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No. 21-10449
IN THE
United States Court of Appeals for the Fifth Circuit

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

NexPoint Advisors, L.P.; Highland Capital Management Fund Advisors, L.P.; Highland Income Fund; NexPoint Strategic Opportunities Fund; Highland Global Allocation Fund; NexPoint Capital, Incorporated; James Dondero; The Dugaboy Investment Trust; Get Good Trust,

Appellants,

vs.

Highland Capital Management, L.P.,

Appellee.

On appeal from the United States Bankruptcy Court for the Northern District of Texas at No. 19-34054-sgj11

REPLY BRIEF FOR APPELLANTS HIGHLAND INCOME FUND, NEXPOINT STRATEGIC OPPORTUNITIES FUND, HIGHLAND GLOBAL ALLOCATION FUND AND NEXPOINT CAPITAL, INC.

A. Lee Hogewood, III
Emily Mather
K&L GATES LLP
4350 Lassiter at North Hills Ave.
Suite 300
Raleigh, N.C. 27609
(919) 743-7306
lee.hogewood@klgates.com
emily.mather@klgates.com

David R. Fine
K&L GATES LLP
Market Square Plaza
17 North Second St.
18th Floor
Harrisburg, PA 17101
(717) 231-5820
david.fine@klgates.com

Counsel for Appellants Highland Income Fund, NexPoint Strategic Opportunities Fund, Highland Global Allocation Fund and NexPoint Capital, Inc.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTRODUCTION[1]

The Debtor's principal tactic in defending against this appeal is perpetuating the narrative that it has adhered to throughout its bankruptcy case: that Mr. Dondero is a vexatious litigