rule 2015.3 implements section 419 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005," which amended 28 U.S.C. § 2073). The Advisors' attempt to tether the rule to the bankruptcy trustee's general duties lacks any legal basis. See 11 U.S.C. §§ 704(a)(8), 1106(a)(1), 1107(a). The bankruptcy court, therefore, correctly overruled the Advisors' objection.

D. Factual Findings

One factual finding is in dispute, but we see no clear error. The bankruptcy court found that, despite their purported independence, the Funds are entities "owned and/or controlled by [Dondero]." The Funds ask the court to vacate the factual finding because it threatens the Funds' compliance with federal law and damages their reputations and values. According to the Funds, the characterization is unfair, as *they* are not litigious like Dondero and are completely independent from him. Highland Capital maintains Dondero has sole discretion over the Funds as their portfolio manager and through his control of the Advisors, so the finding is supported by the record.

"Clear error is a formidable standard: this court disturbs factual findings only if left with a firm and definite conviction that the bankruptcy court made a mistake." *In re Krueger*, 812 F.3d 365, 374 (5th Cir. 2016) (cleaned up). We defer to the bankruptcy court's credibility determinations. See *Randall & Blake, Inc.* v. *Evans* (*In re Canion*), 196 F.3d 579, 587-88 (5th Cir. 1999).

Here, the bankruptcy court drew its factual finding from the testimony of Jason Post, the Advisors' chief compliance officer, and Dustin Norris, an executive vice president for the Funds and the Advisors. Post testified that the Funds have independent board members that run them. But the bankruptcy court found Post not credible because "he abruptly resigned" from Highland Capital at the same time as Dondero and is currently employed by Dondero. Norris testified that Dondero "owned and/or controlled" the Funds and Advisors. The bankruptcy court found Norris credible and relied on his testimony. The bankruptcy court also observed that none of the Funds' board members testified in the bank-

ruptcy case and all "engaged with the Highland complex for many years." Because nothing in this record leaves us with a firm and definite conviction that the bankruptcy court made a mistake in finding that the Funds are "owned and/or controlled by [Dondero]," we leave the bankruptcy court's factual finding undisturbed.

E. The Protection Provisions

Finally, we address the legality of the Plan's protection provisions. As discussed, the Plan exculpates certain non-debtor third parties supporting the Plan from post-petition lawsuits not arising from gross negligence, bad faith, or willful or criminal misconduct. It also enjoins certain parties "from taking any actions to interfere with the implementation or consummation of the Plan." The injunction requires that, before any lawsuit is filed, the plaintiff must seek the bankruptcy court's approval of the claim as "colorable"—*i.e.*, the bankruptcy court acts as a gatekeeper. Together, the provisions screen and prevent bad-faith litigation against Highland Capital, its successors, and other bankruptcy participants that could disrupt the Plan's effectiveness.

The bankruptcy court deemed the provisions legal, necessary under the circumstances, and in the best interest of all parties. We agree, but only in part. Though the injunction and gatekeeping provisions are sound, the exculpation of certain non-debtors exceeds the bankruptcy court's authority. We reverse and vacate that limited portion of the Plan.

1. *Non-Debtor Exculpation*

We start with the scope of the non-debtor exculpation. In a Chapter 11 bankruptcy proceeding, "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. §524(e). Contrary to the bankruptcy

court's holding, the exculpation here partly runs afoul of that statutory bar on non-debtor discharge by reaching beyond Highland Capital, the Committee, and the Independent Directors. See *Pacific Lumber*, 584 F.3d 251-53. We must reverse and strike the few unlawful parts of the Plan's exculpation provision.

The parties agree that *Pacific Lumber* controls and also that the bankruptcy court had the power to exculpate both Highland Capital and the Committee members. Appellants, however, submit the bankruptcy court improperly stretched *Pacific Lumber* to shield other non-debtors from breach-of-contract and negligence claims, in violation of §524(e). Highland Capital counters that the exculpation provision is a commonplace Chapter 11 term, is appropriate given Dondero's litigious nature, does not implicate §524(e), and merely provides a heightened standard of care.

To support that argument, Highland Capital highlights the distinction between a concededly unlawful release of all non-debtor liability and the Plain's limited exculpation of non-debtor post-petition liability. See, *e.g.*, *In re PWS Holding Corp.*, 228 F.3d 224, 246-47 (3d Cir. 2000) (describing releases as "eliminating" a covered party's liability "altogether" while exculpation provisions "set[ ] forth the applicable standard of liability" in future litigation). According to Highland Capital, the Third and Ninth Circuits have adopted that distinction when applying §524(e). See *Blixseth* v. *Credit Suisse*, 961 F.3d 1074, 1084 (9th Cir. 2020), cert. denied, 141 S. Ct. 1394 (2021); *In re PWS Holding*, 228 F.3d at 246-47. Under those cases, narrow exculpations of post-petition liability for certain critical third-party non-debtors are lawful "appropriate" or "necessary" actions for the bankruptcy court to carry out the proceeding through its statutory

authority under §1123(b)(6) and §105(a). See 11 U.S.C. §1123(b)(6) ("[A] plan may . . . include any other appropriate provision not inconsistent with the applicable provisions of this title."); *id.* §105(a) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.").

Highland Capital reads *Pacific Lumber* as "in step with the law in [those] other circuits" by allowing a limited exculpation of post-petition liability. Cf. *Blixseth*, 961 F.3d at 1084. We disagree. As the Ninth Circuit acknowledged, our court in *Pacific Lumber* arrived at "a conclusion opposite [the Ninth Circuit's]." 961 F.3d at 1085 n.7. Moreover, the Ninth Circuit expressly disavowed *Pacific Lumber*'s rationale—that an exculpation provision provides a "fresh start" to a non-debtor in violation of §524(e)—because, in the Ninth Circuit's view, the post-petition exculpation "affects only claims arising from the bankruptcy proceedings themselves." *Ibid.* We are not persuaded, as Highland Capital contends, that the Ninth Circuit was "sloppy" and simply "misread *Pacific Lumber*." See O.A. Rec. 19:45-21:38.

The simple fact of the matter is that there is a circuit split concerning the effect and reach of §524(e).[14] Our court along with the Tenth Circuit hold §524(e) categorically bars third-party exculpations absent express authority in another provision of the Bankruptcy Code. *Pacific Lumber*, 584 F.3d at 252-53; *Landsing Diversified Props.* v. *First Nat'l Bank & Tr. Co. of Tulsa* (*In re W. Real Estate Fund, Inc.*), 922 F.2d 592, 600 (10th Cir. 1990) (per

[14] Amicus's contention that failing to adopt the Ninth Circuit's holding "would generate a clear circuit split" is wrong. There already is one. See Petition for Writ of Certiorari, *Blixseth* v. *Credit Suisse*, 141 S. Ct. 1394 (No. 20-1028) (highlighting the circuits' divergent approaches to the non-debtor discharge bar under §524(e)).

curiam). By contrast, the Ninth Circuit joins the Second, Third, Fourth, Sixth, Seventh, and Eleventh Circuits in reading §524(e) to allow varying degrees of limited third-party exculpations. *Blixseth*, 961 F.3d at 1084; accord *In re PWS Holding*, 228 F.3d at 246-47 (allowing third-party releases for "fairness, necessity to the reorganization, and specific factual findings to support these conclusions"); *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 143 (2d Cir. 2005); *In re A.H. Robins Co.*, 880 F.2d 694, 702 (4th Cir. 1989); *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002); *In re Airadigm Commc'ns., Inc.*, 519 F.3d 640, 657 (7th Cir. 2008); *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070, 1078 (11th Cir. 2015).

Our *Pacific Lumber* decision was not blind to the countervailing view, as it twice cites the Third Circuit's contrary holding in other contexts. See 584 F.3d at 241, 253 (citing *In re PWS Holding*, 228 F.3d at 236-37, 246). But we rejected the parsing between limited exculpations and full releases that Highland Capital now requests. We are obviously bound to apply our own precedent. See *Hidalgo Cnty. Emergency Serv. Found.* v. *Carranza* (*In re Hidalgo Cnty. Emergency Serv. Found.*), 962 F.3d 838, 841 (5th Cir. 2020) ("Under our well-recognized rule of orderliness, . . . a panel of this court is bound by circuit precedent." (citation omitted)).

Under *Pacific Lumber*, §524(e) does not permit "absolv[ing] the [non-debtor] from any negligent conduct that occurred during the course of the bankruptcy" absent another source of authority. 584 F.3d at 252-53; see also *In re Zale Corp.*, 62 F.3d 746, 760 (5th Cir. 1995). At oral argument, Highland Capital pointed only to §1123(b)(6) and §105(a) as footholds. See O.A. Rec. 16:45-17:28. But in this circuit, §105(a) provides no statutory basis for a non-debtor exculpation. *In re Zale*, 62

F.3d at 760 (noting "[a] §105 injunction cannot alter another provision of the code" (citing *In re Oxford Mgmt., Inc.*, 4 F.3d 1329, 1334 (5th Cir. 1993))). And the same logic extends to §1123(b)(6), which allows a plan to "include any other appropriate provision *not inconsistent with the applicable provisions of this title*." 11 U.S.C. §1123(b)(6) (emphasis added).

Pacific Lumber identified two sources of authority to exculpate non-debtors. See 584 F.3d at 252-53. The first is to channel asbestos claims (not present here). *Id.* at 252 (citing 11 U.S.C. §524(g)). The second is to provide a limited qualified immunity to creditors' committee members for actions within the scope of their statutory duties. *Pacific Lumber*, 584 F.3d at 253 (citing 11 U.S.C. §1103(c)); see *In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1069 (5th Cir. 2012). And, though not before the court in *Pacific Lumber*, we have also recognized a limited qualified immunity to bankruptcy trustees unless they act with gross negligence. *In re Hilal*, 534 F.3d at 501 (citing *In re Smyth*, 207 F.3d 758, 762 (5th Cir. 2000)); accord *Baron* v. *Sherman* (*In re Ondova Ltd.*), 914 F.3d 990, 993 (5th Cir. 2019) (per curiam). If other sources exist, Highland Capital failed to identify them. So we see no statutory authority for the full extent of the exculpation here.

The bankruptcy court read *Pacific Lumber* differently. In its view, *Pacific Lumber* created an additional ground to exculpate non-debtors: when the record demonstrates that "costs [a party] might incur defending against suits alleging such negligence are likely to swamp either [it] or the consummated reorganization." 584 F.3d at 252. We do not read the decision that way. The bankruptcy court's underlying factual findings do not alter whether it has statutory authority to exculpate a non-debtor. That is the holding of *Pacific Lumber*.

That leaves one remaining question: whether the bankruptcy court can exculpate the Independent Directors under *Pacific Lumber*. We answer in the affirmative. As the bankruptcy court's governance order clarified, nontraditional as it may be, the Independent Directors were appointed to act together as the bankruptcy trustee for Highland Capital. Like a debtor-in-possession, the Independent Directors are entitled to all the rights and powers of a trustee. See 11 U.S.C. §1107(a); 7 Collier on Bankruptcy ¶1101.01. It follows that the Independent Directors are entitled to the limited qualified immunity for any actions short of gross negligence. See *In re Hilal*, 534 F.3d at 501. Under this unique governance structure, the bankruptcy court legally exculpated the Independent Directors.

In sum, our precedent and §524(e) require any exculpation in a Chapter 11 reorganization plan be limited to the debtor, the creditors' committee and its members for conduct within the scope of their duties, 11 U.S.C. §1103(c), and the trustees within the scope of their duties, see *Baron*, 914 F.3d at 993. And so, excepting the Independent Directors and the Committee members, the exculpation of non-debtors here was unlawful. Accordingly, the other non-debtor exculpations must be struck from the Plan. See *Pacific Lumber*, 584 F.3d at 253.[15]

---

[15] Highland Capital, like the bankruptcy court, claims the *res judicata* effect of the January and July 2020 orders appointing the independent directors and appointing Seery as CEO binds the court to include the protection provisions here. We lack jurisdiction to consider collateral attacks on final bankruptcy orders even when it concerns whether the court properly exercised jurisdiction or authority at the time. See *Travelers Indem. Co.* v. *Bailey*, 557 U.S. 137 (2009); *In re Linn Energy, L.L.C.*, 927 F.3d 862, 866-67 (5th Cir. 2019) (quoting *Bailey*, 557 U.S. at 152). To the extent Appellants seek to roll back the protections in the bankruptcy court's January 2020 and

As it stands, the Plan's exculpation provision extends to Highland Capital and its employees and CEO; Strand; the Reorganized Debtor and HCMLP GP LLC; the Independent Directors; the Committee and its members; the Claimant Trust, its trustee, and the members of its Oversight Board; the Litigation Sub-Trust and its trustee; professionals retained by the Highland Capital and the Committee in this case; and all "Related Persons." Consistent with § 524(e), we strike all exculpated parties from the Plan except Highland Capital, the Committee and its members, and the Independent Directors.

2. *Injunction & Gatekeeper Provisions*

The injunction and gatekeeper provisions are, on the other hand, perfectly lawful. Appellants object to the bankruptcy court's injunction as vague and the gatekeeper provision as overbroad. We are unpersuaded.

First, Appellants' primary contention—that the Plan's injunction "is broad" by releasing non-debtors in violation of § 524(e)—is resolved by our striking the impermissibly exculpated parties. See *supra* Part IV.E.1.

Second, Appellants dispute the permanency of the injunction for the legally exculpated parties by enjoining

---

July 2020 orders (which is not clear from their briefing), such a collateral attack is precluded.

As a result, the bankruptcy court was correct insofar as *those* orders have the effect of exculpating the Independent Directors and Seery in his executive capacities, but it was incorrect that *res judicata* mandates their inclusion in the Plan's new exculpation provision. Despite removal from the exculpation provision in the confirmation order, the Independent Directors' agents, advisors, and employees, as well as Seery in his official capacities are all exculpated to the extent provided in the January and July 2020 orders, given the orders' ongoing *res judicata* effects and our lack of jurisdiction to review those orders. But that says nothing of the effect of the Plan's exculpation provision.

conduct "on and after the Effective Date." Even assuming the issue was preserved,[16] permanency alone is no reason to alter a bankruptcy court's otherwise-lawful injunction on appeal. See *In re Zale*, 62 F.3d at 759-60 (recognizing the bankruptcy court's jurisdiction to issue an injunction in the first place allowed it to issue a permanent injunction).

Third, the Advisors argue that the injunction is "overbroad and vague" because it does not define what it means to "interfere" with the "implementation or consummation of the Plan." That is unsupported by the record. As the bankruptcy court recognized, the Plan defined what constitutes interference: (i) filing a lawsuit, (ii) enforcing judgments, (iii) enforcing security interests, (iv) asserting setoff rights, or (v) acting "in any manner" not conforming with the Plan. The injunction is not unlawfully overbroad or vague.

Finally, Appellants maintain that the gatekeeper provision impermissibly extends to unrelated claims over which the bankruptcy court lacks subject-matter jurisdiction. See *In re Craig's Stores of Tex., Inc.*, 266 F.3d 388, 390 (5th Cir. 2001) (noting a bankruptcy court retains jurisdiction post-confirmation only over "matters pertaining to the implementation or execution of the plan" (citations omitted)). While that may be the case, our precedent requires we leave that determination to the bankruptcy court in the first instance.

Courts have long recognized bankruptcy courts can perform a gatekeeping function. Under the "*Barton* doctrine," the bankruptcy court may require a party to "obtain leave of the bankruptcy court before initiating an

---

[16] See *Roy*, 950 F.3d at 251 ("Failure adequately to brief an issue on appeal constitutes waiver of that argument." (citation omitted)).

action in district court when the action is against the trustee or other bankruptcy-court-appointed officer, for acts done in the actor's official capacity." *Villegas* v. *Schmidt*, 788 F.3d 156, 159 (5th Cir. 2015) (emphasis added) (quoting *Carter* v. *Rodgers*, 220 F.3d 1249, 1252 (11th Cir. 2000)); accord *Barton* v. *Barbour*, 104 U.S. 126 (1881).[17] *In Villegas*, we held "that a party must continue to file with the relevant bankruptcy court for permission to proceed with a claim against the trustee." 788 F.3d at 158. Relevant here, we left to the bankruptcy court, faced with pre-approval of a claim, to determine whether it had subject matter jurisdiction over that claim in the first instance. *Id.* at 158-59; see, *e.g.*, *Carroll* v. *Abide*, 788 F.3d 502, 506-07 (5th Cir. 2015) (noting *Villegas* "rejected an argument that the Barton doctrine does not apply when the bankruptcy court lacked jurisdiction"). In other words, we need not evaluate whether the bankruptcy court would have jurisdiction under every conceivable claim falling under the widest interpretation of the gatekeeper provision. We leave that to the bankruptcy court in the first instance.[18]

---

[17] The Advisors also maintain that Highland Capital is neither a receiver nor a trustee, so *Barton* has no application here. We disagree. Highland Capital, for all practical purposes, was a debtor in possession entitled to the rights of a trustee. See 7 Collier on Bankruptcy ¶ 1101.01 ("The debtor in possession is generally vested with all of the rights and powers of a trustee as set forth in section 1106"); see also *Carter*, 220 F.3d at 1252 n.4 (finding no distinction between bankruptcy court "approved" and bankruptcy court "appointed" officers).

[18] For the same reasons, we also leave the applicability of *Barton*'s limited statutory exception to the bankruptcy and district courts in the first instance. See 28 U.S.C. § 959(a) (allowing suit, without leave of the appointing court, if the challenged acts relate to the trustee or debtor in possession "carrying on business connected with [their] property").

* * *

In sum, the Plan violates § 524(e) but only insofar as it exculpates and enjoins certain non-debtors. The exculpatory order is therefore vacated as to all parties *except* Highland Capital, the Committee and its members, and the Independent Directors for conduct within the scope of their duties. We otherwise affirm the inclusion of the injunction and the gatekeeper provisions in the Plan.[19]

V. Conclusion

Highland Capital's motion to dismiss the appeal as equitably moot is DENIED. The bankruptcy court's judgment is AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

[19] Nothing in this opinion should be construed to hinder the bankruptcy court's power to enjoin and impose sanctions on Dondero and other entities by following the procedures to designate them vexatious litigants. See *In re Carroll*, 850 F.3d 811, 815 (5th Cir. 2017) (per curiam). But non-debtor exculpation within a reorganization plan is not a lawful means to impose vexatious litigant injunctions and sanctions.

APPENDIX C

UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

CASE NO. 19-34054-sgj11

IN RE: HIGHLAND CAPITAL MANAGEMENT, L.P.[1]

Debtor.

ORDER (I) CONFIRMING THE FIFTH AMENDED PLAN OF REORGANIZATION OF HIGHLAND CAPITAL MANAGEMENT, L.P. (AS MODIFIED) AND (II) GRANTING RELATED RELIEF

February 22, 2021

The Bankruptcy Court[2] having:

a. entered, on November 24, 2020, the *Order (A) Approving the Adequacy of the Disclosure Statement, (B) Scheduling a Hearing to Confirm the Fifth Amended Plan of Reorganization (C) Establishing Deadline for Filing Objections to Confirmation of Plan, (D) Approving Form of Ballots, Voting Deadline and Solicitation*

[1] The Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

[2] Capitalized terms used but not otherwise defined herein have the meanings given to them in the Plan (as defined below). The rules of interpretation set forth in Article I of the Plan apply to this Confirmation Order.

Procedures, and (E) Approving Form and Manner of Notice [Docket No. 1476] (the "Disclosure Statement Order"), pursuant to which the Bankruptcy Court approved the adequacy of the *Disclosure Statement Relating to the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1473] (the "Disclosure Statement") under section 1125 of the Bankruptcy Code and authorized solicitation of the Disclosure Statement;

b. set January 5, 2021, at 5:00 p.m. prevailing Central Time (the "Objection Deadline"), as the deadline for filing objections to confirmation of the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (As Modified)* [Docket No. 1808] (as amended, supplemented or modified, the "Plan");

c. set January 5, 2021, at 5:00 p.m. prevailing Central Time, as the deadline for voting on the Plan (the "Voting Deadline") in accordance with the Disclosure Statement Order;

d. initially set January 13, 2021, at 9:30 a.m. prevailing Central Time, as the date and time to commence the hearing to consider confirmation of the Plan pursuant to Bankruptcy Rules 3017 and 3018, sections 1126, 1128, and 1129 of the Bankruptcy Code, and the Disclosure Statement Order, which hearing was continued to January 26, 2021, at 9:30 a.m. prevailing Central Time and further continued to February 2, 2021;

e. reviewed: (i) the Plan; (ii) the Disclosure Statement; and (iii) *Notice of (I) Entry of Order Approving Disclosure Statement; (II) Hearing to Confirm; and (III) Related Important Dates* (the "Confirmation Hearing Notice"), the form of which is attached as Exhibit 1-B to the Disclosure Statement Order;

f. reviewed: (i) the *Debtor's Notice of Filing of Plan Supplement for the Third Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1389] filed November 13, 2020; (ii) *Debtor's Notice of Filing of Plan Supplement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1606] filed on December 18, 2020; (iii) the *Debtor's Notice of Filing of Plan Supplement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1656] filed on January 4, 2021; (iv) *Notice of Filing Plan Supplement to the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (with Technical Modifications)* dated January 22, 2021 [Docket No. 1811]; and (v) *Debtor's Notice of Filing of Plan Supplement to the Fifth Amended Plan of Reorganization of Highland of Highland Capital Management, L.P. (As Modified)* on February 1, 2021 [Docket No. 1875]; (collectively, the documents listed in (i) through (v) of this paragraph, the "Plan Supplements");

g. reviewed: (i) the *Notice of (I) Executory Contracts and Unexpired Leases to be Assumed by the Debtor Pursuant to the Fifth Amended Plan, (II) Cure Amounts, if Any, and (III) Related Procedures in Connection Therewith* filed on December 30, 2020 [Docket No. 1648]; (ii) the *Second Notice of (I) Executory Contracts and Unexpired Leases to be Assumed by the Debtor Pursuant to the Fifth Amended Plan, (II) Cure Amounts, if Any, and (III) Related Procedures in Connection Therewith* filed on January 11, 2021 [Docket No. 1719]; (iii) the *Third Notice of (I) Executory Contracts and Unexpired Leases to be Assumed by the Debtor Pursuant to the Fifth Amended Plan, (II) Cure Amounts, if Any, and (III) Related Procedures in Connection Therewith* filed

on January 15, 2021 [Docket No. 1749]; (iv) the *Notice of Withdrawal of Certain Executory Contracts and Unexpired Leases from List of Executory Contracts and Unexpired Leases to be Assumed by the Debtor Pursuant to the Fifth Amended Plan* [Docket No. 1791]; (v) the *Fourth Notice of (I) Executory Contracts and Unexpired Leases to be Assumed by the Debtor Pursuant to the Fifth Amended Plan (II) Cure Amounts, if Any, and (III) Released Procedures in Connection Therewith* filed on January 27, 2021 [Docket No. 1847]; (vi) the *Notice of Hearing on Agreed Motion to (I) Assume Nonresidential Real Property Lease with Crescent TC Investors, L.P. Upon Confirmation of Plan and (II) Extend Assumption Deadline* filed on January 28, 2021 [Docket No. 1857]; and (vii) the *Fifth Notice of (I) Executory Contracts and Unexpired Leases to be Assumed by the Debtor Pursuant to the Fifth Amended Plan (II) Cure Amounts, if Any, and (III) Released Procedures in Connection Therewith* filed on February 1, 2021 [Docket No. 1873] (collectively, the documents referred to in (i) to (vii) are referred to as "List of Assumed Contracts");

h. reviewed: (i) the *Debtor's Memorandum of Law in Support of Confirmation of the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1814] (the "Confirmation Brief"); (ii) the *Debtor's Omnibus Reply to Objections to Confirmation of the Fifth Amended Chapter 11 Plan of Reorganization of Highland Capital Management* [Docket No. 1807]; and (iii) the *Certification of Patrick M. Leathem With Respect to the Tabulation of Votes on the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1772] and *Supplemental Certification of Patrick M. Leathem With Respect to the Tabulation of Votes on the Fifth Amended Plan of Reorgani-*

zation of Highland Capital Management, L.P. [Docket No. 1887] filed on February 3, 2021 (together, the "Voting Certifications").

i. reviewed: (i) the *Notice of Affidavit of Publication* dated December 3, 2020 [Docket No. 1505]; (ii) the *Certificate of Service* dated December 23, 2020 [Docket No. 1630]; (iii) the *Supplemental Certificate of Service* dated December 24, 2020 [Docket No. 1637]; (iv) the *Second Supplemental Certificate of Service* dated December 31, 2020 [Docket No. 1653]; (v) the *Certificate of Service* dated December 23, 2020 [Docket No. 1627]; (vi) the *Certificate of Service* dated January 6, 2021 [Docket No. 1696]; (vii) the *Certificate of Service* dated January 7, 2021 [Docket No. 1699]; (viii) the *Certificate of Service* dated January 7, 2021 [Docket No 1700]; (ix) the *Certificate of Service* dated January 15, 2021 [Docket No. 1761]; (x) the *Certificate of Service* dated January 19, 2021 [Docket No. 1775]; (xi) the *Certificate of Service* dated January 20, 2021 [Docket No. 1787]; (xii) the *Certificate of Service* dated January 26, 2021[Docket No. 1844]; (xiii) the *Certificate of Service* dated January 27, 2021 [Docket No. 1854]; (xiv) the *Certificate of Service* dated February 1, 2021 [Docket No. 1879]; (xv) the *Certificates of Service* dated February 3, 2021 [Docket No. 1891 and 1893]; and (xvi) the *Certificates of Service* dated February 5, 2021 [Docket Nos. 1906, 1907, 1908 and 1909] (collectively, the "Affidavits of Service and Publication");

j. reviewed all filed[3] pleadings, exhibits, statements, and comments regarding approval of the Disclosure

[3] Unless otherwise indicated, use of the term "filed" herein refers also to the service of the applicable document filed on the docket in this Chapter 11 Case, as applicable.

Statement and confirmation of the Plan, including all objections, statements, and reservations of rights;

k. conducted a hearing to consider confirmation of the Plan, which commenced on February 2, 2021, at 9:30 a.m. prevailing Central Time and concluded on February 3, 2021, and issued its oral ruling on February 8, 2021 (collectively, the "Confirmation Hearing");

l. heard the statements and arguments made by counsel in respect of confirmation of the Plan and having considered the record of this Chapter 11 Case and taken judicial notice of all papers and pleadings filed in this Chapter 11 Case; and

m. considered all oral representations, testimony, documents, filings, and other evidence regarding confirmation of the Plan, including (a) all of the exhibits admitted into evidence;[4] (b) the sworn testimony of (i) James P. Seery, Jr., the Debtor's Chief Executive Officer and Chief Restructuring Officer and a member of the Board of Directors of Strand Advisors, Inc. ("Strand"), the Debtor's general partner; (ii) John S. Dubel, a member of the Board of Strand; (iii) Marc Tauber, a Vice President at Aon Financial Services; and (iv) Robert Jason Post, the Chief Compliance Officer of NexPoint Advisors, LP (collectively, the "Witnesses"); (c) the credibility of the Witnesses; and (d) the Voting Certifications.

NOW, THEREFORE, after due deliberation thereon and good cause appearing therefor, the Bank-

[4] The Court admitted the following exhibits into evidence: (a) all of the Debtor's exhibits lodged at Docket No. 1822 (except TTTTT, which was withdrawn by the Debtor); (b) all of the Debtor's exhibits lodged at Docket No. 1866; (c) all of the Debtor's exhibits lodged at Docket No. 1877; (d) all of the Debtor's exhibits lodged at Docket No. 1895; and (e) Exhibits 6-12 and 15-17 offered by Mr. James Dondero and lodged at Docket No. 1874.

ruptcy Court hereby makes and issues the following findings of fact and conclusions of law:

FINDING OF FACT AND CONCLUSIONS OF LAW

1. **Findings of Fact and Conclusions of Law.** The findings and conclusions set forth herein, together with the findings of fact and conclusions of law set forth in the record during the Confirmation Hearing, constitute the Bankruptcy Court's findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52, made applicable to this proceeding pursuant to Bankruptcy Rules 7052 and 9014. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent that any of the following conclusions of law constitute findings of fact, they are adopted as such.

2. **Introduction and Summary of the Plan.** Prior to addressing the specific requirements under the Bankruptcy Code and Bankruptcy Rules with respect to the confirmation of the Plan, the Bankruptcy Court believes it would be useful to first provide the following background of the Debtor's Chapter 11 Case, the parties involved therewith, and some of the major events that have transpired culminating in the filing and solicitation of the Plan of this very unusual case. Before the Bankruptcy Court is the *Debtor's Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.*, filed on November 24, 2020, as modified on January 22, 2021 and again on February 1, 2021. The parties have repeatedly referred to the Plan as an "asset monetization plan" because it involves the orderly wind-down of the Debtor's estate, including the sale of assets and certain of its funds over time, with the Reorganized Debtor continuing to manage certain other funds, subject to the oversight of the Claimant Trust Oversight Board. The Plan provides

for a Claimant Trust to, among other things, manage and monetize the Claimant Trust Assets for the benefit of the Debtor's economic stakeholders. The Claimant Trustee is responsible for this process, among other duties specified in the Plan's Claimant Trust Agreement. There is also anticipated to be a Litigation Sub-trust established for the purpose of pursuing certain avoidance or other causes of action for the benefit of the Debtor's economic constituents.

3. **Confirmation Requirements Satisfied.** The Plan is supported by the Committee and all claimants with Convenience Claims (*i.e.*, general unsecured claims under $1 million) who voted in Class 7. Claimants with Class 8 General Unsecured Claims, however, voted to reject the Plan because, although the Plan was accepted by 99.8% of the amount of Claims in that class, only 17 claimants voted to accept the Plan while 27 claimants voted to reject the Plan. As a result of such votes, and because Mr. Dondero and the Dondero Related Entities (as defined below) objected to the Plan on a variety of grounds primarily relating to the Plan's release, exculpation and injunction provisions, the Bankruptcy Court heard two full days of evidence on February 2 and 3, 2021, and considered testimony from five witnesses and thousands of pages of documentary evidence in determining whether the Plan satisfies the confirmation standards required under the Bankruptcy Code. The Bankruptcy Court finds and concludes that the Plan meets all of the relevant requirements of sections 1123, 1124, and 1129, and other applicable provisions of the Bankruptcy Code, as more fully set forth below with respect to each of the applicable confirmation requirements.

4. **Not Your Garden Variety Debtor.** The Debtor's case is not a garden variety chapter 11 case. The Debtor

is a multibillion-dollar global investment adviser registered with the SEC, pursuant to the Investment Advisers Act of 1940. It was founded in 1993 by James Dondero and Mark Okada. Mark Okada resigned from his role with Highland prior to the bankruptcy case being filed on October 16, 2019 (the "Petition Date"). Mr. Dondero controlled the Debtor as of the Petition Date but agreed to relinquish control of it on or about January 9, 2020, pursuant to an agreement reached with the Committee, as described below. Although Mr. Dondero remained with the Debtor as an unpaid employee/portfolio manager after January 9, 2020, his employment with the Debtor terminated on October 9, 2020. Mr. Dondero continues to work for and/or control numerous non-debtor entities in the complex Highland enterprise.

5. **The Debtor.** The Debtor is headquartered in Dallas, Texas. As of the Petition Date, the Debtor employed approximately 76 employees. The Debtor is privately-owned: (a) 99.5% by the Hunter Mountain Investment Trust; (b) 0.1866% by The Dugaboy Investment Trust, a trust created to manage the assets of Mr. Dondero and his family; (c) 0.0627% by Mark Okada, personally and through family trusts; and (d) 0.25% by Strand, the Debtor's general partner.

6. **The Highland Enterprise.** Pursuant to various contractual arrangements, the Debtor provides money management and advisory services for billions of dollars of assets, including collateralized loan obligation vehicles ("CLOs"), and other investments. Some of these assets are managed by the Debtor pursuant to shared services agreements with certain affiliated entities, including other affiliated registered investment advisors. In fact, there are approximately 2,000 entities in the byzantine complex of entities under the Highland umbrella. None of these

affiliated entities filed for chapter 11 protection. Most, but not all, of these entities are not subsidiaries (direct or indirect) of the Debtor. Many of the Debtor's affiliated companies are offshore entities, organized in jurisdictions such as the Cayman Islands and Guernsey. See Disclosure Statement, at 17-18.

7. **Debtor's Operational History.** The Debtor's primary means of generating revenue has historically been from fees collected for the management and advisory services provided to funds that it manages, plus fees generated for services provided to its affiliates. For additional liquidity, the Debtor, prior to the Petition Date, would sell liquid securities in the ordinary course, primarily through a brokerage account at Jefferies, LLC. The Debtor would also, from time to time, sell assets at non-Debtor subsidiaries and cause those proceeds to be distributed to the Debtor in the ordinary course of business. The Debtor's current Chief Executive Officer, James P. Seery, Jr., credibly testified at the Confirmation Hearing that the Debtor was "run at a deficit for a long time and then would sell assets or defer employee compensation to cover its deficits." The Bankruptcy Court cannot help but wonder if that was necessitated because of enormous litigation fees and expenses incurred by the Debtor due to its culture of litigation—as further addressed below.

8. **Not Your Garden Variety Creditor's Committee.** The Debtor and this chapter 11 case are not garden variety for so many reasons. One of the most obvious standouts in this case is the creditor constituency. The Debtor did not file for bankruptcy because of any of the typical reasons that large companies file chapter 11. For example, the Debtor did not have a large, asset-based secured lender with whom it was in default; it only had relatively

insignificant secured indebtedness owing to Jeffries, with whom it had a brokerage account, and one other entity, Frontier State Bank. The Debtor also did not have problems with its trade vendors or landlords. The Debtor also did not suffer any type of catastrophic business calamity. In fact, the Debtor filed for Chapter 11 protection six months before the onset of the COVID-19 pandemic. Rather, the Debtor filed for Chapter 11 protection due to a myriad of massive, unrelated, business litigation claims that it faced—many of which had finally become liquidated (or were about to become liquidated) after a decade or more of contentious litigation in multiple forums all over the world. The Committee in this case has referred to the Debtor—under its former chief executive, Mr. Dondero—as a "serial litigator." The Bankruptcy Court agrees with that description. By way of example, the members of the Committee (and their history of litigation with the Debtor and others in the Highland complex) are as follows:

a. **The Redeemer Committee of the Highland Crusader Fund (the "Redeemer Committee").** This Committee member obtained an arbitration award against the Debtor in the amount of $190,824,557, inclusive of interest, approximately five months before the Petition Date, from a panel of the American Arbitration Association. It was on the verge of having that award confirmed by the Delaware Chancery Court immediately prior to the Petition Date, after years of disputes that started in late 2008 (and included legal proceedings in Bermuda). This creditor's claim was settled during this Chapter 11 Case in the amount of approximately $137,696,610 (subject to other adjustments and details not relevant for this purpose).

b. **Acis Capital Management, L.P., and Acis Capital Management GP, LLC ("Acis").** Acis was formerly in the Highland complex of companies, but was not affiliated with Highland as of the Petition Date. This Committee member and its now-owner, Joshua Terry, were involved in litigation with the Debtor dating back to 2016. Acis was forced by Mr. Terry (who was a former Highland portfolio manager) into an involuntary chapter 11 bankruptcy in the Bankruptcy Court for the Northern District of Texas, Dallas Division before the Bankruptcy Court in 2018, after Mr. Terry obtained an approximately $8 million arbitration award and judgment against Acis. Mr. Terry ultimately was awarded the equity ownership of Acis by the Bankruptcy Court in the Acis bankruptcy case. Acis subsequently asserted a multi-million dollar claim against Highland in the Bankruptcy Court for Highland's alleged denuding of Acis to defraud its creditors—primarily Mr. Terry. The litigation involving Acis and Mr. Terry dates back to mid-2016 and has continued on with numerous appeals of Bankruptcy Court orders, including one appeal still pending at the Fifth Circuit Court of Appeals. There was also litigation involving Mr. Terry and Acis in the Royal Court of the Island of Guernsey and in a state court in New York. The Acis claim was settled during this Chapter 11 Case, in Bankruptcy Court-ordered mediation, for approximately $23 million (subject to other details not relevant for this purpose), and is the subject of an appeal being pursued by Mr. Dondero.

c. **UBS Securities LLC and UBS AG London Branch ("UBS").** UBS is a Committee member that filed a proof of claim in the amount of $1,039,957,799.40 in this Chapter 11 Case. The UBS

Claim was based on a judgment that UBS received from a New York state court in 2020. The underlying decision was issued in November 2019, after a multi-week bench trial (which had occurred many months earlier) on a breach of contract claim against non-Debtor entities in the Highland complex. The UBS litigation related to activities that occurred in 2008 and 2009. The litigation involving UBS and Highland and affiliates was pending for more than a decade (there having been numerous interlocutory appeals during its history). The Debtor and UBS recently announced an agreement in principle for a settlement of the UBS claim (which came a few months after Bankruptcy Court ordered mediation) which will be subject to a 9019 motion to be filed with the Bankruptcy Court on a future date.

d. **Meta-E Discovery ("Meta-E").** Meta-E is a Committee member that is a vendor who happened to supply litigation and discovery-related services to the Debtor over the years. It had unpaid invoices on the Petition Date of more than $779,000.

It is fair to say that the members of the Committee in this case all have wills of steel. They fought hard before and during this Chapter 11 Case. The members of the Committee, all of whom have volunteered to serve on the Claimant Trust Oversight Board post-confirmation, are highly sophisticated and have had highly sophisticated professionals representing them. They have represented their constituency in this case as fiduciaries extremely well.

9. **Other Key Creditor Constituents.** In addition to the Committee members who were all embroiled in years of litigation with Debtor and its affiliates in various ways, the Debtor has been in litigation with Patrick Daugherty, a former limited partner and employee of the Debtor, for

many years in both Delaware and Texas state courts. Mr. Daugherty filed an amended proof of claim in this Chapter 11 Case for $40,710,819.42 relating to alleged breaches of employment-related agreements and for defamation arising from a 2017 press release posted by the Debtor. The Debtor and Mr. Daugherty recently announced a settlement of Mr. Daugherty's claim pursuant to which he will receive $750,000 in cash on the Effective Date of the Plan, an $8.25 million general unsecured claim, and a $2.75 million subordinated claim (subject to other details not relevant for this purpose). Additionally, entities collectively known as "HarbourVest" invested more than $70 million with an entity in the Highland complex and asserted a $300 million proof of claim against the Debtor in this case, alleging, among other things, fraud and RICO violations. HarbourVest's claim was settled during the bankruptcy case for a $45 million general unsecured claim and a $35 million subordinated claim, and that settlement is also being appealed by a Dondero Entity.

10. **Other Claims Asserted.** Other than the Claims just described, most of the other Claims in this Chapter 11 Case are Claims asserted against the Debtor by: (a) entities in the Highland complex—most of which entities the Bankruptcy Court finds to be controlled by Mr. Dondero; (b) employees who contend they are entitled to large bonuses or other types of deferred compensation; and (c) numerous law firms that worked for the Debtor prior to the Petition Date and had outstanding amounts due for their prepetition services.

11. **Not Your Garden Variety Post-Petition Corporate Governance Structure.** Yet another reason this is not your garden variety chapter 11 case is its post-petition corporate governance structure. Immediately

from its appointment, the Committee's relationship with the Debtor was contentious at best. First, the Committee moved for a change of venue from Delaware to Dallas. Second, the Committee (and later, the United States Trustee) expressed its then-desire for the appointment of a chapter 11 trustee due to its concerns over and distrust of Mr. Dondero, his numerous conflicts of interest, and his history of alleged mismanagement (and perhaps worse).

12. **Post-Petition Corporate Governance Settlement with Committee.** After spending many weeks under the threat of the potential appointment of a trustee, the Debtor and Committee engaged in substantial and lengthy negotiations resulting in a corporate governance settlement approved by the Bankruptcy Court on January 9, 2020.[5] As a result of this settlement, among other things, Mr. Dondero relinquished control of the Debtor and resigned his positions as an officer or director of the Debtor and its general partner, Strand. As noted above, Mr. Dondero agreed to this settlement pursuant a stipulation he executed,[6] and he also agreed not to cause any Related Entity (as defined in the Settlement Motion) to terminate any agreements with the Debtor. The January 9 Order also (a) required that the Bankruptcy Court serve as "gatekeeper" prior to the commencement of any litigation against the three independent board members

---

[5] This order is hereinafter referred to as the "January 9 Order" and was entered by the Court on January 9, 2020 [Docket No. 339] pursuant to the *Motion of the Debtor to Approve Settlement with Official Committee of Unsecured Creditors Regarding the Governance of the Debtor and Procedures for Operation in the Ordinary Course* [Docket No. 281] (the "Settlement Motion").

[6] See *Stipulation in Support of Motion of the Debtor for Approval of Settlement With the Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in Ordinary Course* [Docket No. 338] (the "Stipulation").

appointed to oversee and lead the Debtor's restructuring in lieu of Mr. Dondero and (b) provided for the exculpation of those board members by limiting claims subject to the "gatekeeper" provision to those alleging willful misconduct and gross negligence.

13. **Appointment of Independent Directors.** As part of the Bankruptcy Court-approved settlement, three eminently qualified independent directors were chosen to lead Highland through its Chapter 11 Case. They are: James P. Seery, Jr., John S. Dubel (each chosen by the Committee), and Retired Bankruptcy Judge Russell Nelms. These three individuals are each technically independent directors of Strand (Mr. Dondero had previously been the sole director of Strand and, thus, the sole person in ultimate control of the Debtor). The three independent board members' resumes are in evidence. The Bankruptcy Court later approved Mr. Seery's appointment as the Debtor's Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative. Suffice it to say that this settlement and the appointment of the independent directors changed the entire trajectory of the case and saved the Debtor from the appointment of a trustee. The Bankruptcy Court and the Committee each trusted the independent directors. They were the right solution at the right time. Because of the unique character of the Debtor's business, the Bankruptcy Court believed the appointment of three qualified independent directors was a far better outcome for creditors than the appointment of a conventional chapter 11 trustee. Each of the independent directors brought unique qualities to the table. Mr. Seery, in particular, knew and had vast experience at prominent firms with high-yield and distressed investing similar to the Debtor's business. Mr. Dubel had 40 years of experience restructuring large

complex businesses and serving on boards in this context. And Retired Judge Nelms had not only vast bankruptcy experience but seemed particularly well-suited to help the Debtor maneuver through conflicts and ethical quandaries. By way of comparison, in the chapter 11 case of Acis, the former affiliate of Highland that the Bankruptcy Court presided over and which company was much smaller in size and scope than Highland (managing only 5-6 CLOs), the creditors elected a chapter 11 trustee who was not on the normal trustee rotation panel in this district but, rather, was a nationally known bankruptcy attorney with more than 45 years of large chapter 11 experience. While the Acis chapter 11 trustee performed valiantly, he was sued by entities in the Highland complex shortly after he was appointed (which the Bankruptcy Court had to address). The Acis trustee was also unable to persuade the Debtor and its affiliates to agree to any actions taken in the case, and he finally obtained confirmation of Acis' chapter 11 plan over the objections of the Debtor and its affiliates on his fourth attempt (which confirmation was promptly appealed).

14. **Conditions Required by Independent Directors.** Given the experiences in Acis and the Debtor's culture of constant litigation, it was not as easy to get such highly qualified persons to serve as independent board members and, later, as the Debtor's Chief Executive Officer, as it would be in an ordinary chapter 11 case. The independent board members were stepping into a morass of problems. Naturally, they were worried about getting sued no matter how defensible their efforts—given the litigation culture that enveloped Highland historically. Based on the record of this Case and the proceedings in the Acis chapter 11 case, it seemed as though everything always ended in litigation at Highland. The Bankruptcy

Court heard credible testimony that none of the independent directors would have taken on the role of independent director without (1) an adequate directors and officers' ("D&O") insurance policy protecting them; (2) indemnification from Strand that would be guaranteed by the Debtor; (3) exculpation for mere negligence claims; and (4) a gatekeeper provision prohibiting the commencement of litigation against the independent directors without the Bankruptcy Court's prior authority. This gatekeeper provision was also included in the Bankruptcy Court's order authorizing the appointment of Mr. Seery as the Debtor's Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative entered on July 16, 2020.[7] The gatekeeper provisions in both the January 9 Order and July 16 Order are precisely analogous to what bankruptcy trustees have pursuant to the so-called "Barton Doctrine" (first articulated in an old Supreme Court case captioned *Barton* v. *Barbour*, 104 U.S. 126 (1881)). The Bankruptcy Court approved all of these protections in the January 9 Order and the July 16 Order, and no one appealed either of those orders. As noted above, Mr. Dondero signed the Stipulation that led to the settlement that was approved by the January 9 Order. The Bankruptcy Court finds that, like the Committee, the independent board members have been resilient and unwavering in their efforts to get the enormous problems in this case solved. They seem to have at all times negotiated hard and in good faith, which culminated in the proposal of the Plan currently before the Bank-

[7] See *Order Approving the Debtor's Motion Under Bankruptcy Code Sections 105(a) and 363(b) Authorizing Retention of James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative Nunc Pro Tunc to March 15, 2020* [Docket No. 854] entered on July 16, 2020 (the "July 16 Order")

ruptcy Court. As noted previously, they completely changed the trajectory of this case.

15. **Not Your Garden Variety Mediators.** And still another reason why this was not your garden variety case was the mediation effort. In the summer of 2020, roughly nine months into the chapter 11 case, the Bankruptcy Court ordered mediation among the Debtor, Acis, UBS, the Redeemer Committee, and Mr. Dondero. The Bankruptcy Court selected co-mediators because mediation among these parties seemed like such a Herculean task—especially during COVID-19 where people could not all be in the same room. Those co-mediators were: Retired Bankruptcy Judge Alan Gropper from the Southern District of New York, who had a distinguished career presiding over complex chapter 11 cases, and Ms. Sylvia Mayer, who likewise has had a distinguished career, first as a partner at a preeminent law firm working on complex chapter 11 cases, and subsequently as a mediator and arbitrator in Houston, Texas. As noted earlier, the Redeemer Committee and Acis claims were settled during the mediation—which seemed nothing short of a miracle to the Bankruptcy Court—and the UBS claim was settled several months later and the Bankruptcy Court believes the ground work for that ultimate settlement was laid, or at least helped, through the mediation. And, as earlier noted, other significant claims have been settled during this case, including those of HarbourVest (who asserted a $300 million claim) and Patrick Daugherty (who asserted a $40 million claim). The Bankruptcy Court cannot stress strongly enough that the resolution of these enormous claims—and the acceptance by all of these creditors of the Plan that is now before the Bankruptcy Court—seems nothing short of a miracle. It was more than a year in the making.

16. **Not Your Garden Variety Plan Objectors (That Is, Those That Remain).** Finally, a word about the current, remaining objectors to the Plan before the Bankruptcy Court. Once again, the Bankruptcy Court will use the phrase "not your garden variety", which phrase applies to this case for many reasons. Originally, there were over a dozen objections filed to the Plan. The Debtor then made certain amendments or modifications to the Plan to address some of these objections, none of which require further solicitation of the Plan for reasons set forth in more detail below. The only objectors to the Plan left at the time of the Confirmation Hearing were Mr. Dondero [Docket No. 1661] and entities that the Bankruptcy Court finds are owned and/or controlled by him and that filed the following objections:

a. *Objection to Confirmation of the Debtor's Fifth Amended Plan of Reorganization* (filed by Get Good Trust and The Dugaboy Investment Trust) [Docket No. 1667];

b. *Objection to Confirmation of Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (filed by Highland Capital Management Fund Advisors, L.P., Highland Fixed Income Fund, Highland Funds I and its series, Highland Funds II and its series, Highland Global Allocation Fund, Highland Healthcare Opportunities Fund, Highland Income Fund, Highland Merger Arbitrate Fund, Highland Opportunistic Credit Fund, Highland Small-Cap Equity Fund, Highland Socially Responsible Equity Fund, Highland Total Return Fund, Highland/iBoxx Senior Loan ETF, NexPoint Advisors, L.P., NexPoint Capital, Inc., NexPoint Real Estate Strategies Fund, NexPoint Strategic Opportunities Fund)* [Docket No. 1670];

c. *A Joinder to the Objection filed at 1670 by: NexPoint Real Estate Finance Inc., NexPoint Real Estate Capital, LLC, NexPoint Residential Trust, Inc., NexPoint Hospitality Trust, NexPoint Real Estate Partners, LLC, NexPoint Multifamily Capital Trust, Inc., VineBrook Homes Trust, Inc., NexPoint Real Estate Advisors, L.P., NexPoint Real Estate Advisors II, L.P., NexPoint Real Estate Advisors III, L.P., NexPoint Real Estate Advisors IV, L.P., NexPoint Real Estate Advisors V, L.P., NexPoint Real Estate Advisors VI, L.P., NexPoint Real Estate Advisors VII, L.P., NexPoint Real Estate Advisors VIII, L.P., and any funds advised by the foregoing* [Docket No. 1677];

d. *NexPoint Real Estate Partners LLC's Objection to Debtor's Fifth Amended Plan of Reorganization (filed by NexPoint Real Estate Partners LLC f/k/a HCRE Partners LLC)* [Docket No. 1673]; and

e. *NexBank's Objection to Debtor's Fifth Amended Plan of Reorganization (filed by NexBank Title, Inc., NexBank Securities, Inc., NexBank Capital, Inc., and NexBank)* [Docket No. 1676]. The entities referred to in (i) through (v) of this paragraph are hereinafter referred to as the "Dondero Related Entities").

17. **Questionability of Good Faith as to Outstanding Confirmation Objections.** Mr. Dondero and the Dondero Related Entities technically have standing to object to the Plan, but the remoteness of their economic interests is noteworthy, and the Bankruptcy Court questions the good faith of Mr. Dondero's and the Dondero Related Entities' objections. In fact, the Bankruptcy Court has good reason to believe that these parties are not objecting to protect economic interests they have in the Debtor but to be disruptors. Mr. Dondero wants his company back. This is understandable, but it is not a good faith

basis to lob objections to the Plan. As detailed below, the Bankruptcy Court has slowed down plan confirmation multiple times and urged the parties to talk to Mr. Dondero in an attempt to arrive at what the parties have repeatedly referred to as a "grand bargain," the ultimate goal to resolve the Debtor's restructuring. The Debtor and the Committee represent that they have communicated with Mr. Dondero regarding a grand bargain settlement, and the Bankruptcy Court believes that they have.

18. **Remote Interest of Outstanding Confirmation Objectors.** To be specific about the remoteness of Mr. Dondero's and the Dondero Related Entities' interests, the Bankruptcy Court will address them each separately. First, Mr. Dondero has a pending objection to the Plan. Mr. Dondero's only economic interest with regard to the Debtor is an unliquidated indemnification claim (and, based on everything the Bankruptcy Court has heard, his indemnification claims would be highly questionable at this juncture). Mr. Dondero owns no equity in the Debtor directly. Mr. Dondero owns the Debtor's general partner, Strand, which in turn owns a quarter percent of the total equity in the Debtor. Second, a joint objection has been filed by The Dugaboy Trust ("Dugaboy") and the Get Good Trust ("Get Good"). The Dugaboy Trust was created to manage the assets of Mr. Dondero and his family and owns a 0.1866% limited partnership interest in the Debtor. See Disclosure Statement at 7, n.3. The Bankruptcy Court is not clear what economic interest the Get Good Trust has, but it likewise seems to be related to Mr. Dondero. Get Good filed three proofs of claim relating to a pending federal tax audit of the Debtor's 2008 return, which the Debtor believes arise from Get Good's equity security interests and are subject to subordination

as set forth in its Confirmation Brief. Dugaboy filed three claims against the Debtor: (a) an administrative claim relating to the Debtor's alleged postpetition management of Multi-Strat Credit Fund, L.P., (b) a prepetition claim against a subsidiary of the Debtor for which it seeks to pierce the corporate veil, each of which the Debtor maintains are frivolous in the Confirmation Brief, and (c) a claim arising from its equity security interest in the Debtor, which the Debtor asserts should be subordinated. Another group of objectors that has joined together in one objection is what the Bankruptcy Court will refer to as the "Highland Advisors and Funds." See Docket No. 1863. The Bankruptcy Court understands they assert disputed administrative expense claims against the estate that were filed shortly before the Confirmation Hearing on January 23, 2021 [Docket No. 1826], and during the Confirmation Hearing on February 3, 2021 [Docket No. 1888]. At the Confirmation Hearing, Mr. Post testified on behalf of the Highland Advisors and Funds that the Funds have independent board members that run the Funds, but the Bankruptcy Court was not convinced of their independence from Mr. Dondero because none of the so-called independent board members have ever testified before the Bankruptcy Court and all have been engaged with the Highland complex for many years. Notably, the Court questions Mr. Post's credibility because, after more than 12 years of service, he abruptly resigned from the Debtor in October 2020 at the exact same time that Mr. Dondero resigned at the Board of Directors' request, and he is currently employed by Mr. Dondero. Moreover, Dustin Norris, a witness in a prior proceeding (whose testimony was made part of the record at the Confirmation Hearing), recently testified on behalf of the Highland Advisors and Funds in another proceeding that Mr. Dondero owned and/or controlled these entities.

Finally, various NexBank entities objected to the Plan. The Bankruptcy Court does not believe they have liquidated claims against the Debtor. Mr. Dondero appears to be in control of these entities as well.

19. **Background Regarding Dondero Objecting Parties.** To be clear, the Bankruptcy Court has allowed all these objectors to fully present arguments and evidence in opposition to confirmation, even though their economic interests in the Debtor appear to be extremely remote and the Bankruptcy Court questions their good faith. Specifically, the Bankruptcy Court considers them all to be marching pursuant to the orders of Mr. Dondero. In the recent past, Mr. Dondero has been subject to a temporary restraining order and preliminary injunction by the Bankruptcy Court for interfering with Mr. Seery's management of the Debtor in specific ways that were supported by evidence. Around the time that this all came to light and the Bankruptcy Court began setting hearings on the alleged interference, Mr. Dondero's company phone, which he had been asked to turn in to Highland, mysteriously went missing. The Bankruptcy Court merely mentions this in this context as one of many reasons that the Bankruptcy Court has to question the good faith of Mr. Dondero and his affiliates in raising objections to confirmation of the Plan.

20. **Other Confirmation Objections.** Other than the objections filed by Mr. Dondero and the Dondero Related Entities, the only other pending objection to the Plan is the *United States Trustee's Limited Objection to Confirmation of Debtor's Fifth Amended Plan of Reorganization* [Docket No. 1671], which objected to the Plan's exculpation, injunction, and Debtor release provisions. In juxtaposition to these pending objections, the Bank-

ruptcy Court notes that the Debtor resolved the following objections to the Plan:

a. *CLO Holdco, Ltd.'s Joinder to Objection to Confirmation of Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. and Supplemental Objections to Plan Confirmation* [Docket No. 1675]. This Objection has been resolved pursuant to mutually agreed language by the parties set forth in paragraph VV of the Confirmation Order;

b. *Objection of Dallas County, City of Allen, Allen ISD, City of Richardson, and Kaufman County to Confirmation of the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1662]. This Objection has been resolved pursuant to mutually agreed language by the parties set forth in paragraph QQ of the Confirmation Order;

c. *Senior Employees' Limited Objection to Debtor's Fifth Amended Plan of Reorganization (filed by Scott Ellington, Thomas Surgent, Frank Waterhouse, Isaac Leventon*) [Docket No. 1669]. This Objection has been resolved pursuant to mutually agreed language by the parties set forth in paragraph 82 and paragraphs RR and SS of the Confirmation Order;

d. *Limited Objection of Jack Yang and Brad Borud to Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1666] and the amended joinder filed by Davis Deadman, Paul Kauffman and Todd Travers [Docket No. 1679]. This Objection and the amended joinder were resolved by agreement of the parties pursuant to modifications to the Plan filed by the Debtor;

e. *United States' (IRS) Limited Objection to Debtor's Fifth Amended Plan of Reorganization* [Docket No. 1668]. This Objection has been resolved

pursuant to mutually agreed language by the parties set forth in paragraphs TT and UU of the Confirmation Order; and

f. *Patrick Hagaman Daugherty's Objection to Confirmation of Fifth Amended Plan of* Reorganization [Docket No. 1678]. This objection was resolved by the parties pursuant to the settlement of Mr. Daugherty's claim announced on the record of the Confirmation Hearing.

21. **Capitalized Terms.** Capitalized terms used herein, but not defined herein, shall have the respective meanings attributed to such terms in the Plan and the Disclosure Statement, as applicable.

22. **Jurisdiction and Venue.** The Bankruptcy Court has jurisdiction over the Debtor's Chapter 11 Case pursuant to 28 U.S.C. §§157 and 1334. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2). Venue of this proceeding and this Chapter 11 Case is proper in this district and in the Bankruptcy Court pursuant to 28 U.S.C. §§ 1408 and 1409.

23. **Chapter 11 Petition.** On the Petition Date, the Debtor commenced a voluntary case under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware, which case was transferred to the Bankruptcy Court on December 19, 2019. The Debtor continues to operate its business and manage its property as debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this Chapter 11 Case. The Office of the United States Trustee appointed the Committee on October 29, 2019.

24. **Judicial Notice.** The Bankruptcy Court takes judicial notice of the docket in this Chapter 11 Case maintained by the clerk of the Bankruptcy Court and the

court-appointed claims agent, Kurtzman Carson Consultants LLC ("KCC"), including, without limitation, all pleadings, notices, and other documents filed, all orders entered, and all evidence and arguments made, proffered or adduced at the hearings held before the Bankruptcy Court during this Chapter 11 Case, including, without limitation, the hearing to consider the adequacy of the Disclosure Statement and the Confirmation Hearing, as well as all pleadings, notices, and other documents filed, all orders entered, and all evidence and arguments made, proffered, or adduced at hearings held before the Bankruptcy Court or the District Court for the Northern District of Texas in connection with an adversary proceeding or appellate proceeding, respectively, related to this Chapter 11 Case.

25. **Plan Supplement Documents.** Prior to the Confirmation Hearing, the Debtor filed each of the Plan Supplements. The Plan Supplements contain, among other documents, the Retained Causes of Action, the Claimant Trust Agreement, the Litigation Sub-Trust Agreement, the Senior Employee Stipulation, the Related Entity List, the Schedule of Employees, the Reorganized Limited Partnership Agreement, supplements to the Liquidation Analysis/Financial Projections, the Schedule of Contracts and Leases to be Assumed, and the other Plan Documents set forth therein (collectively, the "Plan Supplement Documents").

26. **Retained Causes of Action Adequately Preserved.** The Bankruptcy Court finds that the list of Retained Causes of Action included in the Plan Supplements sufficiently describes all potential Retained Causes of Action, provides all persons with adequate notice of any Causes of Action regardless of whether any specific claim to be brought in the future is listed therein or

whether any specific potential defendant or other party is listed therein, and satisfies applicable law in all respects to preserve all of the Retained Causes of Action. The definition of the Causes of Action and Schedule of Retained Causes of Action, and their inclusion in the Plan, specifically and unequivocally preserve the Causes of Action for the benefit of the Reorganized Debtor, the Claimant Trust, or the Litigation Sub-Trust, as applicable.

27. **Plan Modifications Are Non-Material.** In addition to the Plan Supplements, the Debtor made certain non-material modifications to the Plan, which are reflected in (i) the *Redline of Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* filed on January 22, 2021 [Docket No. 1809], and (ii) Exhibit B to the *Debtor's Notice of Filing of Plan Supplement to Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* filed on February 1, 2021 [Docket No. 1875] (collectively, the "Plan Modifications"). Section 1127(a) of the Bankruptcy Code provides that a plan proponent may modify its plan at any time before confirmation so long as such modified plan meets the requirements of sections 1122 and 1123 of the Bankruptcy Code. None of the modifications set forth in the Plan Supplements or the Plan Modifications require any further solicitation pursuant to sections 1125, 1126, or 1127 of the Bankruptcy Code and Bankruptcy Rule 3019, because, among other things, they do not materially adversely change the treatment of the claims of any creditors or interest holders who have not accepted, in writing, such supplements and modifications. Among other things, there were changes to the projections that the Debtor filed shortly before the Confirmation Hearing (which included projected distributions to creditors and a comparison of projected distributions under the Plan to

potential distributions under a hypothetical chapter 7 liquidation). The Plan Supplements and Plan Modifications did not mislead or prejudice any creditors or interest holders nor do they require that Holders of Claims or Equity Interests be afforded an opportunity to change previously cast votes to accept or reject the Plan. Specifically, the Amended Liquidation Analysis/Financial Projections filed on February 1, 2021 [Docket No. 1875] do not constitute any material adverse change to the treatment of any creditors or interest holders but, rather, simply update the estimated distributions based on Claims that were settled in the interim and provide updated financial data. The filing and notice of the Plan Supplements and Plan Modifications were appropriate and complied with the requirements of section 1127(a) of the Bankruptcy Code and the Bankruptcy Rules, and no other solicitation or disclosure or further notice is or shall be required. The Plan Supplements and Plan Modifications each became part of the Plan pursuant section 1127(a) of the Bankruptcy Code. The Debtor or Reorganized Debtor, as applicable, is authorized to modify the Plan or Plan Supplement Documents following entry of this Confirmation Order in a manner consistent with section 1127(b) of the Bankruptcy Code, the Plan, and, if applicable, the terms of the applicable Plan Supplement Document.

28. **Notice of Transmittal, Mailing and Publication of Materials.** As is evidenced by the Voting Certifications and the Affidavits of Service and Publication, the transmittal and service of the Plan, the Disclosure Statement, Ballots, and Confirmation Hearing Notice were adequate and sufficient under the circumstances, and all parties required to be given notice of the Confirmation Hearing (including the deadline for filing and serving objections to the confirmation of the Plan) have

been given due, proper, timely, and adequate notice in accordance with the Disclosure Statement Order and in compliance with the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, and applicable non-bankruptcy law, and such parties have had an opportunity to appear and be heard with respect thereto. No other or further notice is required. The publication of the Confirmation Hearing Notice, as set forth in the *Notice of Affidavit of Publication* dated December 3, 2020 [Docket No. 1505], complied with the Disclosure Statement Order.

29. **Voting.** The Bankruptcy Court has reviewed and considered the Voting Certifications. The procedures by which the Ballots for acceptance or rejection of the Plan were distributed and tabulated, including the tabulation as subsequently amended to reflect the settlement of certain Claims to be Allowed in Class 7, were fairly and properly conducted and complied with the Disclosure Statement Order, the Bankruptcy Code, the Bankruptcy Rules, and the Local Rules.

30. **Bankruptcy Rule 3016(a).** In accordance with Bankruptcy Rule 3016(a), the Plan is dated and identifies the Debtor as the proponent of the Plan.

31. **Plan Compliance with Bankruptcy Code (11 U.S.C. § 1129(a)(1)).** As set forth below, the Plan complies with all of the applicable provisions of the Bankruptcy Code, thereby satisfying section 1129(a)(1) of the Bankruptcy Code.

32. **Proper Classification (11 U.S.C. §§ 1122, 1123(a)(1)).** Section 1122 of the Bankruptcy Code provides that a plan may place a claim or interest in a particular class only if such claim or interest is substantially similar to the other claims or interest of such class. The Claims and Equity Interests placed in each Class are substantially similar to other Claims and Equity Inter-

ests, as the case may be, in each such Class. Valid business, factual, and legal reasons exist for separately classifying the various Classes of Claims and Equity Interests created under the Plan, and such Classes do not unfairly discriminate between Holders of Claims and Equity Interests.

33. **Classification of Secured Claims.** Class 1 (Jefferies Secured Claim) and Class 2 (Frontier Secured Claim) each constitute separate secured claims held by Jefferies LLC and Frontier State Bank, respectively, and it is proper and consistent with section 1122 of the Bankruptcy Code to separately classify the claims of these secured creditors. Class 3 (Other Secured Claims) consists of other secured claims (to the extent any exist) against the Debtor, are not substantially similar to the Secured Claims in Class 1 or Class 2, and are also properly separately classified.

34. **Classification of Priority Claims.** Class 4 (Priority Non-Tax Claims) consists of Claims entitled to priority under section 507(a), other than Priority Tax Claims, and are properly separately classified from non-priority unsecured claims. Class 5 (Retained Employee Claims) consists of the potential claims of employees who may be retained by the Debtor on the Effective Date, which claims will be Reinstated under the Plan, are not substantially similar to other Claims against the Debtor, and are properly classified.

35. **Classification of Unsecured Claims.** Class 6 (PTO Claims) consists solely of the claims of the Debtor's employees for unpaid paid time off in excess of the $13,650 statutory cap amount under sections 507(a)(4) and (a)(5) of the Bankruptcy Code and are dissimilar from other unsecured claims in Class 7 and Class 8. Class 7 (Convenience Claims) allows holders of eligible

and liquidated Claims (below a certain threshold dollar amount) to receive a cash payout of the lesser of 85% of the Allowed amount of the creditor's Claim or such holder's *pro rata* share of the Convenience Claims Cash Pool. Class 7 (Convenience Claims) are provided for administrative convenience purposes in order to allow creditors, most of whom are either trade creditors or holders of professional claims, to receive treatment provided under Class 7 in lieu of the treatment of Class 8 (General Unsecured Claims). The Plan also provides for reciprocal "opt out" mechanisms to allow holders of Class 7 Claims to elect to receive the treatment for Class 8 Claims. Class 8 creditors primarily constitute the litigation claims of the Debtor. Class 8 Creditors will receive Claimant Trust Interests which will be satisfied pursuant to the terms of the Plan. Class 8 also contains an "opt out" mechanism to allow holders of liquidated Class 8 Claims at or below a $1 million threshold to elect to receive the treatment of Class 7 Convenience Claims. The Claims in Class 7 (primarily trade and professional Claims against the Debtor) are not substantially similar to the Claims in Class 8 (primarily the litigation Claims against the Debtor), and are appropriately separately classified. Valid business reasons also exist to classify creditors in Class 7 separately from creditors in Class 8. Class 7 creditors largely consist of liquidated trade or service providers to the Debtor. In addition, the Claims of Class 7 creditors are small relative to the large litigation claims in Class 8. Furthermore, the Class 8 Claims were overwhelmingly unliquidated when the Plan was filed. The nature of the Class 7 Claims as being largely liquidated created an expectation of expedited payment relative to the largely unliquidated Claims in Class 8, which consists in large part of parties who have been engaged in years, and in some cases over a decade of litigation with the Debtor.

Separate classification of Class 7 and Class 8 creditors was the subject of substantial arm's-length negotiations between the Debtor and the Committee to appropriately reflect these relative differences.

36. **Classification of Equity Interests.** The Plan properly separately classifies the Equity Interests in Class 10 (Class B/C Limited Partnership Interests) from the Equity Interests in Class 11 (Class A Limited Partnership Interests) because they represent different types of equity security interests in the Debtor and different payment priorities.

37. **Elimination of Vacant Classes.** Section III.C of the Plan provides for the elimination of Classes that do not have at least one holder of a Claim or Equity Interest that is Allowed in an amount greater than zero for purposes of voting to accept or reject the Plan, and are disregarded for purposes of determining whether the Plan satisfies section 1129(a)(8) of the Bankruptcy Code with respect to such Class. The purpose of this provision is to provide that a Class that does not have voting members shall not be included in the tabulation of whether that Class has accepted or rejected the Plan. Pursuant to the Voting Certifications, the only voting Class of Claims or Equity Interests that did not have any members is Class 5 (Retained Employees). As noted above, Class 5 does not have any voting members because any potential Claims in Class 5 would not arise, except on account of any current employees of the Debtor who may be employed as of the Effective Date, which is currently unknown. Thus, the elimination of vacant Classes provided in Article III.C of the Plan does not violate section 1122 of the Bankruptcy Code. Class 5 is properly disregarded for purposes of determining whether or not the Plan has been accepted under Bankruptcy Code section 1129(a)(8)

because there are no members in that Class. However, the Plan properly provides for the treatment of any Claims that may potentially become members of Class 5 as of the Effective Date in accordance with the terms of the Plan. The Plan therefore satisfies section 1122 of the Bankruptcy Code.

38. **Classification of Claims and Designation of Non-Classified Claims (11 U.S.C. §§1122, 1123(a)(1)).** Section 1123(a)(1) of the Bankruptcy Code requires that the Plan specify the classification of claims and equity security interests pursuant to section 1122 of the Bankruptcy Code, other than claims specified in sections 507(a)(2), 507(a)(3), or 507(a)(8) of the Bankruptcy Code. In addition to Administrative Claims, Professional Fee Claims, and Priority Tax Claims, each of which need not be classified pursuant to section 1123(a)(1) of the Bankruptcy Code, the Plan designates eleven (11) Classes of Claims and Equity Interests. The Plan satisfies sections 1122 and 1123(a)(1) of the Bankruptcy Code.

39. **Specification of Unimpaired Classes (11 U.S.C. §1123(a)(2)).** Article III of the Plan specifies that each of Class 1 (Jefferies Secured Claim), Class 3 (Other Secured Claims), Class 4 (Priority Non-Tax Claims), Class 5 (Retained Employee Claims), and Class 6 (PTO Claims) are Unimpaired under the Plan. Thus, the requirement of section 1123(a)(2) of the Bankruptcy Code is satisfied.

40. **Specification of Treatment of Impaired Classes (11 U.S.C. §1123(a)(3)).** Article III of the Plan designates each of Class 2 (Frontier Secured Claim), Class 7 (Convenience Claims), Class 8 (General Unsecured Claims), Class 9 (Subordinated Claims), Class 10 (Class B/C Limited Partnership Interests), and Class 11 (Class A Limited Partnership Interests) as Impaired and specifies the treatment of Claims and Equity Interests in such

Classes. Thus, the requirement of section 1123(a)(3) of the Bankruptcy Code is satisfied.

41. **No Discrimination (11 U.S.C. § 1123(a)(4)).** The Plan provides for the same treatment by the Plan proponent for each Claim or Equity Interest in each respective Class unless the Holder of a particular Claim or Equity Interest has agreed to a less favorable treatment of such Claim or Equity Interest. The Plan satisfies this requirement because Holders of Allowed Claims or Equity Interests in each Class will receive the same rights and treatment as other Holders of Allowed Claims or Equity Interests within such holder's respective class, subject only to the voluntary "opt out" options afforded to members of Class 7 and Class 8 in accordance with the terms of the Plan. Thus, the requirement of section 1123(a)(4) of the Bankruptcy Code is satisfied.

42. **Implementation of the Plan (11 U.S.C. § 1123(a)(5)).** Article IV of the Plan sets forth the means for implementation of the Plan which includes, but is not limited to, the establishment of: (i) the Claimant Trust; (ii) the Litigation Sub-Trust; (iii) the Reorganized Debtor; and (iv) New GP LLC, in the manner set forth in the Plan Documents, the forms of which are included in the Plan Supplements.

a. **The Claimant Trust.** The Claimant Trust Agreement provides for the management of the Claimant Trust, as well as the Reorganized Debtor with the Claimant Trust serving as the managing member of New GP LLC (a wholly-owned subsidiary of the Claimant Trust that will manage the Reorganized Debtor as its general partner). The Claimant Trust, the Claimant Trustee, the management and monetization of the Claimant Trust Assets, and the management of the Reorganized Debtor (through the

Claimant Trust's role as managing member of New GP LLC) and the Litigation Sub-Trust will all be managed and overseen by the Claimant Trust Oversight Committee. Additionally, the Plan provides for the transfer to the Claimant Trust of all of the Debtor's rights, title, and interest in and to all of the Claimant Trust Assets in accordance with section 1141 of the Bankruptcy Code and for the Claimant Trust Assets to automatically vest in the Claimant Trust free and clear of all Claims, Liens, encumbrances, or interests subject only to the Claimant Trust Interests and the Claimant Trust Expenses, as provided for in the Claimant Trust Agreement. The Claimant Trust will administer the Claimant Trust Assets as provided under the Plan and the Claimant Trust Agreement contained in the Plan Supplements.

b. **The Litigation Sub-Trust.** The Plan and the Litigation Sub-Trust Agreement provide for the transfer to the Litigation Sub-Trust all of the Claimant Trust's rights, title, and interest in and to all of the Estate Claims (as transferred to the Claimant Trust by the Debtor) in accordance with section 1141 of the Bankruptcy Code and for the Estate Claims to automatically vest in the Litigation Sub-Trust free and clear of all Claims, Liens, encumbrances, or interests subject only to the Litigation Sub-Trust Interests and the Litigation Sub-Trust Expenses, as provided for in the Litigation Sub-Trust Agreement. The Litigation Trustee is charged with investigating, pursuing, and otherwise resolving any Estate Claims (including those with respect to which the Committee has standing to pursue prior to the Effective Date pursuant to the January 9 Order) pursuant to the terms of the Litigation Sub-Trust Agreement and the

Plan, regardless of whether any litigation with respect to any Estate Claim was commenced by the Debtor or the Committee prior to the Effective Date.

c. **The Reorganized Debtor.** The Reorganized Debtor will administer the Reorganized Debtor Assets, which includes managing the wind down of the Managed Funds.

The precise terms governing the execution of these restructuring transactions are set forth in greater detail in the applicable definitive documents included in the Plan Supplements, including the Claimant Trust Agreement, the Litigation Sub-Trust Agreement, and the Schedule of Retained Causes of Action. The Plan, together with the documents and forms of agreement included in the Plan Supplements, provides a detailed blueprint for the transactions contemplated by the Plan. The Plan's various mechanisms provide for the Debtor's continued management of its business as it seeks to liquidate the Debtor's assets, wind down its affairs, and pay the Claims of the Debtor's creditors. Upon full payment of Allowed Claims, plus interest as provided in the Plan, any residual value would then flow to the holders of Class 10 (Class B/C Limited Partnership Interests), and Class 11 (Class A Limited Partnership Interests). Finally, Mr. Seery testified that the Debtor engaged in substantial and arm's length negotiations with the Committee regarding the Debtor's post-Effective Date corporate governance, as reflected in the Plan. Mr. Seery testified that he believes the selection of the Claimant Trustee, Litigation Trustee, and members of the Claimant Trust Oversight Board are in the best interests of the Debtor's economic constituents. Thus, the requirements of section 1123(a)(5) of the Bankruptcy Code are satisfied.

43. **Non-Voting Equity Securities (11 U.S.C. §1123(a)(6)).** The Debtor is not a corporation and the charter documents filed in the Plan Supplements otherwise comply with section 1123(a)(6) of the Bankruptcy Code. Therefore, the requirement of section 1123(a)(6) of the Bankruptcy Code is satisfied.

44. **Selection of Officers and Directors (11 U.S.C. §1123(a)(7)).** Article IV of the Plan provides for the Claimant Trust to be governed and administered by the Claimant Trustee. The Claimant Trust, the management of the Reorganized Debtor, and the management and monetization of the Claimant Trust Assets and the Litigation Sub-Trust will be managed by the Claimant Trust Oversight Board. The Claimant Trust Oversight Board will consist of: (1) Eric Felton, as representative of the Redeemer Committee; (2) Joshua Terry, as representative of Acis; (3) Elizabeth Kozlowski, as representative of UBS; (4) Paul McVoy, as representative of Meta-E Discovery; and (5) David Pauker. Four of the members of the Claimant Trust Oversight Committee are the holders of several of the largest Claims against the Debtor and/or are current members of the Committee. Each of these creditors has actively participated in the Debtor's case, both through their fiduciary roles as Committee members and in their individual capacities as creditors. They are therefore intimately familiar with the Debtor, its business, and assets. The fifth member of the Claimant Trustee Oversight Board, David Pauker, is a disinterested restructuring advisor and turnaround manager with more than 25 years of experience advising public and private companies and their investors, and he has substantial experience overseeing, advising or investigating troubled companies in the financial services industry and has advised or managed such companies on behalf of boards or

directors, court-appointed trustees, examiners and special masters, government agencies, and private investor parties. The members of the Claimant Trust Oversight Board will serve without compensation, except for Mr. Pauker, who will receive payment of $250,000 for his first year of service, and $150,000 for subsequent years.

45. **Selection of Trustees.** The Plan Supplements disclose that Mr. Seery will serve as the Claimant Trustee and Marc Kirschner will serve as the Litigation Trustee. As noted above, Mr. Seery has served as an Independent Board member since January 2020, and as the Chief Executive Officer and Chief Restructuring Officer since July 2020, and he has extensive management and restructuring experience, as evidenced from his curriculum vitae which is part of the record. The evidence shows that Mr. Seery is intimately familiar with the Debtor's organizational structure, business, and assets, as well as how Claims will be treated under the Plan. Accordingly, it is reasonable and in the Estate's best interests to continue Mr. Seery's employment post-emergence as the Claimant Trustee. Mr. Seery, upon consultation with the Committee, testified that he intends to employ approximately 10 of the Debtor's employees to enable him to manage the Debtor's business until the Claimant Trust effectively monetizes its remaining assets, instead of hiring a sub-servicer to accomplish those tasks. Mr. Seery testified that he believes that the Debtor's post-confirmation business can most efficiently and cost-effectively be supported by a sub-set of the Debtor's current employees, who will be managed internally. Mr. Seery shall initially be paid $150,000 per month for services rendered after the Effective Date as Claimant Trustee; however, Mr. Seery's long-term salary as Claimant Trustee and the terms of any bonuses and severance are subject to fur-

ther negotiation by Mr. Seery and the Claimant Trust Oversight Board within forty-five (45) days after the Effective Date. The Bankruptcy Court has also reviewed Mr. Kirschner's curriculum vitae. Mr. Kirschner has been practicing law since 1967 and has substantial experience in bankruptcy litigation matters, particularly with respect to his prior experience as a litigation trustee for several litigation trusts, as set forth on the record of the Confirmation Hearing and in the Confirmation Brief. Mr. Kirschner shall be paid $40,000 per month for the first three months and $20,000 per month thereafter, plus a success fee related to litigation recoveries. The Committee and the Debtor had arm's lengths negotiations regarding the post-Effective Date corporate governance structure of the Reorganized Debtor and believe that the selection of the Claimant Trustee, the Litigation Trustee, and the Claimant Trust Oversight Committee are in the best interests of the Debtor's economic stakeholders. Section 1123(a)(7) of the Bankruptcy Code is satisfied.

46. **Debtor's Compliance with Bankruptcy Code (11 U.S.C. § 1129(a)(2)).** Pursuant to section 1129(a)(2) of the Bankruptcy Code, the Debtor has complied with the applicable provisions of the Bankruptcy Code, including sections 1122, 1123, 1124, 1125, and 1126 of the Bankruptcy Code, the Bankruptcy Rules, and the Disclosure Statement Order governing notice, disclosure, and solicitation in connection with the Plan, the Disclosure Statement, the Plan Supplements, and all other matters considered by the Bankruptcy Court in connection with this Chapter 11 Case.

47. **Debtor's Solicitation Complied with Bankruptcy Code and Disclosure Statement Order.** Before the Debtor solicited votes on the Plan, the Bankruptcy Court entered the Disclosure Statement Order. In accordance

with the Disclosure Statement Order and evidenced by the Affidavits of Service and Publication, the Debtor appropriately served (i) the Solicitation Packages (as defined in the Disclosure Statement Order) on the Holders of Claims in Classes 2, 7, 8 and 9 and Holders of Equity Interests in Classes 10 and 11 who were entitled to vote on the Plan; and (ii) the Notice of Nonvoting Status (as defined in the Disclosure Statement Order) and the Confirmation Hearing Notice to the Holders of Claims in Classes 1, 3, 4, 5 and 6, who were not entitled to vote on the Plan pursuant to the Disclosure Statement Order. The Disclosure Statement Order approved the contents of the Solicitation Packages provided to Holders of Claims and Equity Interests entitled to vote on the Plan, the notices provided to parties not entitled to vote on the Plan, and the deadlines for voting on and objecting to the Plan. The Debtor and KCC each complied with the content and delivery requirements of the Disclosure Statement Order, thereby satisfying sections 1125(a) and (b) of the Bankruptcy Code, as evidenced by the Affidavits of Service and Publication. The Debtor also satisfied section 1125(c) of the Bankruptcy Code, which provides Publication. The Debtor also satisfied section 1125(c) of the Bankruptcy Code, which provides that the same disclosure statement must be transmitted to each holder of a claim or interest in a particular class. The Debtor caused the same Disclosure Statement to be transmitted to all holders of Claims and Equity Interests entitled to vote on the Plan. The Debtor has complied in all respects with the solicitation requirements of section 1125 of the Bankruptcy Code and the Disclosure Statement Order. The Bankruptcy Court rejects the arguments of the Mr. Dondero and certain Dondero Related Entities that the changes made to certain assumptions and projections from the Liquidation Analysis annexed as Exhibit C to

the Disclosure Statement (the "Liquidation Analysis") to the Amended Liquidation Analysis/Financial Projections require resolicitation of the Plan. The Bankruptcy Court heard credible testimony from Mr. Seery regarding the changes to the Liquidation Analysis as reflected in the Amended Liquidation Analysis/Financial Projections. Based on the record, including the testimony of Mr. Seery, the Bankruptcy Court finds that the changes between the Liquidation Analysis and the Amended Liquidation Analysis/Financial Projections do not constitute materially adverse change to the treatment of Claims or Equity Interests. Instead, the changes served to update the projected distributions based on Claims that were settled after the approval of the Disclosure Statement and to otherwise incorporate more recent financial data. Such changes were entirely foreseeable given the large amount of unliquidated Claims at the time the Disclosure Statement was approved and the nature of the Debtor's assets. The Bankruptcy Court therefore finds that holders of Claims and Equity Interests were not misled or prejudiced by the Amended Liquidation Analysis/Financial Projections and the Plan does not need to be resolicited.

48. **Plan Proposed in Good Faith and Not by Means Forbidden by Law (11 U.S.C. § 1129(a)(3)).** The Debtor has proposed the Plan in good faith and not by any means forbidden by law, thereby satisfying section 1129(a)(3) of the Bankruptcy Code. In determining that the Plan has been proposed in good faith, the Bankruptcy Court has examined the totality of the circumstances surrounding the filing of this Chapter 11 Case, the Plan itself, and the extensive, unrebutted testimony of Mr. Seery in which he described the process leading to the Plan's formulation. Based on the totality of the circumstances and Mr. Seery's testimony, the Bankruptcy Court

finds that the Plan is the result of extensive arm's-length negotiations among the Debtor, the Committee, and key stakeholders, and promotes the objectives and purposes of the Bankruptcy Code. Specifically, the Debtor's good faith in proposing the Plan is supported by the following facts adduced by Mr. Seery:

a. The Independent Board determined that it should consider all potential restructuring alternatives, including pursuit of a traditional restructuring and the continuation of the Debtor's business, a potential sale of the Debtor's assets in one or more transactions, an asset monetization plan similar to that described in the Plan, and a so-called "grand bargain" plan that would involve Mr. Dondero's sponsorship of a plan with a substantial equity infusion.

b. The Debtor subsequently engaged in arm's-length, good faith negotiations with the Committee over an asset monetization Plan commencing in June 2020, which negotiations occurred over the next several months.

c. Negotiations between the Debtor and the Committee were often contentious over disputes, including, but not limited to, the post-confirmation corporate governance structure and the scope of releases contemplated by the Plan.

d. While negotiations with the Committee progressed, the Independent Board engaged in discussions with Mr. Dondero regarding a potential "grand bargain" plan which contemplated a significant equity infusion by Mr. Dondero, and which Mr. Seery personally spent hundreds of hours pursuing over many months.

e. On August 3, 2020, the Bankruptcy Court entered the *Order Directing Mediation* [Docket No.

912] pursuant to which the Bankruptcy Court ordered the Debtor, the Committee, UBS, Acis, the Redeemer Committee, and Mr. Dondero into mediation. As a result of this mediation, the Debtor negotiated the settlement of the claims of Acis and Mr. Terry, which the Bankruptcy Court approved on October 28, 2020 [Docket No. 1302].

f. On August 12, 2020, the Debtor filed its *Chapter 11 Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 944] (the "Initial Plan") and related disclosure statement (the "Initial Disclosure Statement") which were not supported by either the Committee or Mr. Dondero. The Independent Board filed the Initial Plan and Initial Disclosure Statement in order to act as a catalyst for continued discussions with the Committee while it simultaneously worked with Mr. Dondero on the "grand bargain" plan.

g. The Bankruptcy Court conducted a contested hearing on the Initial Disclosure Statement on October 27, 2020. The Committee and other parties objected to approval of the Disclosure Statement at the Initial Disclosure Statement hearing, which was eventually continued to November 23, 2020.

h. Following the Initial Disclosure Statement hearing, the Debtor continued to negotiate with the Committee and ultimately resolved the remaining material disputes and led to the Bankruptcy Court's approval of the Disclosure Statement on November 23, 2020.

i. Even after obtaining the Bankruptcy Court's approval of the Disclosure Statement, the Debtor and the Committee continued to negotiate with Mr. Dondero and the Committee over a potential "pot plan" as an alternative to the Plan on file with the Bankruptcy

Court, but such efforts were unsuccessful. This history conclusively demonstrates that the Plan is being proposed in good faith within the meaning of section 1129(a)(3).

49. **Payments for Services or Costs and Expenses (11 U.S.C. §1129(a)(4)).** Article II.B of the Plan provides that Professionals will file all final requests for payment of Professional Fee Claims no later than 60 days after the Effective Date, thereby providing an adequate period of time for interested parties to review such claims. The procedures set forth in the Plan for the Bankruptcy Court's approval of the fees, costs, and expenses to be paid in connection with this chapter 11 Case, or in connection with the Plan and incident to this Chapter 11 Case, satisfy the objectives of and are in compliance with section 1129(a)(4) of the Bankruptcy Code.

50. **Directors, Officers, and Insiders (11 U.S.C. §1129(a)(5)).** Article IV.B of the Plan provides for the appointment of the Claimant Trustee, Litigation Trustee, and the Claimant Trust Oversight Committee and the members thereto. For the reasons more fully explained in paragraphs 44-45 of this Confirmation Order with respect to the requirement of section 1123(a)(7) of the Bankruptcy Code, the Debtor has disclosed the nature of compensation of any insider to be employed or retained by the Reorganized Debtor, if applicable, and compensation for any such insider. The appointment of such individuals is consistent with the interests of Claims and Equity Interests and with public policy. Thus, the Plan satisfies section 1129(a)(5) of the Bankruptcy Code.

51. **No Rate Changes (11 U.S.C. §1129(a)(6)).** The Plan does not provide for any rate change that requires regulatory approval. Section 1129(a)(6) of the Bankruptcy Code is thus not applicable.

52. **Best Interests of Creditors (11 U.S.C. §1129(a)(7)).** The "best interests" test is satisfied as to all Impaired Classes under the Plan, as each Holder of a Claim or Equity Interest in such Impaired Classes will receive or retain property of a value, as of the Effective Date of the Plan, that is not less than the amount that such Holder would so receive or retain if the Debtor were liquidated under chapter 7 of the Bankruptcy Code. On October 15, 2020, the Debtor filed the Liquidation Analysis [Docket 1173], as prepared by the Debtor with the assistance of its advisors and which was attached as Exhibit C to the Disclosure Statement. On January 29, 2021, in advance of Mr. Seery's deposition in connection with confirmation of the Plan, the Debtor provided an updated version of the Liquidation Analysis to the then-objectors of the Plan, including Mr. Dondero and the Dondero Related Entities. On February 1, 2021, the Debtor filed the Amended Liquidation Analysis/Financial Projections. The Amended Liquidation Analysis/Financial Projections included updates to the Debtor's projected asset values, revenues, and expenses to reflect: (1) the acquisition of an interest in an entity known as "HCLOF" that the Debtor will acquire as part of its court-approved settlement with HarbourVest and that was valued at $22.5 million; (2) an increase in the value of certain of the Debtor's assets due to changes in market conditions and other factors; (3) expected revenues and expenses arising in connection with the Debtor's continued management of the CLOs pursuant to management agreements that the Debtor decided to retain; (4) increases in projected expenses for headcount (in addition to adding two or three employees to assist in the management of the CLOs, the Debtor also increased modestly the projected headcount as a result of its decision not to engage a Sub-Servicer) and professional fees; and (5) an increase in projected re-

coveries on notes resulting from the acceleration of term notes owed to the Debtor by the following Dondero Related Entities: NexPoint Advisors, L.P.; Highland Capital Management Services, Inc.; and HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC). Under the Plan, as of the Confirmation Date, (a) Class 7 General Unsecured Creditors are projected to receive 85% on account of their claims; and (b) Class 8 General Unsecured Creditors are projected to receive at least approximately 71% on account of their Claims. Under a hypothetical chapter 7 liquidation, all general unsecured creditors are projected to receive approximately 55% on account of their Claims. The Bankruptcy Court finds that the distributions that Class 7 and 8 General Unsecured Creditors are projected to receive under the Plan substantially exceeds that which they would receive under a chapter 7 liquidation based on Mr. Seery's testimony, including the following credible reasons he posited, among others:

a. The nature of the Debtor's assets is complex. Certain assets relate to complicated real estate structures and private equity investments in operating businesses. Mr. Seery's extensive experience with the Debtor during the thirteen months since his appointment as an Independent Director and later Chief Executive Officer and Chief Restructuring Officer, provides him with a substantial learning curve in connection with the disposition of the Debtor's assets and are reasonably expected to result in him being able to realize tens of millions of dollars more value than would a chapter 7 trustee.

b. Assuming that a hypothetical chapter 7 trustee could even operate the Debtor's business under chapter 7 of the Bankruptcy Code and hire the necessary personnel with the relevant knowledge and experi-

ence to assist him or her in selling the Debtor's assets, a chapter 7 trustee would likely seek to dispose of the Debtor's assets in a forced sale liquidation which would generate substantially less value for the Debtor's creditors than the asset monetization plan contemplated by the Plan.

c. A chapter 7 trustee would be unlikely to retain the Debtor's existing professionals to assist in its efforts to monetize assets, resulting in delays, increased expenses, and reduced asset yields for the chapter 7 estate.

d. The chapter 7 estate would be unlikely to maximize value as compared to the asset monetization process contemplated by the Plan because potential buyers are likely to perceive a chapter 7 trustee as engaging in a quick, forced "fire sale" of assets; and

e. The Debtor's employees, who are vital to its efforts to maximum value and recoveries for stakeholders, may be unwilling to provide services to a chapter 7 trustee.

Finally, there is no evidence to support the objectors' argument that the Claimant Trust Agreement's disclaimed liability for ordinary negligence by the Claimant Trustee compared to a chapter 7 trustee's liability has any relevance to creditor recoveries in a hypothetical chapter 7 liquidation. Thus, section 1129(a)(7) of the Bankruptcy Code is satisfied.

53. **Acceptance by Certain Classes (11 U.S.C. § 1129(a)(8)).** Classes 1, 3, 4, 5 and 6 are Unimpaired under the Plan. Class 2 (Frontier Secured Claim), Class 7 (Convenience Claims), and Class 9 (Subordinated Claims) have each voted to accept the Plan in accordance with the Bankruptcy Code, thereby satisfying section 1129(a)(8) as to those Classes. However, Class 8 (Gen-

eral Unsecured Claims), Class 10 (Class B/C Limited Partnership Interests), and Class 11 (Class A Limited Partnership Interests) have not accepted the Plan. Accordingly, section 1129(a)(8) of the Bankruptcy Code has not been satisfied. The Plan, however, is still confirmable because it satisfies the nonconsensual confirmation provisions of section 1129(b), as set forth below.

54. **Treatment of Administrative, Priority, Priority Tax Claims, and Professional Fee Claims (11 U.S.C. § 1129(a)(9)).** The treatment of Administrative Claims, Priority Claims, and Professional Fee Claims pursuant to Article III of the Plan, and as set forth below with respect to the resolution of the objections filed by the Internal Revenue Service and certain Texas taxing authorities satisfies the requirements of sections 1129(a)(9) of the Bankruptcy Code.

55. **Acceptance by Impaired Class (11 U.S.C. § 1129(a)(10)).** Class 2 (Frontier Secured Claims) and Class 7 (Convenience Claims) are each Impaired Classes of Claims that voted to accept the Plan, determined without including any acceptance of the Plan by any insider. Therefore, the requirement of section 1129(a)(10) of the Bankruptcy Code is satisfied.

56. **Feasibility (11 U.S.C. § 1129(a)(11)).** Article IV of the Plan provides for the implementation of the Plan through the Claimant Trust, the Litigation Sub-Trust, and the Reorganized Debtor. The Plan provides that the Claimant Trust, among other things, will monetize and distribute the Debtor's remaining assets. The Disclosure Statement, the Amended Liquidation Analysis/Financial Projections, and the other evidence presented at the Confirmation Hearing provide a reasonable probability of success that the Debtor will be able to effectuate the provisions of the Plan. The Plan contemplates the estab-

lishment of the Claimant Trust upon the Effective Date, which will monetize the Estate's assets for the benefit of creditors. Mr. Seery testified that the Class 2 Frontier Secured Claim will be paid over time pursuant to the terms of the New Frontier Note and the Reorganized Debtor will have sufficient assets to satisfy its obligations under this note. The Claims of the Holders of Class 7 Claims (as well as those Class 8 creditors who validly opted to receive the treatment of Class 7 Claims) are expected to be satisfied shortly after the Effective Date. Holders of Class 8 Claims (including any holders of Class 7 Claims who opted to receive the treatment provided to Class 8 Claims) are not guaranteed any recovery and will periodically receive *pro rata* distributions as assets are monetized pursuant to the Plan and the Claimant Trust Agreement. Thus, section 1129(a)(11) of the Bankruptcy Code is satisfied.

57. **Payment of Fees (11 U.S.C. §1129(a)(12)).** All fees payable under 28 U.S.C. §1930 have been paid or will be paid on or before the Effective Date pursuant to Article XII.A of the Plan, thus satisfying the requirement of section 1129(a)(12) of the Bankruptcy Code. The Debtor has agreed that the Reorganized Debtor, the Claimant Trust, and the Litigation Sub-Trust shall be jointly and severally liable for payment of quarterly fees to the Office of the United States Trustee pursuant to 28 U.S.C. §1930 through the entry of the Final Decree for the Debtor or the dismissal or conversion of the Chapter 11 Case.

58. **Retiree Benefits.** The Plan provides for the assumption of the Pension Plan (to the extent such Pension Plan provides "retiree benefits" and is governed by section 1114 of the Bankruptcy Code). Thus, the Plan com-

plies with section 1129(a)(13) of the Bankruptcy Code, to the extent applicable.

59. **Miscellaneous Provisions (11 U.S.C. §§ 1129(a)(14)-(16)).** Sections 1129(a)(14)-(16) of the Bankruptcy Code are inapplicable as the Debtor (i) has no domestic support obligations (section 1129(a)(14)), (ii) is not an individual (section 1129(a)(15)), and (iii) is not a nonprofit corporation (section 1129(a)(16)).

60. **No Unfair Discrimination; Fair and Equitable Treatment (11 U.S.C. § 1129(b)).** The classification and treatment of Claims and Equity Interests in Classes 8, 10 and 11, which have not accepted the Plan, is proper pursuant to section 1122 of the Bankruptcy Code, does not discriminate unfairly, and is fair and equitable pursuant to section 1129(b)(1) of the Bankruptcy Code.

a. Class 8. The Plan is fair and equitable with respect to Class 8 General Unsecured Claims. While Equity Interests in Class 10 and Class 11 will receive a contingent interest in the Claimant Trust under the Plan (the "Contingent Interests"), the Contingent Interests will not vest unless and until holders of Class 8 General Unsecured Claims and Class 9 Subordinated Claims receive distributions equal to 100% of the amount of their Allowed Claims plus interest as provided under the Plan and Claimant Trust Agreement. Accordingly, as the holders of Equity Interests that are junior to the Claims in Class 8 and Class 9 will not receive or retain under the Plan on account of such junior claim interest any property unless and until the Claims in Class 8 and Class 9 are paid in full plus applicable interest, the Plan is fair and equitable with respect to holders of Class 8 General Unsecured Claims pursuant to section 1129(b)(2)(B) of the Bank-

ruptcy Code and the reasoning of *In re Introgen Therapuetics*, 429 B.R 570 (Bankr. W.D. Tex. 2010).

b. Class 10 and Class 11. There are no Claims or Equity Interests junior to the Equity Interests in Class 10 and Class 11. Equity Interests in Class 10 and 11 will neither receive nor retain any property under the Plan unless Allowed Claims in Class 8 and Class 9 are paid in full plus applicable interest pursuant to the terms of the Plan and Claimant Trust Agreement. Thus, the Plan does not violate the absolute priority rule with respect to Classes 10 and 11 pursuant to Bankruptcy Code section 1129(b)(2)(C). The Plan does not discriminate unfairly as to Equity Interests. As noted above, separate classification of the Class B/C Partnership Interests from the Class A Partnerships Interests is appropriate because they constitute different classes of equity security interests in the Debtor, and each are appropriately separately classified and treated.

Accordingly, the Plan does not violate the absolute priority rule, does not discriminate unfairly, and is fair and equitable with respect to each Class that has rejected the Plan. Thus, the Plan satisfies the requirements of section 1129(b) of the Bankruptcy Code with respect to Classes 8, 10, and 11.

61. **Only One Plan (11 U.S.C. § 1129(c)).** The Plan is the only chapter 11 plan confirmed in this Chapter 11 Case, and the requirements of section 1129(c) of the Bankruptcy Code are therefore satisfied.

62. **Principal Purpose (11 U.S.C. § 1129(d)).** Mr. Seery testified that the principal purpose of the Plan is neither the avoidance of taxes nor the avoidance of the application of section 5 of the Securities Act of 1933, and no governmental unit has objected to the confirmation of

the Plan on any such grounds. Accordingly, section 1129(d) of the Bankruptcy Code is inapplicable.

63. **Satisfaction of Confirmation Requirements.** Based upon the foregoing, the Plan satisfies the requirements for confirmation set forth in section 1129 of the Bankruptcy Code and should be confirmed.

64. **Good Faith Solicitation (11 U.S.C. § 1125(e)).** The Debtor, the Independent Directors, and the Debtor's employees, advisors, Professionals, and agents have acted in good faith within the meaning of section 1125(e) of the Bankruptcy Code and in compliance with the applicable provisions of the Bankruptcy Code and Bankruptcy Rules in connection with all of their respective activities relating to the solicitation of acceptances of the Plan and their participation in the activities described in section 1125 of the Bankruptcy Code, and they are entitled to the protections afforded by section 1125(e) of the Bankruptcy Code.

65. **Discharge (11 U.S.C. § 1141(d)(3)).** The Debtor is entitled to a discharge of debts pursuant to section 1141(d)(3)(B) of the Bankruptcy Code. Under the Plan, the Claimant Trust or Reorganized Debtor, as applicable, will continue to manage funds and conduct business in the same manner as the Debtor did prior to Plan confirmation, which includes the management of the CLOs, Multi-Strat, Restoration Capital, the Select Fund and the Korea Fund. Although the Plan projects that it will take approximately two years to monetize the Debtor's assets for fair value, Mr. Seery testified that while the Reorganized Debtor and Claimant Trust will be monetizing their assets, there is no specified time frame by which this process must conclude. Mr. Seery's credible testimony demonstrates that the Debtor will continue to engage in business after consummation of the Plan, within the meaning of Section 1141(d)(3)(b) and that the Debtor

is entitled to a discharge pursuant to section 1141(d)(1) of the Bankruptcy Code.

66. **Retention of Jurisdiction.** The Bankruptcy Court may properly retain jurisdiction over the matters set forth in Article XI of the Plan and/or section 1142 of the Bankruptcy Code to the maximum extent under applicable law.

67. **Additional Plan Provisions (11 U.S.C. § 1123(b)).** The Plan's provisions are appropriate, in the best interests of the Debtor and its Estate, and consistent with the applicable provisions of the Bankruptcy Code, Bankruptcy Rules, and Local Rules.

68. **Executory Contracts and Unexpired Leases (11 U.S.C. § 1123(b)(2)).** The Debtor has exercised reasonable business judgment with respect to the rejection of the Executory Contracts and Unexpired Leases pursuant the terms of the Plan and this Confirmation Order, and such rejections are justified and appropriate in this Chapter 11 Case. The Debtor also filed the List of Assumed Contracts, which contain notices to the applicable counterparties to the contracts set forth on Exhibit "FF" to Plan Supplement filed on February 1, 2021 [Docket No. 1875] and which exhibit sets forth the list of executory contracts and unexpired leases to be assumed by the Debtor pursuant to the Plan (collectively, the "Assumed Contracts"). With respect to the Assumed Contracts, only one party objected to the assumption of any of the Assumed Contracts, but that objection was withdrawn.[8] Any modifications, amendments, supplements, and restatements to the Assumed Contracts that may have been executed by

[8] See *Notice of Withdrawal of James Dondero's Objection to Debtor's Proposed Assumption of Contracts and Cure Amounts Proposed in Connection Therewith* [Docket No. 1876].

the Debtor during the Chapter 11 Case shall not be deemed to alter the prepetition nature of the Assumed Contracts or the validity, priority, or amount of any Claims that may arise in connection therewith. Assumption of any Assumed Contract pursuant to the Plan and full payment of any applicable Cure pursuant to the Plan shall result in the full release and satisfaction of any Cures, Claims, or defaults, whether monetary or non-monetary, including defaults of provisions restricting the change in control or ownership interest composition or other bankruptcy-related defaults, arising under any assumed Executory Contract or Unexpired Lease at any time prior to the effective date of assumption.

69. **Compromises and Settlements Under and in Connection with the Plan (11 U.S.C. § 1123(b)(3)).** All of the settlements and compromises pursuant to and in connection with the Plan, comply with the requirements of section 1123(b)(3) of the Bankruptcy Code and Bankruptcy Rule 9019.

70. **Debtor Release, Exculpation and Injunctions (11 U.S.C. § 1123(b)).** The Debtor Release, Exculpation, and Injunction provisions provided in the Plan (i) are within the jurisdiction of the Bankruptcy Court under 28 U.S.C. § 1334; (ii) are integral elements of the transactions incorporated into the Plan, and inextricably bound with the other provisions of the Plan; (iii) confer material benefit on, and are in the best interests of, the Debtor, its Estate, and its creditors; (iv) are fair, equitable, and reasonable; (v) are given and made after due notice and opportunity for hearing; (vi) satisfy the requirements of Bankruptcy Rule 9019; and (vii) are consistent with the Bankruptcy Code and other applicable law, and as set forth below.

71. **Debtor Release.** Section IX.D of the Plan provides for the Debtor's release of the Debtor's and Estate's claims against the Released Parties. Releases by a debtor are discretionary and can be provided by a debtor to persons who have provided consideration to the Debtor and its estate pursuant to section 1123(b)(3)(A) of the Bankruptcy Code. Contrary to the objections raised by Mr. Dondero and certain of the Dondero Related Entities, the Debtor Release is appropriately limited to release claims held by the Debtor and does not purport to release the claims held by the Claimant Trust, Litigation Sub-Trust, or other third parties. The Plan does not purport to release any claims held by third parties and the Bankruptcy Court finds that the Debtor Release is not a "disguised" release of any third party claims as asserted by certain objecting parties. The limited scope of the Debtor Release in the Plan was extensively negotiated with the Committee, particularly with the respect to the Debtor's conditional release of claims against employees, as identified in the Plan, and the Plan's conditions and terms of such releases. The Plan does not release (i) any obligations of any party under the Plan or any document, instrument, or agreement executed to implement the Plan, (ii) the rights or obligations of any current employee of the Debtor under any employment agreement or plan, (iii) the rights of the Debtor with respect to any confidentiality provisions or covenants restricting competition in favor of the Debtor under any employment agreement with a current or former employee of the Debtor, (iv) any Avoidance Actions, or (v) any Causes of Action arising from willful misconduct, criminal misconduct, actual fraud, or gross negligence of such applicable Released Party as determined by Final Order of the Bankruptcy Court or any other court of competent jurisdiction. The Debtor Release also contains conditions to such releases as set

forth in Article X.D of the Plan with respect to employees (the "Release Conditions"). Until the employee satisfies the Release Conditions or the Release Conditions otherwise terminate, any claims against such employee will be tolled so that if the Release Conditions are not met the Litigation Trustee may pursue claims against an employee at a later date. The evidence before the Bankruptcy Court, including, but not limited to Mr. Seery's testimony, demonstrates that the Debtor is not aware of any claims against any of the Released Parties, that the Released Parties have been instrumental in assisting the Debtor's efforts toward confirmation of the Plan and that, therefore, the releases are a *quid pro quo* for the Released Parties' significant contributions to a highly complex and contentious restructuring. The Committee, whose members hold approximately $200 million in claims against the Estate, is highly sophisticated and is represented by highly sophisticated professionals, and has actively and vigorously negotiated the terms of the Debtor Release, which was the subject of significant controversy at the Initial Disclosure Statement hearing held by the Bankruptcy Court on October 27, 2020.

72. **Exculpation.** Section IX.C of the Plan provides for the exculpation of certain Exculpated Parties to the extent provided therein (the "Exculpation Provision"). As explained below, the Exculpation Provision is appropriate under the unique circumstances of this litigious Chapter 11 Case and consistent with applicable Fifth Circuit precedent. First, with respect to the Independent Directors, their agents, and their advisors, including any employees acting at their direction, the Bankruptcy Court finds and concludes that it has already exculpated these parties for acts other than willful misconduct and gross negligence pursuant to the January 9 Order. The

January 9 Order was specifically agreed to by Mr. Dondero, who was in control of the Debtor up until entry of the January 9 Order. The January 9 Order was not appealed. In addition to the appointment of the Independent Directors in an already contentious and litigious case, the January 9 Order set the standard of care for the Independent Directors and specifically exculpated them for negligence. Mr. Seery and Mr. Dubel each testified that they had input into the contents of the January 9 Order and would not have agreed to their appointment as Independent Directors if the January 9 Order did not include the protections set forth in paragraph 10 of the January 9 Order. Paragraph 10 of the January 9 Order (1) requires that parties wishing to sue the Independent Directors or their agents and advisors must first seek approval from the Bankruptcy Court before doing so; (2) sets the standard of care for the Independent Directors during the Chapter 11 Case and exculpated the Independent Directors for acts other than willful misconduct or gross negligence; (3) only permits suits against the Independent Directors to proceed for colorable claims of willful misconduct and gross negligence upon order of the Bankruptcy Court; and (4) does not expire by its terms.

73. **Existing Exculpation of Independent Directors.** The Bankruptcy Court also finds and concludes that it has already exculpated Mr. Seery acting in the capacity as Chief Executive Officer and Chief Restructuring Officer pursuant to the July 16 Order. The Bankruptcy Court concludes its previous approval of the exculpation of the Independent Directors, their agents, advisors and employees working at their direction pursuant to the January 9 Order, and the Chief Executive Officer and Chief Restructuring Officer pursuant to the July 16 Order constitutes the law of this case and are res judicata pur-

suant to *In re Republic Supply Co.* v. *Shoaf*, 815 F.2d 1046 (5th Cir. 1987). The January 9 Order and July 16 Order cannot be collaterally attacked based on the objectors' objection to the exculpation of the Independent Directors, their agents, and advisors, including any employees acting at their direction, as well as the Chief Executive Officer and Chief Restructuring Officer, that the Bankruptcy Court already approved pursuant to the January 9 Order and the July 16 Order.

74. **The Exculpation Provision Complies with Applicable Law.** Separate and apart from the *res judicata* effect of the January 9 Order and the July 16 Order, the Bankruptcy Court also finds and concludes that the Exculpation Provision is consistent with applicable law, including *In re Pacific Lumber Co.*, 584 F.3d 229 (5th Cir. 2009), for several reasons:

a. First, the statutory basis for *Pacific Lumber*'s denial of exculpation for certain parties other than a creditors' committee and its members is that section 524(e) of the Bankruptcy Code "only releases the debtor, not co-liable third parties." *Pacific Lumber*, 253 F.3d. at 253. However, *Pacific Lumber* does not prohibit all exculpations under the Bankruptcy Code and the court in such case specifically approved the exculpations of a creditors' committee and its members on the grounds that "11 U.S.C. §1103(c), which lists the creditors' committee's powers, implies committee members have qualified immunity for actions within the scope of their duties . . . . [I]f members of the committee can be sued by persons unhappy with the committee's performance during the case or unhappy with the outcome of the case, it will be extremely difficult to find members to serve on an official committee." *Pacific Lumber*, 253 F.3d at 253

(quoting Lawrence P. King, et al., Collier on Bankruptcy, ¶1103.05[4][b] (15th ed. 2008). *Pacific Lumber*'s rationale for permitted exculpation of creditors' committees and their members (which was clearly policy-based and based on a creditors' committee qualified immunity flowing from their duties under section 1103(c) of the Bankruptcy Code and their disinterestedness and importance in chapter 11 cases) does not preclude exculpation to other parties in a particular chapter 11 case that perform similar roles to a creditors' committee and its members. The Independent Directors, and by extension the Chief Executive Officer and Chief Restructuring Officer, were not part of the Debtor's enterprise prior to their appointment by the Bankruptcy Court under the January 9 Order. The Bankruptcy Court appointed the Independent Directors in lieu of a chapter 11 trustee to address what the Bankruptcy Court perceived as serious conflicts of interest and fiduciary duty concerns with the then existing management prior to January 9, 2020, as identified by the Committee. In addition, the Bankruptcy Court finds that the Independent Directors expected to be exculpated from claims of negligence, and would likely have been unwilling to serve in contentious cases absent exculpation. The uncontroverted testimony of Mr. Seery and Mr. Dubel demonstrates that the Independent Directors would not have agreed to accept their roles without the exculpation and gatekeeper provision in the January 9 Order. Mr Dubel also testified as to the increasing important role that independent directors are playing in complex chapter 11 restructurings and that unless independent directors could be assured of exculpation for simple negligence in contentious bankruptcy cases they would be reluctant to accept appointment in

chapter 11 cases which would adversely affect the chapter 11 restructuring process. The Bankruptcy Court concludes that the Independent Directors were appointed under the January 9 Order in order to avoid the appointment of a chapter 11 trustee and are analogous to a creditors' committee rather than an incumbent board of directors. The Bankruptcy Court also concludes that if independent directors cannot be assured of exculpation for simple negligence in contentious bankruptcy cases, they may not be willing to serve in that capacity. Based upon the foregoing, the Bankruptcy Court concludes that *Pacific Lumber*'s policy of exculpating creditors' committees and their members from "being sued by persons unhappy with the committee's performance during the case or unhappy with the outcome of the case" is applicable to the Independent Directors in this Chapter 11 Case.[9]

b. Second, the Bankruptcy Court also concludes that *Pacific Lumber* does not preclude the exculpation of parties if there is a showing that "costs [that] the released parties might incur defending against such suits alleging such negligence are likely to swamp either the Exculpated Parties or the reorganization." *Pacific Lumber*, 584 F.3d at 252. If ever there was a risk of that happening in a chapter 11 reorganization, it is this one. Mr. Seery credibly testified that Mr. Dondero stated outside the courtroom that if Mr. Dondero's pot plan does not get approved, that Mr. Dondero will "burn the place down." The Bankruptcy Court can easily expect that the proposed Exculpated Parties might expect to incur costs that

[9] The same reasoning applies to the inclusion of Strand in the Exculpation Provision because Strand is the general partner of the Debtor through which each of the Independent Board members act.

could swamp them and the reorganization based on the prior litigious conduct of Mr. Dondero and his controlled entities that justify their inclusion in the Exculpation Provision.

75. **Injunction.** Section IX.D of the Plan provides for a Plan inunction to implement and enforce the Plan's release, discharge and release provisions (the "Injunction Provision"). The Injunction Provision is necessary to implement the provisions in the Plan. Mr. Seery testified that the Claimant Trustee will monetize the Debtor's assets in order to maximize their value. In order to accomplish this goal, the Claimant Trustee needs to be able to pursue this objective without the interference and harassment of Mr. Dondero and his related entities, including the Dondero Related Entities. Mr. Seery also testified that if the Claimant Trust was subject to interference by Mr. Dondero, it would take additional time to monetize the Debtor's assets and those assets could be monetized for less money to the detriment of the Debtor's creditors. The Bankruptcy Court finds and concludes that the Injunction Provision is consistent with and permissible under Bankruptcy Code sections 1123(a), 1123(a)(6), 1141(a) and (c), and 1142. The Bankruptcy Court rejects assertions by certain objecting parties that the Injunction Provision constitutes a "third-party release." The Injunction Provision is appropriate under the circumstances of this Chapter 11 Case and complies with applicable bankruptcy law. The Bankruptcy Court also concludes that the terms "implementation" and "consummation" are neither vague nor ambiguous.

76. **Gatekeeper Provision.** Section IX.F of the Plan contains a provision contained in paragraph AA of this Confirmation Order and which the Debtor has referred to as a gatekeeper provision (the "Gatekeeper Provi-

sion"). The Gatekeeper Provision requires that Enjoined Parties first seek approval of the Bankruptcy Court before they may commence an action against Protected Parties. Thereafter, if the Bankruptcy Court determines that the action is colorable, the Bankruptcy Court may, if it has jurisdiction, adjudicate the action. The Bankruptcy Court finds that the inclusion of the Gatekeeper Provision is critical to the effective and efficient administration, implementation, and consummation of the Plan. The Bankruptcy Court also concludes that the Bankruptcy Court has the statutory authority as set forth below to approve the Gatekeeper Provision.

77. **Factual Support for Gatekeeper Provision.** The facts supporting the need for the Gatekeeper Provision are as follows. As discussed earlier in this Confirmation Order, prior to the commencement of the Debtor's bankruptcy case, and while under the direction of Mr. Dondero, the Debtor had been involved in a myriad of litigation, some of which had gone on for years and, in some cases, over a decade. Substantially all of the creditors in this case are either parties who were engaged in litigation with the Debtor, parties who represented the Debtor in connection with such litigation and had not been paid, or trade creditors who provided litigation-related services to the Debtor. During the last several months, Mr. Dondero and the Dondero Related Entities have harassed the Debtor, which has resulted in further substantial, costly, and time-consuming litigation for the Debtor. Such litigation includes: (i) entry of a temporary restraining order and preliminary injunction against Mr. Dondero [Adv. Proc. No. 20-03190 Docket No. 10 and 59] because of, among other things, his harassment of Mr. Seery and employees and interference with the Debtor's business operations; (ii) a contempt motion against Mr.

Dondero for violation of the temporary restraining order, which motion is still pending before the Bankruptcy Court [Adv. Proc. No. 20-03190 Docket No. 48]; (iii) a motion by Mr. Dondero's controlled investors in certain CLOs managed by the Debtor that the Bankruptcy Court referred to as frivolous and a waste of the Bankruptcy Court's time [Docket No. 1528] which was denied by the Court [Docket No. 1605]; (iv) multiple plan confirmation objections focused on ensuring the Dondero Related Entities be able to continue their litigation against the Debtor and its successors post-confirmation [Docket Nos. 1661, 1667, 1670, 1673, 1676, 1677 and 1868]; (v) objections to the approval of the Debtor's settlements with Acis and HarbourVest and subsequent appeals of the Bankruptcy Court's order approving each of those settlements [Docket Nos. 1347 and 1870]; and (vi) a complaint and injunction sought against Mr. Dondero's affiliated entities to prevent them from violating the January 9 Order and entry of a restraining order against those entities [Adv Proc. No. 21-03000 Docket No 1] (collectively, the "Dondero Post-Petition Litigation").

78. **Findings Regarding Dondero Post-Petition Litigation.** The Bankruptcy Court finds that the Dondero Post-Petition Litigation was a result of Mr. Dondero failing to obtain creditor support for his plan proposal and consistent with his comments, as set forth in Mr. Seery's credible testimony, that if Mr. Dondero's plan proposal was not accepted, he would "burn down the place." The Bankruptcy Court concludes that without appropriate protections in place, in the form of the Gatekeeper Provision, Mr. Dondero and his related entities will likely commence litigation against the Protected Parties after the Effective Date and do so in jurisdictions other than the Bankruptcy Court in an effort to obtain a forum

which Mr. Dondero perceives will be more hospitable to his claims. The Bankruptcy Court also finds, based upon Mr. Seery's testimony, that the threat of continued litigation by Mr. Dondero and his related entities after the Effective Date will impede efforts by the Claimant Trust to monetize assets for the benefit of creditors and result in lower distributions to creditors because of costs and distraction such litigation or the threats of such litigation would cause.

79. **Necessity of Gatekeeper Provision.** The Bankruptcy Court further finds that unless the Bankruptcy Court approves the Gatekeeper Provision, the Claimant Trustee and the Claimant Trust Oversight Board will not be able to obtain D&O insurance, the absence of which will present unacceptable risks to parties currently willing to serve in such roles. The Bankruptcy Court heard testimony from Mark Tauber, a Vice President with AON Financial Services, the Debtor's insurance broker ("AON"), regarding his efforts to obtain D&O insurance. Mr. Tauber credibly testified that of all the insurance carriers that AON approached to provide D&O insurance coverage after the Effective Date, the only one willing to do so without an exclusion for claims asserted by Mr. Dondero and his affiliates otherwise requires that this Order approve the Gatekeeper Provision. Based on the foregoing, the Bankruptcy Court finds that the Gatekeeper Provision is necessary and appropriate in light of the history of the continued litigiousness of Mr. Dondero and his related entities in this Chapter 11 Case and necessary to the effective and efficient administration, implementation and consummation of the Plan and is appropriate pursuant to *Carroll* v. *Abide (In re Carroll)* 850 F.3d 811 (5th Cir. 2017). Approval of the Gatekeeper Provision will prevent baseless litigation designed merely to harass the

post-confirmation entities charged with monetizing the Debtor's assets for the benefit of its economic constituents, will avoid abuse of the court system and preempt the use of judicial time that properly could be used to consider the meritorious claims of other litigants. Any suit against a Protected Party would effectively be a suit against the Debtor, and the Debtor may be required to indemnify the Protected Parties under the Limited Partnership Agreement, which will remain in effect through the Effective Date, or those certain *Indemnification and Guaranty Agreements*, dated January 9, 2020, between Strand, the Debtor, and each Independent Director, following the Confirmation Date as each such agreement will be assumed pursuant to 11 U.S.C. §365 pursuant to the Plan.

80. **Statutory Authority to Approve Gatekeeper Provision.** The Bankruptcy Court finds it has the statutory authority to approve the Gatekeeper Provision under sections 1123(a)(5), 1123(b)(6), 1141, 1142(b), and 105(a). The Gatekeeper Provision is also within the spirit of the Supreme Court's "Barton Doctrine." *Barton* v. *Barbour*, 104 U.S. 126 (1881). The Gatekeeper Provision is also consistent with the notion of a prefiling injunction to deter vexatious litigants, that has been approved by the Fifth Circuit in such cases as *Baum* v. *Blue Moon Ventures, LLC*, 513 F.3d 181, 189 (5th Cir. 2008), and *In re Carroll*, 850 F.3d 811 (5th Cir. 2017).

81. **Jurisdiction to Implement Gatekeeper Provision.** The Bankruptcy Court finds that it will have jurisdiction after the Effective Date to implement the Gatekeeper Provision as post-confirmation bankruptcy court jurisdiction has been interpreted by the Fifth Circuit under *United States Brass Corp* v. *Travelers Ins. Group, Inc. (In re United States Brass Corp.)*, 301 F.3d 296 (5th

Cir. 2002) and *EOP-Colonnade of Dallas Ltd. P'ship* v. *Faulkner (In re Stonebridge Techs., Inc.)*, 430 F.3d 260 (5th Cir. 2005). Based upon the rationale of the Fifth Circuit in *Villegas* v. *Schmidt*, 788 F.3d 156, 158-59 (5th Cir. 2015), the Bankruptcy Court's jurisdiction to act as a gatekeeper does not violate *Stern* v. *Marshall*. The Bankruptcy Court's determination of whether a claim is colorable, which the Bankruptcy Court has jurisdiction to determine, is distinct from whether the Bankruptcy Court would have jurisdiction to adjudicate any claim it finds colorable.

82. **Resolution of Objections of Scott Ellington and Isaac Leventon**. Each of Scott Ellington ("Mr. Ellington") and Isaac Leventon ("Mr. Leventon") (each, a "Senior Employee Claimant") has asserted certain claims for liquidated but unpaid bonus amounts for the following periods: 2016, 2017, and 2018, as set forth in Exhibit A to that certain *Senior Employees' Limited Objection to Debtor's Fifth Amended Plan of Reorganization* [Docket No. 1669] (the "Senior Employees' Objection") (for each of Mr. Ellington and Mr. Leventon, the "Liquidated Bonus Claims").

a. Mr. Ellington has asserted Liquidated Bonus Claims in the aggregate amount of $1,367,197.00, and Mr. Leventon has asserted Liquidated Bonus Claims in the aggregate amount of $598,198.00. Mr. Ellington received two Ballots[10]—a Ballot for Class 7 of the Plan and a Ballot for Class 8 of the Plan. Mr. Ellington completed and timely returned both of such Ballots, voted to reject the Plan, and elected to have his

[10] As defined in the Plan, "Ballot" means the form(s) distributed to holders of Impaired Claims or Equity Interests entitled to vote on the Plan on which to indicate their acceptance or rejection of the Plan.

Class 8 Liquidated Bonus Claims treated under Class 7 of the Plan, subject to the objections and reservations of rights set forth in the Senior Employees' Objection. If Mr. Ellington is permitted to elect Class 7 treatment for his Liquidated Bonus Claims, then the maximum amount of his Liquidated Bonus Claims will be $1,000,000.

b. Mr. Leventon received two Ballots—a Ballot for Class 7 of the Plan and a Ballot for Class 8 of the Plan. Mr. Leventon completed and timely returned both of such Ballots and voted each such Ballots to reject the Plan.

c. The Senior Employees' Objection, among other things, objects to the Plan on the grounds that the Debtor improperly disputes the right of Mr. Ellington to elect Class 7 treatment for his Liquidated Bonus Claims and Mr. Leventon's entitlement to receive Class 7 Convenience Class treatment for his Liquidated Bonus Claims. The Debtor contended that neither Mr. Ellington or Mr. Leventon were entitled to elect to receive Class 7 Convenience Class treatment on account of their Liquidated Bonus Claims under the terms of the Plan, the Disclosure Statement Order or applicable law.

d. The Debtor and Mr. Ellington and Mr. Leventon negotiated at arms' length in an effort to resolve all issues raised in the Senior Employee's Objection, including whether or not Mr. Ellington and Mr. Leventon were entitled to Class 7 Convenience Class treatment of their Liquidated Bonus Claims. As a result of such negotiation, the Debtor, Mr. Ellington, and Mr. Leventon have agreed to the settlement described in paragraphs 82(e) through 82(k) below and approved

and effectuated pursuant to decretal paragraphs RR through SS (the "Senior Employees' Settlement").

e. Under the terms of the Senior Employees' Settlement, the Debtor has the right to elect one of two treatments of the Liquidated Bonus Claims for a Senior Employee Claimant. Under the first treatment option ("Option A"), the Liquidated Bonus Claims will be entitled to be treated in Class 7 of the Plan, and the Liquidated Bonus Claims will be entitled to receive payment in an amount equal to 70.125% of the Class 7 amount of the Liquidated Bonus Claims, subject to the Liquidated Bonus Claims becoming Allowed Claims under the terms of the Plan. Under this calculation, Mr. Ellington would be entitled to receive $701,250.00 on account of his Class 7 Convenience Class Claim when and as Allowed under the Plan, and Mr. Leventon would be entitled to receive $413,175.10 on account of his Class 7 Convenience Class Claim when and as Allowed under the Plan. If, however, any party in interest objects to the allowance of the Senior Employee Claimant's Liquidated Bonus Claims and does not prevail in such objection, then such Senior Employee Claimant will be entitled to a payment in an amount equal to 85% of his Allowed Liquidated Bonus Claims (subject, in the case of Mr. Ellington, to the cap imposed on Class 7 Claims). In addition, under Option A, each of Mr. Ellington and Mr. Leventon would retain their respective rights to assert that the Liquidated Bonus Claims are entitled to be treated as Administrative Expense Claims, as defined in Article I.B.2. of the Plan, in which case the holder of such Liquidated Bonus Claims would be entitled to payment in full of the Allowed Liquidated Bonus Claims. Under Option A, parties in interest

would retain the right to object to any motion seeking payment of the Liquidated Bonus Amounts as Administrative Expenses.

f. Under the second treatment option ("Option B"), the Debtor would agree that the Senior Employee Claimant has Allowed Liquidated Bonus Claims, no longer subject to objection by any party in interest, in the amounts of the Liquidated Bonus Claims (subject, in the case of Mr. Ellington, to the cap imposed by Class 7). If the Debtor elects Option B as to a Senior Employee Claimant, then such Senior Employee Claimant would be entitled to a payment on account of his Allowed Liquidated Bonus Claims in an amount equal to 60% of the amount of the Liquidated Bonus Claims (which, in Mr. Ellington's case, would be $600,000 and in Mr. Leventon's case, would be $358,918.80), and such payment would be the sole recovery on account of such Allowed Liquidated Bonus Claims.

g. The Debtor may, with the consent of the Committee, elect Option B with respect to a Senior Employee Claimant at any time prior to the occurrence of the Effective Date. If the Debtor does not make an election, then Option A will apply.

h. Under either Option A or Option B, Mr. Ellington and Mr. Leventon will retain all their rights with respect to all Claims other than the Liquidated Bonus Amounts, including, but not limited to, their Class 6 PTO Claims, other claims asserted as Class 8 General Unsecured Claims, the Senior Employees' claims for indemnification against the Debtor, and any other claims that they may assert constitute Administrative Expense Claims, and any other such Claims are subject to the rights of any party in interest to object to

such Claims, and the Debtor reserves any all of its rights and defenses in connection therewith.

i. Subject to entry of this Confirmation Order and as set forth and announced on the record at the hearing on confirmation of the Plan and no party objecting thereto, Mr. Ellington and Mr. Leventon agreed to change the votes in their respective Ballots from rejection to acceptance of the Plan and to withdraw the Senior Employees' Objection.

j. The Senior Employees' Settlement represents a valid exercise of the Debtor's business judgment and satisfies the requirements for a compromise under Bankruptcy Rule 9019(a).

k. For the avoidance of doubt, neither Mr. Leventon nor Mr. Ellington shall be a Released Party under the Plan regardless of how the Senior Employee Claimants' Claims are to be treated hereunder.

Based upon the foregoing findings, and upon the record made before the Bankruptcy Court at the Confirmation Hearing, and good and sufficient cause appearing therefor, it is hereby **ORDERED, ADJUDGED AND DECREED THAT:**

A. Confirmation of the Plan. The Plan is approved in its entirety and CONFIRMED under section 1129 of the Bankruptcy Code. The terms of the Plan, including the Plan Supplements and Plan Modifications, are incorporated by reference into and are an integral part of this Confirmation Order.[11]

B. Findings of Fact and Conclusions of Law. The findings of fact and the conclusions of law set forth in this Confirmation Order and on the record of the Confirmation Hearing constitute findings of fact and conclusions of

[11] The Plan is attached hereto as **Exhibit A**.

law in accordance with Bankruptcy Rule 7052, made applicable to this proceeding by Bankruptcy Rule 9014. All findings of fact and conclusion of law announced by the Bankruptcy Court at the Confirmation Hearing in relation to confirmation of the Plan are hereby incorporated into this Confirmation Order. To the extent that any of the following constitutes findings of fact or conclusions of law, they are adopted as such. To the extent any findings of fact or conclusions of law set forth in this Confirmation Order (including any findings of fact or conclusions of law announced by the Bankruptcy Court at the Confirmation Hearing and incorporated herein) constitutes an order of the Bankruptcy Court, and is adopted as such.

C. Objections. Any resolution or disposition of objections to confirmation of the Plan or otherwise ruled upon by the Bankruptcy Court on the record of the Confirmation Hearing is hereby incorporated by reference. All objections and all reservations of rights pertaining to confirmation of the Plan that have not been withdrawn, waived or settled are overruled on the merits, except as otherwise specifically provided in this Confirmation Order.

D. Plan Supplements and Plan Modifications. The filing with the Bankruptcy Court of the Plan Supplements and the Plan Modifications constitutes due and sufficient notice thereof. Accordingly, pursuant to section 1127(a) of the Bankruptcy Code and Bankruptcy Rule 3019, the Plan Modifications and the Plan Supplements do not require additional disclosure under section 1125 of the Bankruptcy Code or resolicitation of votes under section 1126 of the Bankruptcy Code, nor do they require that Holders of Claims or Equity Interests be afforded an opportunity to change previously cast acceptances or rejections of the Plan. The Plan Modifications and the Plan Supplements constitute the Plan pur-

suant to section 1127(a) of the Bankruptcy Code. Accordingly, the Plan, as modified, is properly before the Bankruptcy Court and all votes cast with respect to the Plan prior to such modification shall be binding and shall apply with respect to the Plan.

E. Deemed Acceptance of Plan. In accordance with section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019, all Holders of Claims and Equity Interests who voted to accept the Plan (or whom are conclusively presumed to accept the Plan) are deemed to have accepted the Plan as modified by the Plan Modifications. No holder of a Claim shall be permitted to change its vote as a consequence of the Plan Modifications.

F. Vesting of Assets in the Reorganized Debtor. Except as otherwise provided in the Plan or this Confirmation Order, on or after the Effective Date, all Reorganized Debtor Assets will vest in the Reorganized Debtor, free and clear of all Liens, Claims, charges or other encumbrances pursuant to section 1141(c) of the Bankruptcy Code, except with respect to such Liens, Claims, charges, and other encumbrances that are specifically preserved under the Plan upon the Effective Date. The Reorganized Debtor shall be the exclusive trustee of the Reorganized Debtor Assets for purposes of 31 U.S.C. § 3713(b) and 26 U.S.C. § 6012(b)(3), as well as the representative of the Estate appointed pursuant to section 1123(b)(3)(B) of the Bankruptcy Code with respect to the Reorganized Debtor Assets.

G. Effectiveness of All Actions. All actions contemplated by the Plan, including all actions in connection with the Claimant Trust Agreement, the Senior Employee Stipulation, the New GP LLC Documents, the New Frontier Note, the Reorganized Limited Partnership Agreement, the Litigation Sub-Trust Agreement, and the other

Plan Documents, are authorized to be taken on, prior to, or after the Effective Date, as applicable, under this Confirmation Order, without further application to or order of the Bankruptcy Court, or further action by the directors, managers, officers or partners of the Debtor or the Reorganized Debtor and with the effect that such actions had been taken by unanimous action of such parties.

H. Restructuring Transactions. The Debtor or Reorganized Debtor, as applicable, are authorized to enter into and effectuate the Restructuring provided under the Plan, including, without limitation, the entry into and consummation of the transactions contemplated by the Claimant Trust Agreement, the Senior Employee Stipulation, the New GP LLC Documents, the New Frontier Note, the Reorganized Limited Partnership Agreement, the Litigation Sub-Trust Agreement, and the other Plan Documents, and may take any actions as may be necessary or appropriate to effect a corporate restructuring of its business or a corporate restructuring of the overall corporate structure of the Reorganized Debtor, as and to the extent provided in the Plan. Any transfers of assets or equity interests effected or any obligations incurred through the Restructuring pursuant to the Plan are hereby approved and shall not constitute fraudulent conveyances or fraudulent transfers or otherwise be subject to avoidance.

I. Preservation of Causes of Action. Unless a Cause of Action against a Holder of a Claim or an Equity Interest or other Entity is expressly waived, relinquished, released, compromised or settled in the Plan or any Final Order (including, without limitation, this Confirmation Order), such Cause of Action is expressly reserved for later adjudication by the Reorganized Debtor, the Litigation Sub-Trust, or the Claimant Trust, as appli-

cable (including, without limitation, Causes of Action not specifically identified or of which the Debtor may presently be unaware or that may arise or exist by reason of additional facts or circumstances unknown to the Debtor at this time or facts or circumstances that may change or be different from those the Debtor now believes to exist) and, therefore, no preclusion doctrine, including, without limitation, the doctrines of res judicata, collateral estoppel, issue preclusion, claim preclusion, waiver, estoppel (judicial, equitable or otherwise) or laches will apply to such Causes of Action as a consequence of the confirmation, effectiveness, or consummation of the Plan based on the Disclosure Statement, the Plan, or this Confirmation Order, except where such Causes of Action have been expressly released in the Plan or any other Final Order (including, without limitation, this Confirmation Order). In addition, the right of the Reorganized Debtor, the Claimant Trust, or the Litigation Sub-Trust to pursue or adopt any claims alleged in any lawsuit in which the Debtor is a plaintiff, defendant or an interested party, against any Entity, including, without limitation, the plaintiffs or co-defendants in such lawsuits, is expressly reserved.

J. Independent Board of Directors of Strand. The terms of the current Independent Directors shall expire on the Effective Date without the need for any further or other action by any of the Independent Directors. For avoidance of doubt, the Assumed Contracts include the *Indemnification and Guaranty Agreement between Highland Capital Management, Strand Advisors, Inc. and James Seery*; the *Indemnification and Guaranty Agreement between Highland Capital Management, Strand Advisors, Inc. and John Dubel and Indemnification and Guaranty Agreement between Highland Capital Management, Strand Advisors, Inc. and Russell Nelms* and

shall each remain in full force and effect notwithstanding the expiration of the terms of any Independent Directors.

K. Cancellation of Equity Interests and Issuance of New Partnership Interests. On the Effective Date, all Class A Limited Partnership Interests, including the Class A Limited Partnership Interests held by Strand, as general partner, and Class B/C Limited Partnerships in the Debtor will be deemed cancelled, and all obligations or debts owed by, or Claims against, the Debtor on account of, or based upon, such Class A Limited Partnership Interests and Class B/C Limited Partnership Interests shall be deemed as cancelled, released, and discharged, including all obligations or duties by the Debtor relating to the Equity Interests in any of the Debtor's formation documents, including the Limited Partnership Agreement. As of the Effective Date and pursuant to the Plan, new Class A Limited Partnership Interests in the Reorganized Debtor will be issued to the Claimant Trust and New GP LLC. The Claimant Trust, as limited partner, will ratify New GP LLC's appointment as general partner of the Reorganized Debtor, and on and following the Effective Date, the Claimant Trust will be the Reorganized Debtor's limited partner and New GP LLC will be its general partner. The Claimant Trust, as limited partner, and New GP LLC, as general partner, will execute the Reorganized Limited Partnership Agreement, which will amend and restate, in all respects, the Debtor's current Limited Partnership Agreement. Following the Effective Date, the Reorganized Debtor will be managed consistent with the terms of the Reorganized Limited Partnership Agreement by New GP LLC. The sole managing member of New GP LLC will be the Claimant Trust, and the Claimant Trustee will be the sole officer of New GP LLC on the Effective Date.

L. Transfer of Assets to Claimant Trust. On or prior to the Effective Date, the Debtor shall irrevocably transfer and shall be deemed to have irrevocably transferred to the Claimant Trust all of its rights, title, and interest in and to all of the Claimant Trust Assets, and in accordance with section 1141 of the Bankruptcy Code, the Claimant Trust Assets shall automatically vest in the Claimant Trust free and clear of all Claims, Liens, encumbrances, or interests subject only to the Claimant Trust Interests and the Claimant Trust Expenses, as provided for in the Claimant Trust Agreement, and such transfer shall be exempt from any stamp, real estate transfer, mortgage from any stamp, transfer, reporting, sales, use, or other similar tax. Following the Effective Date, the Claimant Trust will administer the Claimant Trust Assets pursuant to the Plan and the Claimant Trust Agreement.

M. Transfer of Estate Claims to Litigation Sub-Trust. On or prior to the Effective Date, the Claimant Trust shall irrevocably transfer and shall be deemed to have irrevocably transferred to the Litigation Sub-Trust all of the Claimant Trust's rights, title, and interest in and to all of the Estate Claims as successor in interest to the Debtor, and in accordance with section 1141 of the Bankruptcy Code, the Estate Claims shall automatically vest in the Litigation Sub-Trust free and clear of all Claims, Liens, encumbrances, or interests subject only to the Litigation Sub-Trust Interests and Litigation Sub-Trust Expenses. The Litigation Trustee will be authorized to investigate, pursue, and otherwise resolve the Estate Claims pursuant to the terms of the Litigation Sub-Trust Agreement and the Plan, including as successor in interest to the Debtor or Committee, as applicable,

in any litigation commenced prior to the Effective Date in which Estate Claims are asserted.

N. Compromise of Controversies. In consideration for the distributions and other benefits, including releases, provided under the Plan, the provisions of the Plan constitute a good faith compromise and settlement of all Claims, Equity Interests, and controversies resolved under the Plan and the entry of this Confirmation Order constitutes approval of such compromise and settlement under Bankruptcy Rule 9019.

O. Objections to Claims. The Claims Objection Deadline shall be the date that is 180 days after the Effective Date, *provided, however,* that the Claims Objection Deadline may be extended by the Bankruptcy Court upon a motion by the Claimant Trustee and as otherwise provided under the Plan.

P. Assumption of Contracts and Leases. Effective as of the date of this Confirmation Order, each of the Assumed Contacts shall be assumed by the Debtor without the need for any further notice to or action, order, or approval of the Bankruptcy Court, under section 365 of the Bankruptcy Code and the payment of Cures, if any, shall be paid in accordance with the Plan. Each Assumed Contract shall include all modifications, amendments, supplements, restatements, or other agreements related thereto, and all rights related thereto, if any, including all easements, licenses, permits, rights, privileges, immunities, options, rights of first refusal, and any other interests. Modifications, amendments, supplements, and restatements to any of the Assumed Contracts that have been executed by the Debtor during the Chapter 11 Case shall not be deemed to alter the prepetition nature of such Assumed Contracts or the validity, priority, or amount of any Claims that may arise in connection there-

with. Assumption of the Assumed Contracts pursuant to Article V.A of the Plan and full payment of any applicable Cure pursuant to the Plan shall result in the full release and satisfaction of any Cures, Claims, or defaults, whether monetary or nonmonetary, including defaults of provisions restricting the change in control or ownership interest composition, or other bankruptcy-related defaults, arising under any Assumed Contracts.

Q. Rejection of Contracts and Leases. Unless previously assumed during the pendency of the Chapter 11 Case or pursuant to the Plan, all other Executory Contracts and Unexpired Leases are rejected as of the date of the entry of this Confirmation Order and pursuant to the terms of the Plan. To the extent that any party asserts any damages resulting from the rejection of any Executory Contract or Unexpired Lease, such claim must be filed within **thirty (30) days** following entry of this Confirmation Order, or such claim will be forever barred and disallowed against the Reorganized Debtor.

R. Assumption of Issuer Executory Contracts. On the Confirmation Date, the Debtor will assume the agreements set forth on **Exhibit B** hereto (collectively, the "Issuer Executory Contracts") pursuant to section 365 of the Bankruptcy Code and Article V of the Plan. In full and complete satisfaction of its obligation to cure outstanding defaults under section 365(b)(1) of the Bankruptcy Code, the Debtor or, as applicable, any successor manager under the Issuer Executory Contracts (collectively, the "Portfolio Manager") will pay to the Issuers[12] a

[12] The "Issuers" are: Brentwood CLO, Ltd., Gleneagles CLO, Ltd., Greenbriar CLO, Ltd., Highland CLO 2018-1, Ltd., Highland Legacy Limited, Highland Loan Funding V Ltd., Highland Park CDO I, Ltd., Pam Capital Funding LP, Rockwall CDO II Ltd., Rockwall CDO Ltd., Southfork CLO Ltd., Stratford CLO Ltd., Westchester

cumulative amount of $525,000 (the "Cure Amount") as follows:

a. $200,000 in cash on the date that is five business days from the Effective Date, with such payment paid directly to Schulte Roth & Zabel LLP ("SRZ") in the amount of $85,714.29, Jones Walker LLP ("JW") in the amount of $72,380.95, and Maples Group ("Maples" and collectively with SRZ and JW, the "Issuers' Counsel") in the amount of $41,904.76 as reimbursement for the attorney's fees and other legal expenses incurred by the Issuers in connection with the Debtor's bankruptcy case; and

b. $325,000 in four equal quarterly payments of $81,250.00 (each, a "Payment"), which amounts shall be paid to SRZ in the amount of $34,821.43, JW in the amount of $29,404.76, and Maples in the amount of $17,023.81 as additional reimbursement for the attorney's fees and other legal expenses incurred by the Issuers in connection with the Debtor's bankruptcy case (i) from any management fees actually paid to the Portfolio Manager under the Issuer Executory Contracts (the "Management Fees"), and (ii) on the date(s) Management Fees are required to be paid under the Issuer Executory Contracts (the "Payment Dates"), and such obligation shall be considered an irrevocable direction from the Debtor and the Bankruptcy Court to the relevant CLO Trustee to pay, on each Payment Date, the Payment to Issuers' Counsel, allocated in the proportion set forth in such agreement; *provided, however,* that (x) if the Management

---

CLO, Ltd., Aberdeen Loan Funding, Ltd., Eastland CLO, Ltd., Grayson CLO, Ltd., Highland Credit Opportunities CDO Ltd., Jasper CLO, Ltd., Liberty Cayman Holdings, Ltd., Liberty CLO, Ltd., Red River CLO, Ltd., Valhalla CLO, Ltd.

Fees are insufficient to make any Payment in full on a Payment Date, such shortfall, in addition to any other amounts due hereunder, shall be paid out of the Management Fees owed on the following Payment Date, and (y) nothing herein shall limit either Debtor's liability to pay the amounts set forth herein, nor the recourse of the Issuers or Issuers' Counsel to the Debtor, in the event of any failure to make any Payment.

S. Release of Issuer Claims. Effective as of the Confirmation Date, and to the maximum extent permitted by law, each Issuer on behalf of itself and each of its current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, successors, designees, and date, and to the maximum extent permitted by law, each Issuer on behalf of itself and each of its current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, successors, designees, and assigns hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue, (i) the Debtor and (ii) the Professionals retained by the Debtor and the Committee in the Chapter 11 Case, the Independent Directors, the CEO/CRO, and with respect to the Persons listed in this subsection (ii), such Person's Related Persons (collectively, the "Debtor Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected,

matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, including, without limitation, those which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "Issuer Released Claims").

T. Release of Debtor Claims against Issuer Released Parties. Upon entry of this Order, and to the maximum extent permitted by law, the Debtor hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue [(i) each Issuer and (ii) Wendy Ebanks, (iii) Yun Zheng, (iv) Laura Chisholm, (v) Mora Goddard, (vi) Stacy Bodden, (vii) Suzan Merren (viii) Scott Dakers, (ix) Samit Ghosh, (x) Inderjit Singh, (xi) Ellen Christian, (xii) Andrew Dean, (xiii) Betsy Mortel, (xiv) David Hogan, (xv) Cleveland Stewart, (xvi) Rachael Rankin, (xvii) Otelia Scott, (xviii) Martin Couch, (xx) Ferona Bartley-Davis, (xxi) Charlotte Cloete, (xxii) Christina McLean, (xxiii) Karen Ellerbe, (xxiv) Gennie Kay Bigord, (xxv) Evert Brunekreef, (xxvii) Evan Charles Burtton (collectively, the "Issuer Released Parties"),] for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, which were or

could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "Debtor Released Claims"); provided, however, that notwithstanding anything herein to the contrary, the release contained herein will apply to the Issuer Released Parties set forth in subsection (ii) above only with respect to Debtor Released Claims arising from or relating to the Issuer Executory Contracts. Notwithstanding anything in this Order to the contrary, the releases set forth in paragraphs S and T hereof will not apply with respect to the duties, rights, or obligations of the Debtor or any Issuer hereunder.

U. Authorization to Consummate. The Debtor is authorized to consummate the Plan after the entry of this Confirmation Order subject to satisfaction or waiver of the conditions precedent to the Effective Date of the Plan set forth in Article VIII.A of the Plan. The Plan shall not become effective unless and until the conditions set forth in Article VIII.A of the Plan have been satisfied, or otherwise waived pursuant to Article VIII.B of the Plan.

V. Professional Compensation. All requests for payment of Professional Fee Claims for services rendered and reimbursement of expenses incurred prior to the Effective Date must be filed **no later than sixty (60) days after the Effective Date**. The Bankruptcy Court shall determine the Allowed amounts of such Professional Fee Claims after notice and an opportunity for hearing in accordance with the procedures established by the Bankruptcy Code and the Bankruptcy Court. The Debtor shall fund the Professional Fee Reserve as provided under the Plan. The Reorganized Debtor shall pay Professional Fee Claims in Cash in the amounts the Bankruptcy Court allows. The Debtor is authorized to pay the pre-Effective Date fees and expenses of all ordinary course

professionals in the ordinary course of business without the need for further Bankruptcy Court order or approval. From and after the Effective Date, any requirement that Professionals comply with sections 327 through 331 and 1103 (if applicable) of the Bankruptcy Code in seeking retention or compensation for services rendered after such date shall terminate, and the Reorganized Debtor or Claimant Trustee, as applicable, may employ and pay any Professional or Entity employed in the ordinary course of the Debtor's business without any further notice to or action, order, or approval of the Bankruptcy Court.

W. Release, Exculpation, Discharge, and Injunction Provisions. The following release, exculpation, discharge, and injunction provisions set forth in the Plan are approved and authorized in their entirety, and such provisions are effective and binding on all parties and Entities to the extent provided therein.

X. Discharge of Claims and Termination of Interests. To the fullest extent provided under section 1141(d)(1)(A) and other applicable provisions of the Bankruptcy Code, except as otherwise expressly provided by the Plan or this Confirmation Order, all consideration distributed under the Plan will be in exchange for, and in complete satisfaction, settlement, discharge, and release of, all Claims and Equity Interests of any kind or nature whatsoever against the Debtor or any of its Assets or properties, and regardless of whether any property will have been distributed or retained pursuant to the Plan on account of such Claims or Equity Interests. Except as otherwise expressly provided by the Plan or this Confirmation Order, upon the Effective Date, the Debtor and its Estate will be deemed discharged and released under and to the fullest extent provided under section 1141(d)(1)(A) and other applicable provisions of the

Bankruptcy Code from any and all Claims and Equity Interests of any kind or nature whatsoever, including, but not limited to, demands and liabilities that arose before the Confirmation Date, and all debts of the kind specified in section 502(g), 502(h), or 502(i) of the Bankruptcy Code.

Y. Exculpation. Subject in all respects to Article XII.D of the Plan, to the maximum extent permitted by applicable law, no Exculpated Party will have or incur, and each Exculpated Party is hereby exculpated from, any claim, obligation, suit, judgment, damage, demand, debt, right, Cause of Action, remedy, loss, and liability for conduct occurring on or after the Petition Date in connection with or arising out of (i) the filing and administration of the Chapter 11 Case; (ii) the negotiation and pursuit of the Disclosure Statement, the Plan, or the solicitation of votes for, or confirmation of, the Plan; (iii) the funding or consummation of the Plan (including the Plan Supplement) or any related agreements, instruments, or other documents, the solicitation of votes on the Plan, the offer, issuance, and Plan Distribution of any securities issued or to be issued pursuant to the Plan, including the Claimant Trust Interests, whether or not such Plan Distributions occur following the Effective Date; (iv) the implementation of the Plan; and (v) any negotiations, transactions, and documentation in connection with the foregoing clauses (i)-(v); provided, however, the foregoing will not apply to (a) any acts or omissions of an Exculpated Party arising out of or related to acts or omissions that constitute bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct or (b) Strand or any Employee other than with respect to actions taken by such Entities from the date of appointment of the Independent Directors through the Effective Date. The

Plan's exculpation shall be in addition to, and not in limitation of, all other releases, indemnities, exculpations, any other applicable law or rules, or any other provisions of the Plan, including Article IV.C.2 of the Plan, protecting such Exculpated Parties from liability.

Z. Releases by the Debtor. On and after the Effective Date, each Released Party is deemed to be, hereby conclusively, absolutely, unconditionally, irrevocably, and forever released and discharged by the Debtor and the Estate, in each case on behalf of themselves and their respective successors, assigns, and representatives, including, but not limited to, the Claimant Trust and the Litigation Sub-Trust from any and all Causes of Action, including any derivative claims, asserted on behalf of the Debtor, whether known or unknown, foreseen or unforeseen, matured or unmatured, existing or hereafter arising, in law, equity, contract, tort or otherwise, that the Debtor or the Estate would have been legally entitled to assert in their own right (whether individually or collectively) or on behalf of the holder of any Claim against, or Interest in, a Debtor or other Person. Notwithstanding anything contained herein to the contrary, the foregoing release does not release: (i) any obligations of any party under the Plan or any document, instrument, or agreement executed to implement the Plan, (ii) the rights or obligations of any current employee of the Debtor under any employment agreement or plan, (iii) the rights of the Debtor with respect to any confidentiality provisions or covenants restricting competition in favor of the Debtor under any employment agreement with a current or former employee of the Debtor, (iv) any Avoidance Actions, or (v) any Causes of Action arising from willful misconduct, criminal misconduct, actual fraud, or gross negligence of such applicable Released Party as determined

by Final Order of the Bankruptcy Court or any other court of competent jurisdiction.

AA. Injunction. Upon entry of this Confirmation Order, all Enjoined Parties are and shall be permanently enjoined, on and after the Effective Date, from taking any actions to interfere with the implementation or consummation of the Plan. Except as expressly provided in the Plan, this Confirmation Order, or a separate order of the Bankruptcy Court, all Enjoined Parties are and shall be permanently enjoined, on and after the Effective Date, with respect to any Claims and Equity Interests, from directly or indirectly (i) commencing, conducting, or continuing in any manner, any suit, action, or other proceeding of any kind (including any proceeding in a judicial, arbitral, administrative or other forum) against or affecting the Debtor or the property of the Debtor, (ii) enforcing, levying, attaching (including any prejudgment attachment), collecting, or otherwise recovering, enforcing, or attempting to recover or enforce, by any manner or means, any judgment, award, decree, or order against the Debtor or the property of the Debtor, (iii) creating, perfecting, or otherwise enforcing in any manner, any security interest, lien or encumbrance of any kind against the Debtor or the property of the Debtor, (iv) asserting any right of setoff, directly or indirectly, against any obligation due to the Debtor or against property or interests in property of the Debtor, except to the limited extent permitted under Sections 553 and 1141 of the Bankruptcy Code, and (v) acting or proceeding in any manner, in any place whatsoever, that does not conform to or comply with the provisions of the Plan. The injunctions set forth in the Plan and this Confirmation Order shall extend to, and apply to any act of the type set forth in any of clauses (i)-(v) of the immediately preceding para-

graph against any successors of the Debtor, including, but not limited to, the Reorganized Debtor, the Litigation Sub-Trust, and the Claimant Trust and their respective property and interests in property. Subject in all respects to Article XII.D of the Plan, no Enjoined Party may commence or pursue a claim or cause of action of any kind against any Protected Party that arose or arises from or is related to the Chapter 11 Case, the negotiation of the Plan, the administration of the Plan or property to be distributed under the Plan, the wind down of the business of the Debtor or Reorganized Debtor, the administration of the Claimant Trust or the Litigation Sub-Trust, or the transactions in furtherance of the foregoing without the Bankruptcy Court (i) first determining, after notice and a hearing, that such claim or cause of action represents a colorable claim of any kind, including, but not limited to, negligence, bad faith, criminal misconduct, willful misconduct, fraud, or gross negligence against a Protected Party and (ii) specifically authorizing such Enjoined Party to bring such claim or cause of action against any such Protected Party; *provided, however,* the foregoing will not apply to a claim or cause of action against Strand or against any Employee other than with respect to actions taken, respectively, by Strand or by such Employee from the date of appointment of the Independent Directors through the Effective Date. The Bankruptcy Court will have sole and exclusive jurisdiction to determine whether a claim or cause of action is colorable and, only to the extent legally permissible and as provided for in Article XI of the Plan, shall have jurisdiction to adjudicate the underlying colorable claim or cause of action.

BB. Duration of Injunction and Stays. Unless otherwise provided in the Plan, in this Confirmation Order, or

in a Final Order of the Bankruptcy Court, (i) all injunctions and stays entered during the Chapter 11 Case and in existence on the Confirmation Date, shall remain in full force and effect in accordance with their terms; and (ii) the automatic stay arising under section 362 of the Bankruptcy Code shall remain in full force and effect subject to Section 362(c) of the Bankruptcy Code, and to the extent necessary if the Debtor does not receive a discharge, the Bankruptcy Court will enter an equivalent order under Section 105.

CC. Continuance of January 9 Order and July 16 Order. Unless otherwise provided in the Plan, in this Confirmation Order, or in a Final Order of the Bankruptcy Court, each of the Order *Approving Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course, entered by the Bankruptcy Court on January 9, 2020* [Docket No. 339] and *Order Approving the Debtor's Motion Under Bankruptcy Code Sections 105(a) and 363(b) Authorizing Retention of James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative Nunc Pro Tunc to March 15, 2020* [Docket No. 854] entered on July 16, 2020 shall remain in full force and effect from the Confirmation Date and following the Effective Date.

DD. No Governmental Releases. Nothing in this Confirmation Order or the Plan shall effect a release of any claim by the United States Government or any of its agencies or any state and local authority whatsoever, including without limitation any claim arising under the Internal Revenue Code, the environmental laws or any criminal laws of the United States or any state and local authority against any party or person, nor shall anything in this Confirmation Order or the Plan enjoin the United

States or any state or local authority from bringing any claim, suit, action, or other proceedings against any party or person for any liability of such persons whatever, including without limitation any claim, suit, or action arising under the Internal Revenue Code, the environmental laws or any criminal laws of the United States or any state and local authority against such persons, nor shall anything in this Confirmation Order or the Plan exculpate any party or person from any liability to the United States Government or any of its agencies or any state and local authority whatsoever, including any liabilities arising under the Internal Revenue Code, the environmental laws, or any criminal laws of the United States or any state and local authority against any party or person.

EE. Exemption from Transfer Taxes. Pursuant to section 1146(a) of the Bankruptcy Code, any transfers (whether from the Debtor to the Reorganized Debtor or to any other Person) of property under the Plan or pursuant to: (a) the issuance, distribution, transfer, or exchange of any debt, equity security, or other interest in the Debtor or the Reorganized Debtor; (b) the Restructuring transactions pursuant to the Plan; (c) the creation, modification, consolidation, termination, refinancing, and/or recording of any mortgage, deed of trust, or other security interest, or the securing of additional indebtedness by such or other means; (d) the making, assignment, or recording of any lease or sublease; or (e) the making, delivery, or recording of any deed or other instrument of transfer under, in furtherance of, or in connection with, the Plan, including any deeds, bills of sale, assignments, or other instrument of transfer executed in connection with any transaction arising out of, contemplated by, or in any way related to the Plan, shall not be subject to any document recording tax, stamp tax, conveyance fee, in-

tangibles or similar tax, mortgage tax, real estate transfer tax, mortgage recording tax, Uniform Commercial Code filing or recording fee, regulatory filing or recording fee, or other similar tax or governmental assessment to the fullest extent contemplated by section 1146(a) of the Bankruptcy Code, and upon entry of this Confirmation Order, the appropriate state or local governmental officials or agents shall forego the collection of any such tax or governmental assessment and accept for filing and recordation of any of the foregoing instruments or other documents without the payment of any such tax, recordation fee, or governmental assessment.

FF. Cancellation of Notes, Certificates and Instruments. Except for the purpose of evidencing a right to a distribution under the Plan and except as otherwise set forth in the Plan or as otherwise provided in this Confirmation Order, on the Effective Date, all agreements, instruments, Securities and other documents evidencing any prepetition Claim or Equity Interest and any rights of any Holder in respect thereof shall be deemed cancelled, discharged, and of no force or effect. The holders of or parties to such cancelled instruments, Securities, and other documentation will have no rights arising from or related to such instruments, Securities, or other documentation or the cancellation thereof, except the rights provided for pursuant to the Plan, and the obligations of the Debtor thereunder or in any way related thereto will be fully released, terminated, extinguished and discharged, in each case without further notice to or order of the Bankruptcy Court, act or action under applicable law, regulation, order, or rule or any requirement of further action, vote or other approval or authorization by any Person.

GG. Documents, Mortgages, and Instruments. Each federal, state, commonwealth, local, foreign, or other gov-

ernmental agency is authorized to accept any and all documents, mortgages, and instruments necessary or appropriate to effectuate, implement, or consummate the Plan, including the Restructuring transactions contemplated under the Plan, and this Confirmation Order.

HH. Post-Confirmation Modifications. Subject to section 1127(b) of the Bankruptcy Code and the Plan, the Debtor and the Reorganized Debtor expressly reserve their rights to revoke or withdraw, or to alter, amend, or modify materially the Plan, one or more times after Confirmation and, to the extent necessary, may initiate proceedings in the Bankruptcy Court to so alter, amend, or modify the Plan, or remedy any defect or omission, or reconcile any inconsistencies in the Plan or this Confirmation Order, in such manner as may be necessary to carry out the purposes and intent of the Plan. Any such modification or supplement shall be considered a modification of the Plan and shall be made in accordance with Article XII.B of the Plan.

II. Applicable Nonbankruptcy Law. The provisions of this Confirmation Order, the Plan and related documents, or any amendments or modifications thereto, shall apply and be enforceable notwithstanding any otherwise applicable nonbankruptcy law.

JJ. Governmental Approvals Not Required. This Confirmation Order shall constitute all approvals and consents required, if any, by the laws, rules, or regulations of any state, federal, or other governmental authority with respect to the dissemination, implementation, or consummation of the Plan and the Disclosure Statement, any certifications, documents, instruments or agreements, and any amendments or modifications thereto, and any other acts referred to in, or contemplated by, the Plan and the Disclosure Statement.

KK. Notice of Effective Date. As soon as reasonably practicable after the Effective Date, the Reorganized Debtor shall file notice of the Effective Date and shall serve a copy of the same on all Holders of Claims and Equity Interests, and all parties who have filed with the Bankruptcy Court requests to receive notices in accordance with Bankruptcy Rules 2002 and 3020(c). Notwithstanding the above, no notice of Confirmation or Consummation or service of any kind shall be required to be mailed or made upon any Entity to whom the Debtor mailed notice of the Confirmation Hearing, but received such notice returned marked "undeliverable as addressed," "moved, left no forwarding address" or "forwarding order expired," or similar reason, unless the Debtor has been informed in writing by such Entity, or is otherwise aware, of that Entity's new address. The above-referenced notices are adequate under the particular circumstances of this Chapter 11 Case and no other or further notice is necessary.

LL. Substantial Consummation. On the Effective Date, the Plan shall be deemed to be substantially consummated under sections 1101 and 1127 of the Bankruptcy Code.

MM. Waiver of Stay. For good cause shown, the stay of this Confirmation Order provided by any Bankruptcy Rule is waived, and this Confirmation Order shall be effective and enforceable immediately upon its entry by the Bankruptcy Court.

NN. References to and Omissions of Plan Provisions. References to articles, sections, and provisions of the Plan are inserted for convenience of reference only and are not intended to be a part of or to affect the interpretation of the Plan. The failure to specifically include or to refer to any particular article, section, or provision

of the Plan in this Confirmation Order shall not diminish or impair the effectiveness of such article, section, or provision, it being the intent of the Bankruptcy Court that the Plan be confirmed in its entirety, except as expressly modified herein, and incorporated herein by this reference.

OO. Headings. Headings utilized herein are for convenience and reference only, and do not constitute a part of the Plan or this Confirmation Order for any other purpose.

PP. Effect of Conflict. This Confirmation Order supersedes any Bankruptcy Court order issued prior to the Confirmation Date that may be inconsistent with this Confirmation Order. If there is any inconsistency between the terms of the Plan and the terms of this Confirmation Order, the terms of this Confirmation Order govern and control. If there is any inconsistency between the terms of this Confirmation Order and the terms of a final, executed Plan Supplement Document, the terms of the final, executed Plan Supplement Document will govern and control.

QQ. Resolution of Objection of Texas Taxing Authorities. Dallas County, Kaufman County, City of Allen, Allen ISD and City of Richardson (collectively, the "Tax Authorities") assert that they are the holders of prepetition and administrative expense claims for 2019, 2020 and 2021 ad valorem real and business personal property taxes. The ad valorem property taxes for tax year 2020 shall be paid in accordance with and to the extent required under applicable nonbankruptcy law. In the event the 2020 taxes are paid after February 1, 2021, the Tax Authorities may assert any rights and amounts they claim are owed with respect to penalties and interest that have accrued through the date of payment and the

Debtor and Reorganized Debtor reserve any all rights and defenses in connection therewith.

a. The Debtor/Reorganized Debtor shall pay all amounts owed to the Tax Authorities for tax year 2021 in accordance with and to the extent required under applicable nonbankruptcy law. The Tax Authorities shall not be required to file and serve an administrative expense claim and request for payment as a condition of allowance of their administrative expense claims pursuant to 11 U.S.C. Section 503(b)(1)(D). With regard to year 2019 ad valorem property taxes, the Tax Authorities will receive payment of their prepetition claims within 30 days of the Effective Date of the Plan. The payment will include interest from the Petition Date through the Effective Date and from the Effective Date through payment in full at the state statutory rate pursuant to 11 U.S.C. Sections 506(b), 511, and 1129, if applicable, subject to all of the Debtor's and Reorganized Debtor's rights and defenses in connection therewith. Notwithstanding any other provision in the Plan, the Tax Authorities shall (i) retain the liens that secure all prepetition and postpetition amounts ultimately owed to them, if any, as well as (ii) the state law priority of those liens until the claims are paid in full.

b. The Tax Authorities' prepetition claims and their administrative expense claims shall not be discharged until such time as the amounts owed are paid in full. In the event of a default asserted by the Taxing Authorities, the Tax Authorities shall provide notice Debtor or Reorganized Debtor, as applicable, and may demand cure of any such asserted default. Subject to all of its rights and defenses, the Debtor or Reorganized Debtor shall have fifteen (15) days from

the date of the notice to cure the default. If the alleged default is not cured, the Tax Authorities may exercise any of their respective rights under applicable law and pursue collection of all amounts owed pursuant to state law outside of the Bankruptcy Court, subject in all respects to the Debtor's and Reorganized Debtor's applicable rights and defenses. The Debtor/Reorganized Debtor shall be entitled to any notices of default required under applicable nonbankruptcy law and each of the Taxing Authorities, the Debtor and the Reorganized Debtor reserve any and all of their respective rights and defenses in connection therewith. The Debtor's and Reorganized Debtor's rights and defenses under Texas Law and the Bankruptcy Code with respect to this provision of the Confirmation Order, including their right to dispute or object to the Tax Authorities' Claims and liens, are fully preserved.

c. Pursuant to Bankruptcy Rule 3018(a), Mr. Ellington and Mr. Leventon were permitted to change their votes on the Plan. Accordingly, Mr. Ellington's votes on his Ballots in Class 7 and Class 8 of the Plan were changed from a rejection of the Plan to acceptance of the Plan, and Mr. Leventon's votes on his Ballots in Class 7 and Class 8 of the Plan were changed from rejections of the Plan to acceptances of the Plan.

d. The Senior Employees' Objection is deemed withdrawn.

SS. No Release of Claims Against Senior Employee Claimants. For the avoidance of doubt, the Senior Employees' Settlement, as approved herein, shall not, and shall not be deemed to, release any Claims or Causes of Action held by the Debtor against either Senior Employee Claimant nor shall either Senior Employee Claimant be, or be deemed to be, a "Released Party" under the Plan.

TT. Resolution of Objection of Internal Revenue Service. Notwithstanding any other provision or term of the Plan or Confirmation Order, the following Default Provision shall control as to the United States of America, Internal Revenue Service ("IRS") and all of its claims, including any administrative claim (the "IRS Claim"):

(a) Notwithstanding any other provision in the Plan, if the Debtor, the Reorganized Debtor, or any successor in interest fails to pay when due any payment required to be made on federal taxes, the IRS Claim, or other payment required to be made to the IRS under the terms and provisions of this Plan, the Confirmation Order, or the Internal Revenue Code (26 U.S.C.), or fails to timely file any required federal tax return, or if any other event of default as set forth in the Plan occurs, the IRS shall be entitled to give the Debtor, the Reorganized Debtor and/or any successor in interest and their counsel of record, by United States Certified Mail, written notice of the failure and/or default with demand that it be cured, and if the failure and/or default is not cured within 14 days of the date of said notice and demand, then the following shall apply to the IRS:

(1) The administrative collection powers and the rights of the IRS shall be reinstated as they existed prior to the filing of the bankruptcy petition, including, but not limited to, the assessment of taxes, the filing of a notice of Federal tax lien and the powers of levy, seizure, and collection as provided under the Internal Revenue Code;

(2) The automatic stay of 11 U.S.C. §362 and any injunction of the Plan or in the Confirmation Order shall, with regard to the IRS only, lift or terminate without further notice or hearing by the

Bankruptcy Court, and the entire prepetition liability owed to the IRS, together with any unpaid postpetition tax liabilities, may become due and payable immediately; and

(3) The IRS shall have the right to proceed to collect from the Debtor, the Reorganized Debtor or any successor in interest any of the prepetition tax liabilities and related penalties and interest through administrative or judicial collection procedures available under the United States Code as if no bankruptcy petition had been filed and as if no plan had been confirmed.

(b) If the IRS declares the Debtor, the Reorganized Debtor, or any successor-in-interest to be in default of the Debtor's, the Reorganized Debtor's and/or any successor-in-interest's obligations under the Plan, then entire prepetition liability of an IRS' Allowed Claim, together with any unpaid postpetition tax liabilities shall become due and payable immediately upon written demand to the Debtor, Reorganized Debtor and/or any successor-in-interest. Failure of the IRS to declare a failure and/or default does not constitute a waiver by the United States or its agency the IRS of the right to declare that the Debtor, Reorganized Debtor, and/or any successor in interest is in default.

(c) The IRS shall only be required to send two notices of failure and/or default, and upon the third event of a failure and/or default, the IRS shall be entitled to proceed as set out in paragraphs (1), (2), and/or (3) herein above without further notice to the Debtor, the Reorganized Debtor, or any successor in interest, or its counsel. The collection statute expiration date for

all unpaid federal tax liabilities shall be extended pursuant to non-bankruptcy law.

(d) The Internal Revenue Service shall not be bound by any release provisions in the Plan that would release any liability of the responsible persons of the Debtor, the Reorganized Debtor, and/or any successor in interest to the IRS. The Internal Revenue Service may take such actions as it deems necessary to assess any liability that may be due and owing by the responsible persons of the Debtor, the Reorganized Debtor and/or any successor in interest to the Internal Revenue Service.

(e) Nothing contained in the Plan or the Confirmation Order shall be deemed to be a waiver or relinquishment of any rights, claims, causes of action, rights of setoff or recoupment, rights to appeal tax assessments, or other legal or equitable defenses that the Debtor or Reorganized Debtor have under non-bankruptcy law in connection with any claim, liability or cause of action of the United States and its agency the Internal Revenue Service.

(f) The term "any payment required to be made on federal taxes," as used herein above, is defined as: any payment or deposit required by the Internal Revenue Code to be made by the Debtor from and after the Confirmation Date, or the Reorganized Debtor and/or any successor in interest from and after the Effective Date, to the date the IRS Claim is together with interest paid in full. The term "any required tax return," as used herein above, is defined as: any tax return or report required by the Internal Revenue Code to be made by the Debtor from and after the Confirmation Date, or the Reorganized Debtor and/or any successor

in interest from and after the Effective Date, to the date the IRS Claim is together with interest paid in full.

UU. IRS Proof of Claim. Notwithstanding anything in the Plan or in this Confirmation Order, until all required tax returns are filed with and processed by the IRS, the IRS's proof of claim will not be deemed fixed for purposes of Section 502 of the Bankruptcy Code and may be amended in order to reflect the IRS' assessment of the Debtor's unpaid priority and general unsecured taxes, penalties and interest.

VV. CLO Holdco, Ltd. Settlement. Notwithstanding anything contained herein to the contrary, nothing in this Order is or is intended to supersede the rights and obligations of either the Debtor or CLO Holdco contained in that certain *Settlement Agreement between CLO Holdco, Ltd., and Highland Capital Management, L.P., dated January 25,2021* [Docket No. 1838- 1] (the "CLOH Settlement Agreement"). In the event of any conflict between the terms of this Order and the terms of the CLOH Settlement Agreement, the terms of the CLOH Settlement Agreement will govern.

WW. Retention of Jurisdiction. The Bankruptcy Court may properly, and upon the Effective Date shall, to the maximum extent permitted under applicable law, retain jurisdiction over all matters arising out of, and related to, this Chapter 11 Case, including the matters set forth in Article XI of the Plan and section 1142 of the Bankruptcy Code.

XX. Payment of Statutory Fees; Filing of Quarterly Reports. All fees payable pursuant to 28 U.S.C. § 1930 shall be paid on or before the Effective Date. The Reorganized Debtor, the Claimant Trust, and the Litigation Sub-Trust shall be jointly and severally liable for payment of quarterly fees to the Office of the United States

Trustee pursuant to 28 U.S.C. § 1930 through the entry of the Final Decree for the Debtor or the dismissal or conversion of the Chapter 11 Case. Notwithstanding anything to the contrary in the Plan, the U.S. Trustee shall not be required to file any proofs of claim with respect to quarterly fees payable pursuant to 28 U.S.C. § 1930.

YY. Dissolution of the Committee. On the Effective Date, the Committee will dissolve, and the members of the Committee and the Committee's Professionals will cease to have any role arising from or relating to the Chapter 11 Case, except in connection with final fee applications of Professionals for services rendered prior to the Effective Date (including the right to object thereto). Notwithstanding the foregoing, any Committee member or Professional may serve following the Effective Date with respect to the Claimant Trust Oversight Board or Litigation Sub-Trust. The Professionals retained by the Committee and the members thereof will not be entitled to assert any fee claims for any services rendered to the Committee or expenses incurred in the service of the Committee after the Effective Date, except for reasonable fees for services rendered, and actual and necessary costs incurred, in connection with any applications for allowance of Professional Fees pending on the Effective Date or filed and served after the Effective Date pursuant to the Plan. Nothing in the Plan shall prohibit or limit the ability of the Debtor's or Committee's Professionals to represent either of the Trustees or to be compensated or reimbursed per the Plan, the Claimant Trust Agreement, and/or Litigation Sub-Trust in connection with such representation.

ZZ. Miscellaneous. After the Effective Date, the Debtor or Reorganized Debtor, as applicable, shall have no obligation to file with the Bankruptcy Court or serve

on any parties reports that the Debtor or Reorganized Debtor, as applicable, were obligated to file under the Bankruptcy Code or a court order, including monthly operating reports (even for those periods for which a monthly operating report was not filed before the Effective Date), ordinary course professional reports, reports to any parties otherwise required under the "first" and "second" day orders entered in this Chapter 11 Case (including any cash collateral financing orders entered in this Chapter 11 Case) and monthly or quarterly reports for Professionals; *provided, however,* that the Debtor or Reorganized Debtor, as applicable, will comply with the U.S. Trustee's post confirmation reporting requirements.

END OF ORDER

167a

APPENDIX D

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

CASE NO. 19-34054-sgj11

IN RE: HIGHLAND CAPITAL MANAGEMENT, L.P.[1]

Debtor.

FIFTH AMENDED PLAN OF REORGANIZATION OF HIGHLAND CAPITAL MANAGEMENT, L.P. (AS MODIFIED)

January 22, 2021

---

* * * * *

HIGHLAND CAPITAL MANAGEMENT, L.P., as debtor and debtor-in-possession in the above-captioned case (the "Debtor"), proposes the following chapter 11 plan of reorganization (the "Plan") for, among other things, the resolution of the outstanding Claims against, and Equity Interests in, the Debtor. Unless otherwise noted, capitalized terms used in this Plan have the meanings set forth in Article I of this Plan. The Debtor is the proponent of this Plan within the meaning of section 1129 of the Bankruptcy Code.

---

[1] The Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

* * * * *

ARTICLE I.

RULES OF INTERPRETATION, COMPUTATION OF TIME, GOVERNING LAW AND DEFINED TERMS

* * * * *

B. Defined Terms

* * * * *

56. "*Enjoined Parties*" means (i) all Entities who have held, hold, or may hold Claims against or Equity Interests in the Debtor (whether or not proof of such Claims or Equity Interests has been filed and whether or not such Entities vote in favor of, against or abstain from voting on the Plan or are presumed to have accepted or deemed to have rejected the Plan), (ii) James Dondero ("Dondero"), (iii) any Entity that has appeared and/or filed any motion, objection, or other pleading in this Chapter 11 Case regardless of the capacity in which such Entity appeared and any other party in interest, (iv) any Related Entity, and (v) the Related Persons of each of the foregoing.

* * * * *

62. "*Exculpated Parties*" means, collectively, (i) the Debtor and its successors and assigns, (ii) the Employees, (iii) Strand, (iv) the Independent Directors, (v) the Committee, (vi) the members of the Committee (in their official capacities), (vii) the Professionals retained by the Debtor and the Committee in the Chapter 11 Case, (viii) the CEO/CRO; and (ix) the Related Persons of each of the parties listed in (iv) through (viii); *provided*, however, that, for the avoidance of doubt, none of James Dondero, Mark Okada, NexPoint Advisors, L.P. (and any of its

subsidiaries and managed entities), the Charitable Donor Advised Fund, L.P. (and any of its subsidiaries, including CLO Holdco, Ltd., and managed entities), Highland CLO Funding, Ltd. (and any of its subsidiaries, members, and managed entities), Highland Capital Management Fund Advisors, L.P. (and any of its subsidiaries and managed entities), NexBank, SSB (and any of its subsidiaries), the Hunter Mountain Investment Trust (or any trustee acting for the trust), the Dugaboy Investment Trust (or any trustee acting for the trust), or Grant Scott is included in the term "Exculpated Party."

* * * * *

105. "*Protected Parties*" means, collectively, (i) the Debtor and its successors and assigns, direct and indirect majority-owned subsidiaries, and the Managed Funds, (ii) the Employees, (iii) Strand, (iv) the Reorganized Debtor, (v) the Independent Directors, (vi) the Committee, (vii) the members of the Committee (in their official capacities), (viii) the Claimant Trust, (ix) the Claimant Trustee, (x) the Litigation Sub-Trust, (xi) the Litigation Trustee, (xii) the members of the Claimant Trust Oversight Committee (in their official capacities), (xiii) New GP LLC, (xiv) the Professionals retained by the Debtor and the Committee in the Chapter 11 Case, (xv) the CEO/CRO; and (xvi) the Related Persons of each of the parties listed in (iv) through (xv); *provided, however,* that, for the avoidance of doubt, none of James Dondero, Mark Okada, NexPoint Advisors, L.P. (and any of its subsidiaries and managed entities), the Charitable Donor Advised Fund, L.P. (and any of its subsidiaries, including CLO Holdco, Ltd., and managed entities), Highland CLO Funding, Ltd. (and any of its subsidiaries, members, and managed entities), NexBank, SSB (and any of its subsidiaries), Highland Capital Management Fund Advisors,

L.P. (and any of its subsidiaries and managed entities), the Hunter Mountain Investment Trust (or any trustee acting for the trust), the Dugaboy Investment Trust (or any trustee acting for the trust), or Grant Scott is included in the term "Protected Party."

* * * * *

112. "*Related Persons*" means, with respect to any Person, such Person's predecessors, successors, assigns (whether by operation of law or otherwise), and each of their respective present, future, or former officers, directors, employees, managers, managing members, members, financial advisors, attorneys, accountants, investment bankers, consultants, professionals, advisors, shareholders, principals, partners, subsidiaries, divisions, management companies, heirs, agents, and other representatives, in each case solely in their capacity as such.

* * * * *

ARTICLE IV.

MEANS FOR IMPLEMENTATION OF THIS PLAN

A. Summary

As discussed in the Disclosure Statement, the Plan will be implemented through (i) the Claimant Trust, (ii) the Litigation Sub-Trust, and (iii) the Reorganized Debtor.

On the Effective Date, all Class A Limited Partnership Interests, including the Class A Limited Partnership Interests held by Strand, as general partner, and Class B/C Limited Partnerships in the Debtor will be cancelled, and new Class A Limited Partnership Interests in the Reorganized Debtor will be issued to the Claimant Trust and New GP LLC – a newly-chartered limited liability company wholly-owned by the Claimant Trust. The Claimant Trust, as limited partner, will ratify New GP

LLC's appointment as general partner of the Reorganized Debtor, and on and following the Effective Date, the Claimant Trust will be the Reorganized Debtor's limited partner and New GP LLC will be its general partner. The Claimant Trust, as limited partner, and New GP LLC, as general partner, will execute the Reorganized Limited Partnership Agreement, which will amend and restate, in all respects, the Debtor's current Limited Partnership Agreement. Following the Effective Date, the Reorganized Debtor will be managed consistent with the terms of the Reorganized Limited Partnership Agreement by New GP LLC. The sole managing member of New GP LLC will be the Claimant Trust, and the Claimant Trustee will be the sole officer of New GP LLC on the Effective Date.

Following the Effective Date, the Claimant Trust will administer the Claimant Trust Assets pursuant to this Plan and the Claimant Trust Agreement, and the Litigation Trustee will pursue, if applicable, the Estate Claims pursuant to the terms of the Litigation Sub-Trust Agreement and the Plan. The Reorganized Debtor will administer the Reorganized Debtor Assets and, if needed, with the utilization of a Sub-Servicer, which administration will include, among other things, managing the wind down of the Managed Funds.

Although the Reorganized Debtor will manage the wind down of the Managed Funds, it is currently anticipated that neither the Reorganized Debtor nor the Claimant Trust will assume or assume and assign the contracts between the Debtor and certain Related Entities pursuant to which the Debtor provides shared services and sub-advisory services to those Related Entities. The Debtor believes that the continued provision of the services under such contracts will not be cost effective.

The Reorganized Debtor will distribute all proceeds from the wind down to the Claimant Trust, as its limited partner, and New GP LLC, as its general partner, in each case in accordance with the Reorganized Limited Partnership Agreement. Such proceeds, along with the proceeds of the Claimant Trust Assets, will ultimately be distributed to the Claimant Trust Beneficiaries as set forth in this Plan and the Claimant Trust Agreement.

B. The Claimant Trust[2]

1. *Creation and Governance of the Claimant Trust and Litigation Sub-Trust.*

On or prior to the Effective Date, the Debtor and the Claimant Trustee shall execute the Claimant Trust Agreement and shall take all steps necessary to establish the Claimant Trust and the Litigation Sub-Trust in accordance with the Plan in each case for the benefit of the Claimant Trust Beneficiaries. Additionally, on or prior to the Effective Date, the Debtor shall irrevocably transfer and shall be deemed to have irrevocably transferred to the Claimant Trust all of its rights, title, and interest in and to all of the Claimant Trust Assets, and in accordance with section 1141 of the Bankruptcy Code, the Claimant Trust Assets shall automatically vest in the Claimant Trust free and clear of all Claims, Liens, encumbrances, or interests subject only to the Claimant Trust Interests and the Claimant Trust Expenses, as provided for in the Claimant Trust Agreement, and such transfer shall be exempt from any stamp, real estate transfer, mortgage from any stamp, transfer, reporting, sales, use, or other similar tax.

---

[2] In the event of a conflict between the terms of this summary and the terms of the Claimant Trust Agreement and the Litigation Sub-Trust Agreement, the terms of the Claimant Trust Agreement or the Litigation Sub-Trust Agreement, as applicable, shall control.

The Claimant Trustee shall be the exclusive trustee of the Claimant Trust Assets, excluding the Estate Claims and the Litigation Trustee shall be the exclusive trustee with respect to the Estate Claims in each case for purposes of 31 U.S.C. § 3713(b) and 26 U.S.C. § 6012(b)(3), as well as the representative of the Estate appointed pursuant to section 1123(b)(3)(B) of the Bankruptcy Code with respect to the Claimant Trust Assets. The Claimant Trustee shall also be responsible for resolving all Claims and Equity Interests in Class 8 through Class 11, under the supervision of the Claimant Trust Oversight Committee.

On the Effective Date, the Claimant Trustee and Litigation Trustee shall execute the Litigation Sub-Trust Agreement and shall take all steps necessary to establish the Litigation Sub-Trust. Upon the creation of the Litigation Sub-Trust, the Claimant Trust shall irrevocably transfer and assign to the Litigation Sub-Trust the Estate Claims. The Claimant Trust shall be governed by the Claimant Trust Agreement and administered by the Claimant Trustee. The powers, rights, and responsibilities of the Claimant Trustee shall be specified in the Claimant Trust Agreement and shall include the authority and responsibility to, among other things, take the actions set forth in this ARTICLE IV, subject to any required reporting to the Claimant Trust Oversight Committee as may be set forth in the Claimant Trust Agreement. The Claimant Trust shall hold and distribute the Claimant Trust Assets (including the proceeds from the Estate Claims, if any) in accordance with the provisions of the Plan and the Claimant Trust Agreement; *provided* that the Claimant Trust Oversight Committee may direct the Claimant Trust to reserve Cash from distributions as necessary to fund the Claimant Trust and Litigation Sub-Trust. Other rights and duties of the Claimant Trustee

and the Claimant Trust Beneficiaries shall be as set forth in the Claimant Trust Agreement. After the Effective Date, neither the Debtor nor the Reorganized Debtor shall have any interest in the Claimant Trust Assets.

The Litigation Sub-Trust shall be governed by the Litigation Sub-Trust Agreement and administered by the Litigation Trustee. The powers, rights, and responsibilities of the Litigation Trustee shall be specified in the Litigation Sub-Trust Agreement and shall include the authority and responsibility to, among other things, take the actions set forth in this ARTICLE IV, subject to any required reporting as may be set forth in the Litigation Sub-Trust Agreement. The Litigation Sub-Trust shall investigate, prosecute, settle, or otherwise resolve the Estate Claims in accordance with the provisions of the Plan and the Litigation Sub-Trust Agreement and shall distribute the proceeds therefrom to the Claimant Trust for distribution. Other rights and duties of the Litigation Trustee shall be as set forth in the Litigation Sub-Trust Agreement.

2. *Claimant Trust Oversight Committee.*

The Claimant Trust, the Claimant Trustee, the management and monetization of the Claimant Trust Assets, and the management of the Reorganized Debtor (through the Claimant Trust's role as managing member of New GP LLC) and the Litigation Sub-Trust will be overseen by the Claimant Trust Oversight Committee, subject to the terms of the Claimant Trust Agreement and the Litigation Sub-Trust Agreement, as applicable.

The Claimant Trust Oversight Committee will initially consist of five members. Four of the five members will be representatives of the members of the Committee: (i) the Redeemer Committee of Highland Crusader Fund, (ii) UBS, (iii) Acis, and (iv) Meta-e Discovery. The fifth

member will be an independent, natural Person chosen by the Committee and reasonably acceptable to the Debtor. The members of the Claimant Trust Oversight Committee may be replaced as set forth in the Claimant Trust Agreement. The identity of the members of the Claimant Trust Oversight Committee will be disclosed in the Plan Supplement.

As set forth in the Claimant Trust Agreement, in no event will any member of the Claimant Trust Oversight Committee with a Claim against the Estate be entitled to vote, opine, or otherwise be involved in any matters related to such member's Claim.

The independent member(s) of the Claimant Trust Oversight Committee may be entitled to compensation for their services as set forth in the Claimant Trust Agreement. Any member of the Claimant Trust Oversight Committee may be removed, and successor chosen, in the manner set forth in the Claimant Trust Agreement.

3. *Purpose of the Claimant Trust.*

The Claimant Trust shall be established for the purpose of (i) managing and monetizing the Claimant Trust Assets, subject to the terms of the Claimant Trust Agreement and the oversight of the Claimant Trust Oversight Committee, (ii) serving as the limited partner of, and holding the limited partnership interests in, the Reorganized Debtor, (iii) serving as the sole member and manager of New GP LLC, the Reorganized Debtor's general partner, (iv) in its capacity as the sole member and manager of New GP LLC, overseeing the management and monetization of the Reorganized Debtor Assets pursuant to the terms of the Reorganized Limited Partnership Agreement; and (v) administering the Disputed Claims Reserve and serving as Distribution Agent with respect to Disputed Claims in Class 7 or Class 8.

In its management of the Claimant Trust Assets, the Claimant Trust will also reconcile and object to the General Unsecured Claims, Subordinated Claims, Class B/C Limited Partnership Interests, and Class A Limited Partnership Interests, as provided for in this Plan and the Claimant Trust Agreement, and make Trust Distributions to the Claimant Trust Beneficiaries in accordance with Treasury Regulation section 301.7701-4(d), with no objective to continue or engage in the conduct of a trade or business.

The purpose of the Reorganized Debtor is discussed at greater length in ARTICLE IV.C.

4. *Purpose of the Litigation Sub-Trust.*

The Litigation Sub-Trust shall be established for the purpose of investigating, prosecuting, settling, or otherwise resolving the Estate Claims. Any proceeds therefrom shall be distributed by the Litigation Sub-Trust to the Claimant Trust for distribution to the Claimant Trust Beneficiaries pursuant to the terms of the Claimant Trust Agreement.

5. *Claimant Trust Agreement and Litigation Sub-Trust Agreement.*

The Claimant Trust Agreement generally will provide for, among other things:

(i) the payment of the Claimant Trust Expenses;

(ii) the payment of other reasonable expenses of the Claimant Trust;

(iii) the retention of employees, counsel, accountants, financial advisors, or other professionals and the payment of their reasonable compensation;

(iv) the investment of Cash by the Claimant Trustee within certain limitations, including those specified in the Plan;

(v) the orderly monetization of the Claimant Trust Assets;

(vi) litigation of any Causes of Action, which may include the prosecution, settlement, abandonment, or dismissal of any such Causes of Action, subject to reporting and oversight by the Claimant Trust Oversight Committee;

(vii) the resolution of Claims and Equity Interests in Class 8 through Class 11, subject to reporting and oversight by the Claimant Trust Oversight Committee;

(viii) the administration of the Disputed Claims Reserve and distributions to be made therefrom; and

(ix) the management of the Reorganized Debtor, including the utilization of a Sub-Servicer, with the Claimant Trust serving as the managing member of New GP LLC.

Except as otherwise ordered by the Bankruptcy Court, the Claimant Trust Expenses shall be paid from the Claimant Trust Assets in accordance with the Plan and Claimant Trust Agreement. The Claimant Trustee may establish a reserve for the payment of Claimant Trust Expense (including, without limitation, any reserve for potential indemnification claims as authorized and provided under the Claimant Trust Agreement), and shall periodically replenish such reserve, as necessary.

In furtherance of, and consistent with the purpose of, the Claimant Trust and the Plan, the Trustees, for the benefit of the Claimant Trust, shall, subject to reporting and oversight by the Claimant Trust Oversight Committee as set forth in the Claimant Trust Agreement: (i) hold the Claimant Trust Assets for the benefit of the Claimant Trust Beneficiaries, (ii) make Distributions to the Claim-

ant Trust Beneficiaries as provided herein and in the Claimant Trust Agreement, and (iii) have the sole power and authority to prosecute and resolve any Causes of Action and objections to Claims and Equity Interests (other than those assigned to the Litigation Sub-Trust), without approval of the Bankruptcy Court. Except as otherwise provided in the Claimant Trust Agreement, the Claimant Trustee shall be responsible for all decisions and duties with respect to the Claimant Trust and the Claimant Trust Assets; *provided, however*, that the prosecution and resolution of any Estate Claims included in the Claimant Trust Assets shall be the responsibility of the Litigation Trustee. The Litigation Sub-Trust Agreement generally will provide for, among other things:

(i) the payment of other reasonable expenses of the Litigation Sub-Trust;

(ii) the retention of employees, counsel, accountants, financial advisors, or other professionals and the payment of their reasonable compensation; and

(iii) the investigation and prosecution of Estate Claims, which may include the prosecution, settlement, abandonment, or dismissal of any such Estate Claims, subject to reporting and oversight as set forth in the Litigation Sub-Trust Agreement.

The Trustees, on behalf of the Claimant Trust and Litigation Sub-Trust, as applicable, may each employ, without further order of the Bankruptcy Court, employees and other professionals (including those previously retained by the Debtor and the Committee) to assist in carrying out the Trustees' duties hereunder and may compensate and reimburse the reasonable expenses of these professionals without further Order of the Bankruptcy Court from the Claimant Trust Assets in accordance with the Plan and the Claimant Trust Agreement.

The Claimant Trust Agreement and Litigation Sub-Trust Agreement may include reasonable and customary provisions that allow for indemnification by the Claimant Trust in favor of the Claimant Trustee, Litigation Trustee, and the Claimant Trust Oversight Committee. Any such indemnification shall be the sole responsibility of the Claimant Trust and payable solely from the Claimant Trust Assets.

6. *Compensation and Duties of Trustees.*

The salient terms of each Trustee's employment, including such Trustee's duties and compensation shall be set forth in the Claimant Trust Agreement and the Litigation Sub-Trust Agreement, as appropriate. The Trustees shall each be entitled to reasonable compensation in an amount consistent with that of similar functionaries in similar types of bankruptcy cases.

7. *Cooperation of Debtor and Reorganized Debtor.*

To effectively investigate, prosecute, compromise and/or settle the Claims and/or Causes of Action that constitute Claimant Trust Assets (including Estate Claims), the Claimant Trustee, Litigation Trustee, and each of their professionals may require reasonable access to the Debtor's and Reorganized Debtor's documents, information, and work product relating to the Claimant Trust Assets. Accordingly, the Debtor and the Reorganized Debtor, as applicable, shall reasonably cooperate with the Claimant Trustee and Litigation Trustee, as applicable, in their prosecution of Causes of Action and in providing the Claimant Trustee and Litigation Trustee with copies of documents and information in the Debtor's possession, custody, or control on the Effective Date that either Trustee indicates relates to the Estate Claims or other Causes of Action.

The Debtor and Reorganized Debtor shall preserve all records, documents or work product (including all electronic records, documents, or work product) related to the Claims and Causes of Action, including Estate Claims, until the earlier of (a) the dissolution of the Reorganized Debtor or (b) termination of the Claimant Trust and Litigation Sub-Trust.

8. *United States Federal Income Tax Treatment of the Claimant Trust.*

Unless the IRS requires otherwise, for all United States federal income tax purposes, the parties shall treat the transfer of the Claimant Trust Assets to the Claimant Trust as: (a) a transfer of the Claimant Trust Assets (other than the amounts set aside in the Disputed Claims Reserve, if the Claimant Trustee makes the election described in Section 7 below) directly to the applicable Claimant Trust Beneficiaries followed by (b) the transfer by the such Claimant Trust Beneficiaries to the Claimant Trust of such Claimant Trust Assets in exchange for the Claimant Trust Interests. Accordingly, the applicable Claimant Trust Beneficiaries shall be treated for United States federal income tax purposes as the grantors and owners of their respective share of the Claimant Trust Assets. The foregoing treatment shall also apply, to the extent permitted by applicable law, for state and local income tax purposes.

9. *Tax Reporting.*

(a) The Claimant Trustee shall file tax returns for the Claimant Trust treating the Claimant Trust as a grantor trust pursuant to Treasury Regulation section 1.671-4(a). The Claimant Trustee may file an election pursuant to Treasury Regulation 1.468B-9(c) to treat the Disputed Claims Reserve as a disputed ownership fund, in which case the Claimant Trustee will file federal income tax re-

turns and pay taxes for the Disputed Claims Reserve as a separate taxable entity.

(b) The Claimant Trustee shall be responsible for payment, out of the Claimant Trust Assets, of any taxes imposed on the Claimant Trust or its assets.

(c) The Claimant Trustee shall determine the fair market value of the Claimant Trust Assets as of the Effective Date and notify the applicable Claimant Trust Beneficiaries of such valuation, and such valuation shall be used consistently for all federal income tax purposes.

(d) The Claimant Trustee shall distribute such tax information to the applicable Claimant Trust Beneficiaries as the Claimant Trustee determines is required by applicable law.

10. *Claimant Trust Assets.*

The Claimant Trustee shall have the exclusive right, on behalf of the Claimant Trust, to institute, file, prosecute, enforce, abandon, settle, compromise, release, or withdraw any and all Causes of Action included in the Claimant Trust Assets (except for the Estate Claims) without any further order of the Bankruptcy Court, and the Claimant Trustee shall have the exclusive right, on behalf of the Claimant Trust, to sell, liquidate, or otherwise monetize all Claimant Trust Assets, except as otherwise provided in this Plan or in the Claimant Trust Agreement, without any further order of the Bankruptcy Court. Notwithstanding anything herein to the contrary, the Litigation Trustee shall have the exclusive right to institute, file, prosecute, enforce, abandon, settle, compromise, release, or withdraw any and all Estate Claims included in the Claimant Trust Assets without any further order of the Bankruptcy Court.

From and after the Effective Date, the Trustees, in accordance with section 1123(b)(3) and (4) of the Bankruptcy Code, and on behalf of the Claimant Trust, shall each serve as a representative of the Estate with respect to any and all Claimant Trust Assets, including the Causes of Action and Estate Claims, as appropriate, and shall retain and possess the right to (a) commence, pursue, settle, compromise, or abandon, as appropriate, any and all Causes of Action in any court or other tribunal and (b) sell, liquidate, or otherwise monetize all Claimant Trust Assets.

11. *Claimant Trust Expenses.*

From and after the Effective Date, the Claimant Trust shall, in the ordinary course of business and without the necessity of any approval by the Bankruptcy Court, pay the reasonable professional fees and expenses incurred by the Claimant Trust, the Litigation Sub-Trust, and any professionals retained by such parties and entities from the Claimant Trust Assets, except as otherwise provided in the Claimant Trust Agreement.

12. *Trust Distributions to Claimant Trust Beneficiaries.*

The Claimant Trustee, in its discretion, may make Trust Distributions to the Claimant Trust Beneficiaries at any time and/or use the Claimant Trust Assets or proceeds thereof, *provided* that such Trust Distributions or use is otherwise permitted under the terms of the Plan, the Claimant Trust Agreement, and applicable law.

13. *Cash Investments.*

With the consent of the Claimant Trust Oversight Committee, the Claimant Trustee may invest Cash (including any earnings thereon or proceeds therefrom) in a manner consistent with the terms of the Claimant Trust

Agreement; *provided, however,* that such investments are investments permitted to be made by a "liquidating trust" within the meaning of Treasury Regulation section 301.7701-4(d), as reflected therein, or under applicable IRS guidelines, rulings or other controlling authorities.

14. *Dissolution of the Claimant Trust and Litigation Sub-Trust.*

The Trustees and the Claimant Trust and Litigation Sub-Trust shall be discharged or dissolved, as the case may be, at such time as: (a) the Litigation Trustee determines that the pursuit of Estate Claims is not likely to yield sufficient additional proceeds to justify further pursuit of such Estate Claims, (b) the Claimant Trustee determines that the pursuit of Causes of Action (other than Estate Claims) is not likely to yield sufficient additional proceeds to justify further pursuit of such Causes of Action, (c) the Clamant Trustee determines that the pursuit of sales of other Claimant Trust Assets is not likely to yield sufficient additional proceeds to justify further pursuit of such sales of Claimant Trust Assets, (d) all objections to Disputed Claims and Equity Interests are fully resolved, (e) the Reorganized Debtor is dissolved, and (f) all Distributions required to be made by the Claimant Trustee to the Claimant Trust Beneficiaries under the Plan have been made, but in no event shall the Claimant Trust be dissolved later than three years from the Effective Date unless the Bankruptcy Court, upon motion made within the six-month period before such third anniversary (and, in the event of further extension, by order of the Bankruptcy Court, upon motion made at least six months before the end of the preceding extension), determines that a fixed period extension (not to exceed two years, together with any prior extensions, without a favorable letter ruling from the Internal Revenue Service

or an opinion of counsel that any further extension would not adversely affect the status of the Claimant Trust as a liquidating trust for federal income tax purposes) is necessary to facilitate or complete the recovery on, and liquidation of, the Claimant Trust Assets; *provided, however,* that each extension must be approved, upon a finding that the extension is necessary to facilitate or complete the recovery on, and liquidation of the Claimant Trust Assets, by the Bankruptcy Court within 6 months of the beginning of the extended term and no extension, together with any prior extensions, shall exceed three years without a favorable letter ruling from the Internal Revenue Service or an opinion of counsel that any further extension would not adversely affect the status of the Claimant Trust as a liquidating trust for federal income tax purposes.

Upon dissolution of the Claimant Trust, and pursuant to the Claimant Trust Agreement, any remaining Claimant Trust Assets that exceed the amounts required to be paid under the Plan will be transferred (in the sole discretion of the Claimant Trustee) in Cash or in-kind to the Holders of the Claimant Trust Interests as provided in the Claimant Trust Agreement.

C. The Reorganized Debtor

1. *Corporate Existence*

The Debtor will continue to exist after the Effective Date, with all of the powers of partnerships pursuant to the law of the State of Delaware and as set forth in the Reorganized Limited Partnership Agreement.

2. *Cancellation of Equity Interests and Release*

On the Effective Date, (i) all prepetition Equity Interests, including the Class A Limited Partnership Interests and the Class B/C Limited Partnership Interests, in the Debtor shall be canceled, and (ii) all obligations or debts

owed by, or Claims against, the Debtor on account of, or based upon, the Interests shall be deemed as cancelled, released, and discharged, including all obligations or duties by the Debtor relating to the Equity Interests in any of the Debtor's formation documents, including the Limited Partnership Agreement.

3. *Issuance of New Partnership Interests*

On the Effective Date, the Debtor or the Reorganized Debtor, as applicable, will issue new Class A Limited Partnership Interests to (i) the Claimant Trust, as limited partner, and (ii) New GP LLC, as general partner, and will admit (a) the Claimant Trust as the limited partner of the Reorganized Debtor, and (b) New GP LLC as the general partner of the Reorganized Debtor. The Claimant Trust, as limited partner, will ratify New GP LLC's appointment as general partner of the Reorganized Debtor. Also, on the Effective Date, the Claimant Trust, as limited partner, and New GP LLC, as general partner, will execute the Reorganized Limited Partnership Agreement and receive partnership interests in the Reorganized Debtor consistent with the terms of the Reorganized Limited Partnership Agreement.

The Reorganized Limited Partnership Agreement does not provide for, and specifically disclaims, the indemnification obligations under the Limited Partnership Agreement, including any such indemnification obligations that accrued or arose or could have been brought prior to the Effective Date. Any indemnification Claims under the Limited Partnership Agreement that accrued, arose, or could have been filed prior to the Effective Date will be resolved through the Claims resolution process *provided* that a Claim is properly filed in accordance with the Bankruptcy Code, the Plan, or the Bar Date Order. Each of the Debtor, the Reorganized Debtor, the Claim-

ant Trust, and the Litigation Sub-Trust reserve all rights with respect to any such indemnification Claims.

4. *Management of the Reorganized Debtor*

Subject to and consistent with the terms of the Reorganized Limited Partnership Agreement, the Reorganized Debtor shall be managed by its general partner, New GP LLC. The initial officers and employees of the Reorganized Debtor shall be selected by the Claimant Trustee. The Reorganized Debtor may, in its discretion, also utilize a Sub-Servicer in addition to or in lieu of the retention of officers and employees.

As set forth in the Reorganized Limited Partnership Agreement, New GP LLC will receive a fee for managing the Reorganized Debtor. Although New GP LLC will be a limited liability company, it will elect to be treated as a C-Corporation for tax purposes. Therefore, New GP LLC (and any taxable income attributable to it) will be subject to corporate income taxation on a standalone basis, which may reduce the return to Claimants.

5. *Vesting of Assets in the Reorganized Debtor*

Except as otherwise provided in this Plan or the Confirmation Order, on or after the Effective Date, all Reorganized Debtor Assets will vest in the Reorganized Debtor, free and clear of all Liens, Claims, charges or other encumbrances pursuant to section 1141(c) of the Bankruptcy Code except with respect to such Liens, Claims, charges and other encumbrances that are specifically preserved under this Plan upon the Effective Date.

The Reorganized Debtor shall be the exclusive trustee of the Reorganized Debtor Assets for purposes of 31 U.S.C. §3713(b) and 26 U.S.C. §6012(b)(3), as well as the representative of the Estate appointed pursuant to sec-

tion 1123(b)(3)(B) of the Bankruptcy Code with respect to the Reorganized Debtor Assets.

6. *Purpose of the Reorganized Debtor*

Except as may be otherwise provided in this Plan or the Confirmation Order, the Reorganized Debtor will continue to manage the Reorganized Debtor Assets (which shall include, for the avoidance of doubt, serving as the investment manager of the Managed Funds) and may use, acquire or dispose of the Reorganized Debtor Assets and compromise or settle any Claims with respect to the Reorganized Debtor Assets without supervision or approval by the Bankruptcy Court and free of any restrictions of the Bankruptcy Code or Bankruptcy Rules. The Reorganized Debtor shall oversee the resolution of Claims in Class 1 through Class 7.

Without limiting the foregoing, the Reorganized Debtor will pay the charges that it incurs after the Effective Date for Professionals' fees, disbursements, expenses or related support services (including reasonable fees relating to the preparation of Professional fee applications) in the ordinary course of business and without application or notice to, or order of, the Bankruptcy Court.

7. *Distribution of Proceeds from the Reorganized Debtor Assets; Transfer of Reorganized Debtor Assets*

Any proceeds received by the Reorganized Debtor will be distributed to the Claimant Trust, as limited partner, and New GP LLC, as general partner, in the manner set forth in the Reorganized Limited Partnership Agreement. As set forth in the Reorganized Limited Partnership Agreement, the Reorganized Debtor may, from time to time distribute Reorganized Debtor Assets to the Claimant Trust either in Cash or in-kind, including to institute the wind-down and dissolution of the Reorganized Debtor. Any assets distributed to the Claimant Trust

will be (i) deemed transferred in all respects as forth in ARTICLE IV.B.1, (ii) deemed Claimant Trust Assets, and (iii) administered as Claimant Trust Assets.

* * * * *

ARTICLE IX.

EXCULPATION, INJUNCTION AND RELATED PROVISIONS

A. General

Notwithstanding anything contained in the Plan to the contrary, the allowance, classification and treatment of all Allowed Claims and Equity Interests and their respective distributions and treatments under the Plan shall take into account the relative priority and rights of the Claims and the Equity Interests in each Class in connection with any contractual, legal and equitable subordination rights relating thereto whether arising under general principles of equitable subordination, section 510 of the Bankruptcy Code, or otherwise.

B. Discharge of Claims

To the fullest extent provided under section 1141(d)(1)(A) and other applicable provisions of the Bankruptcy Code, except as otherwise expressly provided by this Plan or the Confirmation Order, all consideration distributed under this Plan will be in exchange for, and in complete satisfaction, settlement, discharge, and release of, all Claims and Equity Interests of any kind or nature whatsoever against the Debtor or any of its Assets or properties, and regardless of whether any property will have been distributed or retained pursuant to this Plan on account of such Claims or Equity Interests. Except as otherwise expressly provided by this Plan or the Confirmation Order, upon the Effective Date, the Debtor and its Estate will be deemed discharged and released under and to the fullest extent provided under section 1141(d)(1)(A) and

other applicable provisions of the Bankruptcy Code from any and all Claims and Equity Interests of any kind or nature whatsoever, including, but not limited to, demands and liabilities that arose before the Confirmation Date, and all debts of the kind specified in section 502(g), 502(h), or 502(i) of the Bankruptcy Code.

C. Exculpation

Subject in all respects to ARTICLE XII.D of this Plan, to the maximum extent permitted by applicable law, no Exculpated Party will have or incur, and each Exculpated Party is hereby exculpated from, any claim, obligation, suit, judgment, damage, demand, debt, right, Cause of Action, remedy, loss, and liability for conduct occurring on or after the Petition Date in connection with or arising out of (i) the filing and administration of the Chapter 11 Case; (ii) the negotiation and pursuit of the Disclosure Statement, the Plan, or the solicitation of votes for, or confirmation of, the Plan; (iii) the funding or consummation of the Plan (including the Plan Supplement) or any related agreements, instruments, or other documents, the solicitation of votes on the Plan, the offer, issuance, and Plan Distribution of any securities issued or to be issued pursuant to the Plan, including the Claimant Trust Interests, whether or not such Plan Distributions occur following the Effective Date; (iv) the implementation of the Plan; and (v) any negotiations, transactions, and documentation in connection with the foregoing clauses (i)-(iv); *provided*, *however*, the foregoing will not apply to (a) any acts or omissions of an Exculpated Party arising out of or related to acts or omissions that constitute bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct or (b) Strand or any Employee other than with respect to actions taken by such Entities from the date of appointment of the Independent Directors

through the Effective Date. This exculpation shall be in addition to, and not in limitation of, all other releases, indemnities, exculpations, any other applicable law or rules, or any other provisions of this Plan, including ARTICLE IV.C.2, protecting such Exculpated Parties from liability.

D. Releases by the Debtor

On and after the Effective Date, each Released Party is deemed to be, hereby conclusively, absolutely, unconditionally, irrevocably, and forever released and discharged by the Debtor and the Estate, in each case on behalf of themselves and their respective successors, assigns, and representatives, including, but not limited to, the Claimant Trust and the Litigation Sub-Trust from any and all Causes of Action, including any derivative claims, asserted on behalf of the Debtor, whether known or unknown, foreseen or unforeseen, matured or unmatured, existing or hereafter arising, in law, equity, contract, tort or otherwise, that the Debtor or the Estate would have been legally entitled to assert in their own right (whether individually or collectively) or on behalf of the holder of any Claim against, or Interest in, a Debtor or other Person.

Notwithstanding anything contained herein to the contrary, the foregoing release does not release: (i) any obligations of any party under the Plan or any document, instrument, or agreement executed to implement the Plan, (ii) the rights or obligations of any current employee of the Debtor under any employment agreement or plan, (iii) the rights of the Debtor with respect to any confidentiality provisions or covenants restricting competition in favor of the Debtor under any employment agreement with a current or former employee of the Debtor, (iv) any Avoidance Actions, or (v) any Causes of Action arising from willful misconduct, criminal misconduct, actual fraud, or gross negligence of such applicable Released Party as

determined by Final Order of the Bankruptcy Court or any other court of competent jurisdiction.

Notwithstanding anything herein to the contrary, any release provided pursuant to this ARTICLE IX.D (i) with respect to a Senior Employee, is conditioned in all respects on (a) such Senior Employee executing a Senior Employee Stipulation on or prior to the Effective Date and (b) the reduction of such Senior Employee's Allowed Claim as set forth in the Senior Employee Stipulation (such amount, the "Reduced Employee Claim"), and (ii) with respect to any Employee, including a Senior Employee, shall be deemed null and void and of no force and effect (1) if there is more than one member of the Claimant Trust Oversight Committee who does not represent entities holding a Disputed or Allowed Claim (the "Independent Members"), the Claimant Trustee and the Independent Members by majority vote determine or (2) if there is only one Independent Member, the Independent Member after discussion with the Claimant Trustee, determines (in each case after discussing with the full Claimant Trust Oversight Committee) that such Employee (regardless of whether the Employee is the currently employed by the Debtor, the Reorganized Debtor, or the Claimant Trustee):

- sues, attempts to sue, or threatens or works with or assists any entity or person to sue, attempt to sue, or threaten the Reorganized Debtor, the Claimant Trust, the Litigation Sub-Trust, or any of their respective employees or agents, or any Released Party on or in connection with any claim or cause of action arising prior to the Effective Date,
- has taken any action that impairs or harms the value of the Claimant Trust Assets or the Reorganized Debtor Assets, or

- (x) upon the request of the Claimant Trustee, has failed to provide reasonable assistance in good faith to the Claimant Trustee or the Reorganized Debtor with respect to (1) the monetization of the Claimant Trust Assets or Reorganized Debtor Assets, as applicable, or (2) the resolution of Claims, or (y) has taken any action that impedes or frustrates the Claimant Trustee or the Reorganized Debtor with respect to any of the foregoing.

Provided, however, that the release provided pursuant to this ARTICLE IX.D will vest and the Employee will be indefeasibly released pursuant to this ARTICLE IX.D if such Employee's release has not been deemed null and void and of no force and effect on or prior to the date that is the date of dissolution of the Claimant Trust pursuant to the Claimant Trust Agreement.

By executing the Senior Employee Stipulation embodying this release, each Senior Employee acknowledges and agrees, without limitation, to the terms of this release and the tolling agreement contained in the Senior Employee Stipulation.

The provisions of this release and the execution of a Senior Employee Stipulation will not in any way prevent or limit any Employee from (i) prosecuting its Claims, if any, against the Debtor's Estate, (ii) defending him or herself against any claims or causes of action brought against the Employee by a third party, or (iii) assisting other persons in defending themselves from any Estate Claims brought by the Litigation Trustee (but only with respect to Estate Claims brought by the Litigation Trustee and not collection or other actions brought by the Claimant Trustee).

E. Preservation of Rights of Action

1. *Maintenance of Causes of Action*

Except as otherwise provided in this Plan, after the Effective Date, the Reorganized Debtor or the Claimant Trust will retain all rights to commence, pursue, litigate or settle, as appropriate, any and all Causes of Action included in the Reorganized Debtor Assets or Claimant Trust Assets, as applicable, whether existing as of the Petition Date or thereafter arising, in any court or other tribunal including, without limitation, in an adversary proceeding Filed in the Chapter 11 Case and, as the successors in interest to the Debtor and the Estate, may, and will have the exclusive right to, enforce, sue on, settle, compromise, transfer or assign (or decline to do any of the foregoing) any or all of the Causes of Action without notice to or approval from the Bankruptcy Court.

2. *Preservation of All Causes of Action Not Expressly Settled or Released*

Unless a Cause of Action against a Holder of a Claim or an Equity Interest or other Entity is expressly waived, relinquished, released, compromised or settled in this Plan or any Final Order (including, without limitation, the Confirmation Order), such Cause of Action is expressly reserved for later adjudication by the Reorganized Debtor or Claimant Trust, as applicable (including, without limitation, Causes of Action not specifically identified or of which the Debtor may presently be unaware or that may arise or exist by reason of additional facts or circumstances unknown to the Debtor at this time or facts or circumstances that may change or be different from those the Debtor now believes to exist) and, therefore, no preclusion doctrine, including, without limitation, the doctrines of res judicata, collateral estoppel, issue preclusion, claim preclusion, waiver, estoppel (judicial,

equitable or otherwise) or laches will apply to such Causes of Action as a consequence of the confirmation, effectiveness, or consummation of this Plan based on the Disclosure Statement, this Plan or the Confirmation Order, except where such Causes of Action have been expressly released in this Plan or any other Final Order (including, without limitation, the Confirmation Order). In addition, the right of the Reorganized Debtor or the Claimant Trust to pursue or adopt any claims alleged in any lawsuit in which the Debtor is a plaintiff, defendant or an interested party, against any Entity, including, without limitation, the plaintiffs or codefendants in such lawsuits, is expressly reserved.

F. Injunction

Upon entry of the Confirmation Order, all Enjoined Parties are and shall be permanently enjoined, on and after the Effective Date, from taking any actions to interfere with the implementation or consummation of the Plan.

Except as expressly provided in the Plan, the Confirmation Order, or a separate order of the Bankruptcy Court, all Enjoined Parties are and shall be permanently enjoined, on and after the Effective Date, with respect to any Claims and Equity Interests, from directly or indirectly (i) commencing, conducting, or continuing in any manner any suit, action, or other proceeding of any kind (including any proceeding in a judicial, arbitral, administrative or other forum) against or affecting the Debtor or the property of the Debtor, (ii) enforcing, levying, attaching (including any prejudgment attachment), collecting, or otherwise recovering, enforcing, or attempting to recover or enforce, by any manner or means, any judgment, award, decree, or order against the Debtor or the property of the Debtor, (iii) creating, perfecting, or otherwise enforcing in any manner, any security interest, lien or en-

cumbrance of any kind against the Debtor or the property of the Debtor, (iv) asserting any right of setoff, directly or indirectly, against any obligation due to the Debtor or against property or interests in property of the Debtor, except to the limited extent permitted under Sections 553 and 1141 of the Bankruptcy Code, and (v) acting or proceeding in any manner, in any place whatsoever, that does not conform to or comply with the provisions of the Plan.

The injunctions set forth herein shall extend to, and apply to any act of the type set forth in any of clauses (i)-(v) of the immediately preceding paragraph against any successors of the Debtor, including, but not limited to, the Reorganized Debtor, the Litigation Sub-Trust, and the Claimant Trust and their respective property and interests in property.

Subject in all respects to ARTICLE XII.D, no Enjoined Party may commence or pursue a claim or cause of action of any kind against any Protected Party that arose or arises from or is related to the Chapter 11 Case, the negotiation of the Plan, the administration of the Plan or property to be distributed under the Plan, the wind down of the business of the Debtor or Reorganized Debtor, the administration of the Claimant Trust or the Litigation Sub-Trust, or the transactions in furtherance of the foregoing without the Bankruptcy Court (i) first determining, after notice and a hearing, that such claim or cause of action represents a colorable claim of any kind, including, but not limited to, negligence, bad faith, criminal misconduct, willful misconduct, fraud, or gross negligence against a Protected Party and (ii) specifically authorizing such Enjoined Party to bring such claim or cause of action against any such Protected Party; *provided, however*, the foregoing will not apply to a claim or cause of action against Strand or against any Employee other than with

respect to actions taken, respectively, by Strand or by such Employee from the date of appointment of the Independent Directors through the Effective Date. The Bankruptcy Court will have sole and exclusive jurisdiction to determine whether a claim or cause of action is colorable and, only to the extent legally permissible and as provided for in ARTICLE XI, shall have jurisdiction to adjudicate the underlying colorable claim or cause of action.

G. Duration of Injunctions and Stays

ARTICLE II. Unless otherwise provided in this Plan, in the Confirmation Order, or in a Final Order of the Bankruptcy Court, (i) all injunctions and stays entered during the Chapter 11 Case and in existence on the Confirmation Date shall remain in full force and effect in accordance with their terms; and (ii) the automatic stay arising under section 362 of the Bankruptcy Code shall remain in full force and effect subject to Section 362(c) of the Bankruptcy Code, and to the extent necessary if the Debtor does not receive a discharge, the Court will enter an equivalent order under Section 105.

H. Continuance of January 9 Order

Unless otherwise provided in this Plan, in the Confirmation Order, or in a Final Order of the Bankruptcy Court, the restrictions set forth in paragraphs 9 and 10 of the *Order Approving Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course*, entered by the Bankruptcy Court on January 9, 2020 [D.I. 339] shall remain in full force and effect following the Effective Date.

* * * * *

APPENDIX E

RELEVANT STATUTORY PROVISIONS

1. The Bankruptcy Code, Title 11 of the United States Code, provides in relevant part as follows:

§ 101. Definitions

* * * * *

(10) The term "creditor" means—

(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;

(B) entity that has a claim against the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h) or 502(i) of this title; or

(C) entity that has a community claim.

* * * * *

§ 105. Power of court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions

relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

(d) The court, on its own motion or on the request of a party in interest—

(1) shall hold such status conferences as are necessary to further the expeditious and economical resolution of the case; and

(2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, may issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that—

(A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or

(B) in a case under chapter 11 of this title—

(i) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;

(ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;

(iii) sets the date by which a party in interest other than a debtor may file a plan;

(iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;

(v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or

(vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.

§ 321. Eligibility to serve as trustee

(a) A person may serve as trustee in a case under this title only if such person is—

(1) an individual that is competent to perform the duties of trustee and, in a case under chapter 7, 12, or 13 of this title, resides or has an office in the judicial district within which the case is pending, or in any judicial district adjacent to such district; or

(2) a corporation authorized by such corporation's charter or bylaws to act as trustee, and, in a case under chapter 7, 12, or 13 of this title, having an office in at least one of such districts.

(b) A person that has served as an examiner in the case may not serve as trustee in the case.

(c) The United States trustee for the judicial district in which the case is pending is eligible to serve as trustee in the case if necessary.

§ 322. Qualification of trustee

(a) Except as provided in subsection (b)(1), a person selected under section 701, 702, 703, 1104, 1163, 1183, 1202, or 1302 of this title to serve as trustee in a case under this title qualifies if before seven days after such selection, and before beginning official duties, such person has filed with the court a bond in favor of the United States conditioned on the faithful performance of such official duties.

(b)(1) The United States trustee qualifies wherever such trustee serves as trustee in a case under this title.

(2) The United States trustee shall determine—

(A) the amount of a bond required to be filed under subsection (a) of this section; and

(B) the sufficiency of the surety on such bond.

(c) A trustee is not liable personally or on such trustee's bond in favor of the United States for any penalty or forfeiture incurred by the debtor.

(d) A proceeding on a trustee's bond may not be commenced after two years after the date on which such trustee was discharged.

§ 323. Role and capacity of trustee

(a) The trustee in a case under this title is the representative of the estate.

(b) The trustee in a case under this title has capacity to sue and be sued.

§ 524. Effect of discharge

(a) A discharge in a case under this title—

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1192, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

201a

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1192, 1228(a)(1), or 1328(a)(1), or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

* * * * *

(e) Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

* * * * *

(g)(1)(A) After notice and hearing, a court that enters an order confirming a plan of reorganization under chapter 11 may issue, in connection with such order, an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section.

(B) An injunction may be issued under subparagraph (A) to enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claim or demand that, under a plan of reorganization, is to be paid in whole or in part by a trust described in paragraph (2)(B)(i), except such legal actions as are expressly al-

lowed by the injunction, the confirmation order, or the plan of reorganization.

(2)(A) Subject to subsection (h), if the requirements of subparagraph (B) are met at the time an injunction described in paragraph (1) is entered, then after entry of such injunction, any proceeding that involves the validity, application, construction, or modification of such injunction, or of this subsection with respect to such injunction, may be commenced only in the district court in which such injunction was entered, and such court shall have exclusive jurisdiction over any such proceeding without regard to the amount in controversy.

(B) The requirements of this subparagraph are that—

(i) the injunction is to be implemented in connection with a trust that, pursuant to the plan of reorganization—

(I) is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in personal injury, wrongful death, or property damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products;

(II) is to be funded in whole or in part by the securities of 1 or more debtors involved in such plan and by the obligation of such debtor or debtors to make future payments, including dividends;

(III) is to own, or by the exercise of rights granted under such plan would be entitled to own if specified contingencies occur, a majority of the voting shares of—

(aa) each such debtor;

(bb) the parent corporation of each such debtor; or

(cc) a subsidiary of each such debtor that is also a debtor; and

(IV) is to use its assets or income to pay claims and demands; and

(ii) subject to subsection (h), the court determines that—

(I) the debtor is likely to be subject to substantial future demands for payment arising out of the same or similar conduct or events that gave rise to the claims that are addressed by the injunction;

(II) the actual amounts, numbers, and timing of such future demands cannot be determined;

(III) pursuit of such demands outside the procedures prescribed by such plan is likely to threaten the plan's purpose to deal equitably with claims and future demands;

(IV) as part of the process of seeking confirmation of such plan—

(aa) the terms of the injunction proposed to be issued under paragraph (1)(A), including any provisions barring actions against third parties pursuant to paragraph (4)(A), are set out in such plan and in any disclosure statement supporting the plan; and

(bb) a separate class or classes of the claimants whose claims are to be addressed by a trust described in clause (i) is established and votes, by at least 75 percent of those voting, in favor of the plan; and

(V) subject to subsection (h), pursuant to court orders or otherwise, the trust will operate through mechanisms such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or periodic review of estimates of the numbers and values of present claims and future demands, or other comparable mechanisms, that provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner.

(3)(A) If the requirements of paragraph (2)(B) are met and the order confirming the plan of reorganization was issued or affirmed by the district court that has jurisdiction over the reorganization case, then after the time for appeal of the order that issues or affirms the plan—

(i) the injunction shall be valid and enforceable and may not be revoked or modified by any court except through appeal in accordance with paragraph (6);

(ii) no entity that pursuant to such plan or thereafter becomes a direct or indirect transferee of, or successor to any assets of, a debtor or trust that is the subject of the injunction shall be liable with respect to any claim or demand made against such entity by reason of its becoming such a transferee or successor; and

(iii) no entity that pursuant to such plan or thereafter makes a loan to such a debtor or trust or to such a successor or transferee shall, by reason of making the loan, be liable with respect to any claim or demand made against such entity, nor shall any pledge of assets made in connection with such a loan be upset or impaired for that reason;

(B) Subparagraph (A) shall not be construed to—

(i) imply that an entity described in subparagraph (A)(ii) or (iii) would, if this paragraph were not applicable, necessarily be liable to any entity by reason of any of the acts described in subparagraph (A);

(ii) relieve any such entity of the duty to comply with, or of liability under, any Federal or State law regarding the making of a fraudulent conveyance in a transaction described in subparagraph (A)(ii) or (iii); or

(iii) relieve a debtor of the debtor's obligation to comply with the terms of the plan of reorganization, or affect the power of the court to exercise its authority under sections 1141 and 1142 to compel the debtor to do so.

(4)(A)(i) Subject to subparagraph (B), an injunction described in paragraph (1) shall be valid and enforceable against all entities that it addresses.

(ii) Notwithstanding the provisions of section 524(e), such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of—

(I) the third party's ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor;

(II) the third party's involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party;

(III) the third party's provision of insurance to the debtor or a related party; or

(IV) the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party, including but not limited to—

(aa) involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or

(bb) acquiring or selling a financial interest in an entity as part of such a transaction.

(iii) As used in this subparagraph, the term "related party" means—

(I) a past or present affiliate of the debtor;

(II) a predecessor in interest of the debtor; or

(III) any entity that owned a financial interest in—

(aa) the debtor;

(bb) a past or present affiliate of the debtor; or

(cc) a predecessor in interest of the debtor.

(B) Subject to subsection (h), if, under a plan of reorganization, a kind of demand described in such plan is to be paid in whole or in part by a trust described in paragraph (2)(B)(i) in connection with which an injunction described in paragraph (1) is to be implemented, then such injunction shall be valid and enforceable with respect to a demand of such kind made, after such plan is confirmed, against the debtor or debtors involved, or against a third party described in subparagraph (A)(ii), if—

(i) as part of the proceedings leading to issuance of such injunction, the court appoints a legal representa-

tive for the purpose of protecting the rights of persons that might subsequently assert demands of such kind, and

(ii) the court determines, before entering the order confirming such plan, that identifying such debtor or debtors, or such third party (by name or as part of an identifiable group), in such injunction with respect to such demands for purposes of this subparagraph is fair and equitable with respect to the persons that might subsequently assert such demands, in light of the benefits provided, or to be provided, to such trust on behalf of such debtor or debtors or such third party.

(5) In this subsection, the term "demand" means a demand for payment, present or future, that—

(A) was not a claim during the proceedings leading to the confirmation of a plan of reorganization;

(B) arises out of the same or similar conduct or events that gave rise to the claims addressed by the injunction issued under paragraph (1); and

(C) pursuant to the plan, is to be paid by a trust described in paragraph (2)(B)(i).

(6) Paragraph (3)(A)(i) does not bar an action taken by or at the direction of an appellate court on appeal of an injunction issued under paragraph (1) or of the order of confirmation that relates to the injunction.

(7) This subsection does not affect the operation of section 1144 or the power of the district court to refer a proceeding under section 157 of title 28 or any reference of a proceeding made prior to the date of the enactment of this subsection.

* * * * *

§ 1104. Appointment of trustee or examiner

(a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee—

(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or

(2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

(b)(1) Except as provided in section 1163 of this title, on the request of a party in interest made not later than 30 days after the court orders the appointment of a trustee under subsection (a), the United States trustee shall convene a meeting of creditors for the purpose of electing one disinterested person to serve as trustee in the case. The election of a trustee shall be conducted in the manner provided in subsections (a), (b), and (c) of section 702 of this title.

(2)(A) If an eligible, disinterested trustee is elected at a meeting of creditors under paragraph (1), the United States trustee shall file a report certifying that election.

(B) Upon the filing of a report under subparagraph (A)—

(i) the trustee elected under paragraph (1) shall be considered to have been selected and appointed for purposes of this section; and

(ii) the service of any trustee appointed under subsection (a) shall terminate.

(C) The court shall resolve any dispute arising out of an election described in subparagraph (A).

(c) If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor, if—

(1) such appointment is in the interests of creditors, any equity security holders, and other interests of the estate; or

(2) the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000.

(d) If the court orders the appointment of a trustee or an examiner, if a trustee or an examiner dies or resigns during the case or is removed under section 324 of this title, or if a trustee fails to qualify under section 322 of this title, then the United States trustee, after consultation with parties in interest, shall appoint, subject to the court's approval, one disinterested person other than the

United States trustee to serve as trustee or examiner, as the case may be, in the case.

(e) The United States trustee shall move for the appointment of a trustee under subsection (a) if there are reasonable grounds to suspect that current members of the governing body of the debtor, the debtor's chief executive or chief financial officer, or members of the governing body who selected the debtor's chief executive or chief financial officer, participated in actual fraud, dishonesty, or criminal conduct in the management of the debtor or the debtor's public financial reporting.

§ 1106. Duties of trustee and examiner

(a) A trustee shall—

(1) perform the duties of the trustee, as specified in paragraphs (2), (5), (7), (8), (9), (10), (11), and (12) of section 704(a);

(2) if the debtor has not done so, file the list, schedule, and statement required under section 521(a)(1) of this title;

(3) except to the extent that the court orders otherwise, investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;

(4) as soon as practicable—

(A) file a statement of any investigation conducted under paragraph (3) of this subsection, including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs

of the debtor, or to a cause of action available to the estate; and

(B) transmit a copy or a summary of any such statement to any creditors' committee or equity security holders' committee, to any indenture trustee, and to such other entity as the court designates;

(5) as soon as practicable, file a plan under section 1121 of this title, file a report of why the trustee will not file a plan, or recommend conversion of the case to a case under chapter 7, 12, or 13 of this title or dismissal of the case;

(6) for any year for which the debtor has not filed a tax return required by law, furnish, without personal liability, such information as may be required by the governmental unit with which such tax return was to be filed, in light of the condition of the debtor's books and records and the availability of such information;

(7) after confirmation of a plan, file such reports as are necessary or as the court orders; and

(8) if with respect to the debtor there is a claim for a domestic support obligation, provide the applicable notice specified in subsection (c).

(b) An examiner appointed under section 1104(d) of this title shall perform the duties specified in paragraphs (3) and (4) of subsection (a) of this section, and, except to the extent that the court orders otherwise, any other duties of the trustee that the court orders the debtor in possession not to perform.

(c)(1) In a case described in subsection (a)(8) to which subsection (a)(8) applies, the trustee shall—

(A)(i) provide written notice to the holder of the claim described in subsection (a)(8) of such claim and

of the right of such holder to use the services of the State child support enforcement agency established under sections 464 and 466 of the Social Security Act for the State in which such holder resides, for assistance in collecting child support during and after the case under this title; and

(ii) include in the notice required by clause (i) the address and telephone number of such State child support enforcement agency;

(B)(i) provide written notice to such State child support enforcement agency of such claim; and

(ii) include in the notice required by clause (i) the name, address, and telephone number of such holder; and

(C) at such time as the debtor is granted a discharge under section 1141, provide written notice to such holder and to such State child support enforcement agency of—

(i) the granting of the discharge;

(ii) the last recent known address of the debtor;

(iii) the last recent known name and address of the debtor's employer; and

(iv) the name of each creditor that holds a claim that—

(I) is not discharged under paragraph (2), (4), or (14A) of section 523(a); or

(II) was reaffirmed by the debtor under section 524(c).

(2)(A) The holder of a claim described in subsection (a)(8) or the State child enforcement support agency of the State in which such holder resides may request from a creditor described in paragraph (1)(C)(iv) the last known address of the debtor.

(B) Notwithstanding any other provision of law, a creditor that makes a disclosure of a last known address of a debtor in connection with a request made under subparagraph (A) shall not be liable by reason of making such disclosure.

§ 1107. Rights, powers, and duties of debtor in possession

(a) Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

(b) Notwithstanding section 327(a) of this title, a person is not disqualified for employment under section 327 of this title by a debtor in possession solely because of such person's employment by or representation of the debtor before the commencement of the case.

§ 1123. Contents of plan

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall—

(1) designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(2), 507(a)(3), or 507(a)(8) of this title, and classes of interests;

(2) specify any class of claims or interests that is not impaired under the plan;

(3) specify the treatment of any class of claims or interests that is impaired under the plan;

(4) provide the same treatment for each claim or interest of a particular class, unless the holder of a

particular claim or interest agrees to a less favorable treatment of such particular claim or interest;

(5) provide adequate means for the plan's implementation, such as—

(A) retention by the debtor of all or any part of the property of the estate;

(B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;

(C) merger or consolidation of the debtor with one or more persons;

(D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate;

(E) satisfaction or modification of any lien;

(F) cancellation or modification of any indenture or similar instrument;

(G) curing or waiving of any default;

(H) extension of a maturity date or a change in an interest rate or other term of outstanding securities;

(I) amendment of the debtor's charter; or

(J) issuance of securities of the debtor, or of any entity referred to in subparagraph (B) or (C) of this paragraph, for cash, for property, for existing securities, or in exchange for claims or interests, or for any other appropriate purpose;

(6) provide for the inclusion in the charter of the debtor, if the debtor is a corporation, or of any corporation referred to in paragraph (5)(B) or (5)(C) of this

subsection, of a provision prohibiting the issuance of nonvoting equity securities, and providing, as to the several classes of securities possessing voting power, an appropriate distribution of such power among such classes, including, in the case of any class of equity securities having a preference over another class of equity securities with respect to dividends, adequate provisions for the election of directors representing such preferred class in the event of default in the payment of such dividends;

(7) contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee; and

(8) in a case in which the debtor is an individual, provide for the payment to creditors under the plan of all or such portion of earnings from personal services performed by the debtor after the commencement of the case or other future income of the debtor as is necessary for the execution of the plan.

(b) Subject to subsection (a) of this section, a plan may—

(1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;

(2) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

(3) provide for—

(A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or

(B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;

(4) provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests.

(5) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and

(6) include any other appropriate provision not inconsistent with the applicable provisions of this title.

(c) In a case concerning an individual, a plan proposed by an entity other than the debtor may not provide for the use, sale, or lease of property exempted under section 522 of this title, unless the debtor consents to such use, sale, or lease.

(d) Notwithstanding subsection (a) of this section and sections 506(b), 1129(a)(7), and 1129(b) of this title, if it is proposed in a plan to cure a default the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.

§ 1141. Effect of confirmation

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such credi-

tor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan—

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not—

(i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) A discharge under this chapter does not discharge a debtor who is an individual from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if—

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.

(5) In a case in which the debtor is an individual—

(A) unless after notice and a hearing the court orders otherwise for cause, confirmation of the plan does not discharge any debt provided for in the plan until the court grants a discharge on completion of all payments under the plan;

(B) at any time after the confirmation of the plan, and after notice and a hearing, the court may grant a discharge to the debtor who has not completed payments under the plan if—

(i) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 on such date;

(ii) modification of the plan under section 1127 is not practicable; and

(iii) subparagraph (C) permits the court to grant a discharge; and

(C) the court may grant a discharge if, after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge, the court finds that there is no reasonable cause to believe that—

(i) section 522(q)(1) may be applicable to the debtor; and

(ii) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B); and if the requirements of subparagraph (A) or (B) are met.

(6) Notwithstanding paragraph (1), the confirmation of a plan does not discharge a debtor that is a corporation from any debt—

(A) of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) that is owed to a domestic governmental unit, or owed to a person as the result of an action filed under subchapter III of chapter 37 of title 31 or any similar State statute; or

(B) for a tax or customs duty with respect to which the debtor—

(i) made a fraudulent return; or

(ii) willfully attempted in any manner to evade or to defeat such tax or such customs duty.

2. Title 28 of the United States Code provides in relevant part as follows:

§ 959. Trustees and receivers suable; management; State laws

(a) Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury.

(b) Except as provided in section 1166 of title 11, a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

No. 22-669

IN THE
Supreme Court of the United States

NEXPOINT ADVISORS, L.P. AND
NEXPOINT ASSET MANAGEMENT, L.P.,

Petitioners,

v.

HIGHLAND CAPITAL MANAGEMENT, L.P., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY FOR PETITIONERS

BENOIT QUARMBY
MOLOLAMKEN LLP
430 Park Ave.
New York, NY 10022

JEFFREY A. LAMKEN
Counsel of Record
ROBERT K. KRY
EUGENE A. SOKOLOFF
MOLOLAMKEN LLP
The Watergate, Suite 500
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioners state that the corporate disclosure statement included in the petition remains accurate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

NO. 22-669

NEXPOINT ADVISORS, L.P. AND
NEXPOINT ASSET MANAGEMENT, L.P.,

Petitioners,

v.

HIGHLAND CAPITAL MANAGEMENT, L.P., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY FOR PETITIONERS

Highland does not dispute that there is an entrenched three-way circuit conflict over the standard that governs a bankruptcy trustee's immunity. Nor does it dispute that the conflict is important and warrants the Court's review. Highland urges only that this case is not the right one in which to resolve that conflict because the question was not squarely presented below. That argument misstates the record and disregards the Fifth Circuit's reasoning, which squarely passed on the issue.

With respect to NexPoint's second question, Highland nowhere denies that a bankruptcy plan that purported to relieve a debtor from ordinary post-bankruptcy business liabilities would be a grave departure from basic bank-

ruptcy principles and conflict with several court of appeals decisions. Highland tries to avoid review only by walking back the expansive protections it persuaded the court below to endorse. But the plan provisions speak for themselves.

Highland spends most of its opposition complaining about the alleged "litigiousness" of Mr. Dondero and other entities. Those accusations are groundless, but more importantly, irrelevant. The Fifth Circuit correctly held that a party's purported litigiousness does not permit a court to exercise powers Congress withheld. The Fifth Circuit went astray only by not following that principle through to its logical conclusion.

This case offers a rare opportunity to resolve multiple circuit conflicts and bring much-needed clarity to the law. The Court should grant both Highland's petition and this one as well.

I. NexPoint's First Question Warrants Review

Highland does not dispute the existence or importance of the wide-ranging circuit conflict over the scope of a bankruptcy trustee's common-law qualified immunity. The First, Second, Ninth, and Eleventh Circuits permit suits for ordinary negligence. Pet. 22-23. The Fourth, Sixth, Seventh, and Tenth Circuits require intentional misconduct. *Id.* at 23. The Fifth Circuit takes an "intermediate position" that requires "gross negligence." *Id.* at 23-24. Authorities have regularly highlighted that entrenched conflict. *Id.* at 24-25. And the U.S. Trustee has emphasized the issue's importance, urging the Fifth Circuit to reconsider its position. *Id.* at 26-27.

Highland's only response is to assert that this is not the right case in which to review that important issue. Its arguments lack merit.

A. Highland first asserts that this case is a poor vehicle because it "does not involve common-law qualified immunity," but instead "the legality of *plan provisions* that established gross negligence as the standard of liability." Br. in Opp. 11-13. That argument ignores the court of appeals' reasoning. The Fifth Circuit upheld the plan provisions *precisely because*, in its view, they tracked the qualified immunity standard.

Applying circuit precedent, the Fifth Circuit held that Section 524(e) "categorically bars third-party exculpations absent express authority in another provision of the Bankruptcy Code." Pet. App. 25a-26a. The plan provisions purporting to exculpate the Independent Directors were therefore permissible *only* if there was some legal basis for them beyond the plan itself. The Fifth Circuit located that basis in the qualified immunity of bankruptcy trustees. Citing *In re Smyth*, 207 F.3d 758 (5th Cir. 2000), it explained that it had "recognized a limited qualified immunity [for] bankruptcy trustees unless they act with gross negligence." Pet. App. 27a. It held that the Independent Directors were "entitled to all the rights and powers of a trustee." *Id.* at 28a. It therefore concluded that the Independent Directors had "limited qualified immunity for any actions short of gross negligence." *Ibid.* The Fifth Circuit's ruling on the plan provisions thus rises or falls with that Circuit's standard for the qualified immunity of bankruptcy trustees.[1]

[1] Highland discusses, at some length, whether the protections that courts accord to bankruptcy trustees are better viewed as common-law protections or implied statutory protections. Br. in Opp. 13-14. That discussion, while theoretically interesting, is irrelevant. The important point is that, whatever the *origins* of the protections, courts disagree about their *scope*. Pet. 22-24.

B. Highland also urges that this case is a poor vehicle because the Independent Directors "are *not* bankruptcy trustees" and were granted trustee protections only "by analogy." Br. in Opp. 13. That argument likewise ignores the Fifth Circuit's reasoning.

The court's opinion is clear: "As the bankruptcy court's governance order clarified, nontraditional as it may be, the Independent Directors were appointed to act together *as the bankruptcy trustee* for Highland Capital." Pet. App. 28a (emphasis added). The court thus held that the Independent Directors were, in fact, trustees. To be sure, the parties disputed that point below. NexPoint urged that the Independent Directors were *not* trustees and could *not* benefit from trustee protections. NexPoint C.A. Br. 35. Highland responded that the Independent Directors did "essentially serve[ ]" as "trustee[s]." Highland C.A. Br. 29 n.25. The Fifth Circuit accepted Highland's view. Pet. App. 28a. No party has asked this Court to review that case-specific holding. As the case comes to this Court, the Independent Directors *are* bankruptcy trustees who were granted protections because of that trustee status. The parties' earlier dispute over a nonjurisdictional predicate to the question presented does not make this case a bad vehicle. To the contrary, the absence of any dispute over that issue at *this* stage confirms that this is a suitable case for review.

C. Finally, Highland claims that NexPoint never objected to the gross negligence standard below. Br. in Opp. 13. That claim is both incorrect and irrelevant.

NexPoint did expressly object to the plan's protective provisions on the ground that they purported to shield the Independent Directors from claims for ordinary negligence. NexPoint urged that Fifth Circuit precedent "broadly foreclosed nonconsensual releases and exculpa-

tions of third-party claims" and that "the Plan violates these dictates" by "exculpat[ing] *claims for negligence* that may be held by the Appellants and others against numerous non-debtor parties." NexPoint C.A. Br. 25-26 (emphasis added). NexPoint argued that the plan's exculpatory provisions "directly and unmistakably violate" precedent because "the Plan exculpates *against negligence liabilities*." *Id.* at 27 (emphasis added). NexPoint thus objected, not only to the existence of the third-party exculpations, but also to the specific category of claims they exculpated: ordinary negligence claims. Had the Fifth Circuit followed the lead of the First, Second, Ninth, and Eleventh Circuits—all of which permit claims against bankruptcy trustees for ordinary negligence—that objection would have prevailed. Pet. 22-23.[2]

Regardless, the Fifth Circuit clearly *passed upon* the issue: The court explicitly cited its prior decision in *Smyth* adopting the gross negligence standard and then applied that standard to uphold the plan provisions in this case. Pet. App. 27a-28a. This Court will review an issue that was either "pressed *or* passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41-43 (1992) (emphasis added); see also *Va. Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) ("It suffices for our purposes that the court below passed on the issue presented * * * ."). The

[2] NexPoint's objection was sufficient to preserve the issue regardless of how extensive its arguments were below. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992). That rule makes particular sense in a case like this where binding circuit precedent already forecloses an issue.

Fifth Circuit's ruling squarely tees up the issue for this Court's review.

II. NexPoint's Second Question Warrants Review

Highland has no good arguments against review on the second issue either. The Fifth Circuit upheld plan provisions that shield Highland from ordinary post-bankruptcy business liabilities. Highland does not dispute that, *if* the plan has that effect, the Fifth Circuit's ruling conflicts with decisions of several other courts of appeals. Highland disputes only whether the plan in fact has that effect. It does. Highland's contrary arguments ignore unambiguous plan language.

Highland urges that the plan's *exculpatory* provision does not apply to post-bankruptcy conduct because it covers only the "debtor" and not the "reorganized debtor." Br. in Opp. 15. In fact, that provision covers the "Debtor *and its successors*." Pet. App. 168a § I.B.62 (emphasis added). Even accepting Highland's concession, Highland admits that the plan's *other* protections—the injunction and gatekeeping provisions—are not so limited. Those provisions expressly apply to *both* the "Debtor" *and* the "Reorganized Debtor." *Id.* at 169a § I.B.105; *id.* at 194a-196a § IX.F. NexPoint thus admits, as it must, that the injunction and gatekeeping provisions "continue[ ] to have effect beyond the plan's effective date." Br. in Opp. 16.

Highland tries to downplay that impact by claiming that those provisions apply only to the "implementation" and "consummation" of the plan and then ascribing artificially narrow meanings to those terms. Br. in Opp. 16-17. The premise of that argument is wrong. Those protections are *not* limited to "implementation" and "consummation" of the plan. Rather, the gatekeeping provision applies to any claim relating to "the administration of the Plan" or "the *wind down of the business of the*

Debtor or Reorganized Debtor." Pet. App. 195a § IX.F (emphasis added). Highland does not even attempt to explain how *those* terms could have narrow meanings. They plainly sweep in ordinary post-bankruptcy business liabilities.

In any event, Highland's argument fails even with respect to "implementation." Whatever that term may reach in a typical bankruptcy, it is sprawling here. Highland's reorganization plan calls for the company to continue running its business for three years or longer while it gradually winds down operations and pays off creditors. Pet. App. 187a-188a § IV.C.6-.7; *id.* at 183a-184a § IV.B.14. The "implementation" of that plan necessarily sweeps in ordinary post-bankruptcy business liabilities.

Highland scrounges around for other evidence of narrow meaning, but comes up empty-handed. Highland points out that Section 1123(a)(5) of the Bankruptcy Code lists examples of "implementation" of a plan. Br. in Opp. 16. But, as Highland admits, that list is "non-exclusive." *Ibid.*; see 11 U.S.C. § 1123(a)(5) (prefacing list with the words "such as"). Nothing about that non-exclusive list refutes the obvious point that, when a debtor's plan includes running its business, the "implementation" of that plan also includes running its business.

Highland urges that "article IV of Highland's plan carefully describes its 'Means for Implementation.'" Br. in Opp. 16. Indeed it does: One of the "means for implementation" that Article IV lists is that "the Reorganized Debtor will continue to manage the Reorganized Debtor Assets (which shall include, for the avoidance of doubt, serving as the investment manager of the Managed Funds)." Pet. App. 187a § IV.C.6. Far from helping Highland, that language makes the expansive scope of the plan's protective provisions clearer still.

Finally, Highland asserts that it disclaimed a broad interpretation of the provisions during a bankruptcy court hearing. Br. in Opp. 17. But Highland misstates what it said there. Certain objectors protested that "the injunction language in the plan, including the language preventing actions to interfere with the implementation and consummation of the plan, is so broad and ambiguous that their rights are or may be improperly impacted, especially any rights to remove the manager for acts of malfeasance." Bankr. Ct. Dkt. 1905 at 152:6-11 (2/3/21 Hr'g Tr.). Highland acknowledged that those were "legitimate concerns" and proposed to "modify [the] plan through a provision in the confirmation order" to address them. *Id.* at 153:1-19. The proposed modification stated: "Notwithstanding anything in the plan * * * , the CLO Objecting Parties will not be precluded from exercising their contractual or statutory rights in the CLOs based on negligence, malfeasance, or any wrongdoing, *but before exercising such rights shall come to this Court to determine whether those rights are colorable* * * * ." *Id.* at 153:3-9 (emphasis added). Highland points to no provision in the confirmation order where the court actually adopted that proposal. See Pet. App. 65a-166a. And regardless, the proposal confirms that, even for the CLO Objecting Parties, the *gatekeeping* provision applies with full force.

Highland thus fails to show that the plan's injunction and gatekeeping provisions mean anything less than what they say. Those provisions purport to shield Highland from ordinary post-bankruptcy business liabilities, both by enjoining claims that allegedly "interfere" with its business operations and by requiring parties to obtain the bankruptcy court's permission before suing. The Fifth Circuit's decision to approve those provisions trans-

forms bankruptcy from a "fresh start" into a perpetual "get out of jail free" card—or at the very least, a perpetual right to play by different rules. Other courts of appeals regularly hold that, once a debtor emerges from bankruptcy, it must abide by the same rules as any other business: It leaves behind the bankruptcy court's supervision, but also the bankruptcy court's protection. Pet. 30-31. The Fifth Circuit held the opposite here.

III. The Court Should Review All Three Questions Together

Highland fails to address the obvious synergies that NexPoint's petition offers. By granting both petitions, the Court can settle three circuit conflicts in the same case. That is far more efficient than addressing them piecemeal. Moreover, a ruling prohibiting third-party exculpations may do little to settle the disarray if courts continue to grant broad protections based on expansive conceptions of common-law immunity. This Court's review of all three questions is essential to bring uniformity to this confused area of the law. Pet. 15.

Rather than address those considerations, Highland slings mud, arguing that the Court should deny NexPoint's petition because Mr. Dondero is litigious. Br. in Opp. 2-7. Needless to say, NexPoint has a different perspective: Mr. Dondero and other entities have had many occasions to appeal because the bankruptcy court so often exceeded its authority.

During the bankruptcy, for example, Highland settled another investor's claims by purchasing assets stated to be worth $22.5 million. See Compl. in *Charitable DAF Fund, L.P.* v. *Highland Cap. Mgmt., L.P.*, No. 3:21-cv-00842, Dkt. 1 ¶¶32-36 (N.D. Tex. Apr. 12, 2021). Highland allegedly knew the assets were worth far more—at least $41.75 million—but failed to disclose more recent

valuations so it could benefit at the expense of other investors. *Id.* ¶¶37-50. When those investors sued, the bankruptcy court dismissed the claims, but the district court reversed and remanded. See *Charitable DAF Fund, L.P.* v. *Highland Cap. Mgmt., L.P.*, No. 3:21-cv-03129, Dkt. 28 (N.D. Tex. Sept. 2, 2022).

In another instance, the bankruptcy court tried to insulate a contempt ruling from review by stating that it would "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." *Charitable DAF Fund LP* v. *Highland Cap. Mgmt. LP*, No. 3:21-cv-01974, Dkt. 49 at 13 n.62 (N.D. Tex. Sept. 28, 2022), appeal pending on other grounds, No. 22-11036 (5th Cir.). Highland did not even defend that novel ruling on appeal, and the district court vacated it. *Id.* at 13.

Those incidents amply prove that one party's "litigiousness" is another party's diligent protection of its legal rights. None of them has the slightest relevance to the issues before *this* Court. The Fifth Circuit correctly recognized that a bankruptcy court's views about a party's litigiousness "do not alter whether [the court] has statutory authority to exculpate a non-debtor." Pet. App. 28a. Nor do they alter the standard that governs a trustee's qualified immunity or the principle that a bankruptcy discharge does not grant prospective protections from ordinary post-bankruptcy business liabilities. Highland's *ad hominem* attacks are irrelevant and provide no reason for this Court to exclude otherwise important issues from the scope of its review.

CONCLUSION

The Court should grant both Highland's petition in No. 22-631 and NexPoint's petition in this case.

Respectfully submitted.

BENOIT QUARMBY
MOLOLAMKEN LLP
430 Park Ave.
New York, NY 10022

JEFFREY A. LAMKEN
Counsel of Record
ROBERT K. KRY
EUGENE A. SOKOLOFF
MOLOLAMKEN LLP
The Watergate, Suite 500
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

Counsel for Petitioners

MARCH 2023

Faculty

Sasha M. Gurvitz is a partner with KTBS Law LLP in Los Angeles and has represented clients in a variety of restructuring roles, both out of court and in chapter 11 cases in Delaware, New York, California, Nevada and Indiana. She has represented several chapter 11 debtors in complex Delaware bankruptcy cases. She also has experience representing official creditors' committees, purchasers of assets, secured lenders, contract counterparties, landlords, equityholders, chapter 11 trustees and other chapter 11 stakeholders. Ms. Gurvitz's chapter 11 practice has been focused on mass tort, hospital, real estate, retail and restaurant cases. She also has worked on significant out-of-court workouts in the health care industry, as well as in the retail and marijuana industries. In addition to her primary restructuring work, Ms. Gurvitz has represented clients in federal multi-district litigation, in fraudulent-transfer actions and in appeals, including to the U.S. Court of Appeals for the Third, Seventh Circuit and Ninth Circuits. She is a member of the California State Bar, ABI, the Turnaround Management Association (TMA) and the Financial Lawyers Conference. In addition, she serves as vice president of TMA's Southern California chapter, on the advisory board and sponsorship committee for ABI's Southwest Bankruptcy Conference, and on the board of the Financial Lawyers Conference. Ms. Gurvitz has been named a *Super Lawyers* "Rising Star" from 2019-23 and as a member of ABI's 2021 class of "40 Under 40." She has written articles for several bankruptcy publications, including *Colliers on Bankruptcy*, *Colliers Practice Guide*, the *Norton Adviser* and *Law360*, and she is a frequent speaker at conferences on bankruptcy-related topics. Ms. Gurvitz received her undergraduate degree with highest honors from the University of California, Berkeley and her J.D. from UCLA School of Law, where she graduated tenth in her class, was admitted to the Order of the Coif and was awarded the 2013 American Bankruptcy Institute Medal of Excellence.

Hon. William J. Lafferty, III is a U.S. Bankruptcy Judge for the Northern District of California in Oakland, appointed in April 2011. He also serves on the U.S. Bankruptcy Appellate Panel for the Ninth Circuit, to which he was appointed in 2016, and served as a member of the Federal Judicial Center's Bankruptcy Judge Education Advisory Committee from April 2015 through April 2021. Prior to his appointment to the bankruptcy court, Judge Lafferty served as the first law clerk to Hon. Thomas E. Carlson of the U.S. Bankruptcy Court for the Northern District of California. He joined Howard Rice Nemerovski Canady Falk & Rabkin (now Arnold & Porter) in 1987, and served as a director in the firm's Bankruptcy and Corporate Reorganizations Department from 1993-2011. Judge Lafferty's past affiliations include vice president of the California Bankruptcy Forum, past president of the Bay Area Bankruptcy Forum, and past president of the Bar Association of San Francisco's Commercial Law and Bankruptcy Section. He received his undergraduate degree from the University of California, Berkeley with honors in general scholarship, and his J.D. from the University of California, Hastings College of the Law, where he served on the *Constitutional Law Quarterly*.

Dr. Mary Langsner is an attorney in Garman Turner Gordon's Business Restructuring & Bankruptcy Department in Las Vegas. Her primary practice involves corporate restructuring and bankruptcy litigation, including nondischargeability proceedings, claims litigation and fraudulent-transfer litigation. Dr. Langsner has represented clients from a variety of constituencies, including commercial lenders, business investors, real estate developers, commercial and residential landlords, regional and national banks, a motion picture studio, a national credit union, victims of Ponzi schemes, a construction sub-

contractor and a commercial equipment lessor. She also has represented chapter 11 and 7 trustees and creditors in all aspects of chapter 7, chapter 13 and chapter 11 cases, including single-asset real estate and subchapter V small business cases. In addition, she represents an executive agency of the State of Nevada and has represented local municipalities as creditors in connection with bankruptcy proceedings. Dr. Langsner has successfully represented creditors in their debt collections, including claims litigation and nondischargeability proceedings under 11 U.S.C. §523, and she has obtained over $2.3 million in judgments for fraud against the operators of a Ponzi scheme on behalf of a group of client investors. She also successfully challenged a final report, resulting in more than $80,000 recovered for her client where the trustee had initially identified the client as receiving zero. Prior to joining GTG, she led the creditors' rights bankruptcy practice at a mid-sized Nevada firm and clerked at the U.S. Bankruptcy Court for the District of Nevada. Dr. Langsner co-chairs the Pro Bono Committee of ABI's Veterans and Servicemembers Affairs Task Force. She received her B.S. from the University of California, Davis, her J.D. from the University of Nevada Las Vegas William S. Boyd School of Law and her Ph.D. from the University of California, Santa Cruz.

Jeffrey N. Pomerantz is a partner with Pachulski Stang Ziehl & Jones in Los Angeles. He also is a member of the firm's management committee and co-chair of the firm's creditors' committee practice. Mr. Pomerantz's practice includes representing companies, creditors' committees and private-equity funds in complex financial restructurings and merger-and-acquisition transactions both in and out of court. He has particular expertise in restructurings in the energy, manufacturing, restaurant and retail sectors. He also represents private-equity funds in asset-acquisition transactions. Mr. Pomerantz is a Fellow of the American College of Bankruptcy and served as ABI's President from 2016-17. He holds an AV-Preeminent rating by Martindale-Hubbell, has been named a "Super Lawyer" in the field of Bankruptcy & Creditor/Debtor Rights every year since 2009 in a peer survey conducted by *Law & Politics* and the publishers of *Los Angeles* magazine, and is listed in *The Best Lawyers in America* for Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law. He also been recognized as an outstanding lawyer in *Chambers USA* every year since 2007. Mr. Pomerantz received both his undergraduate degree Phi Beta Kappa in 1986 and his J.D. in 1989 from New York University, where he was a member of the Order of the Coif.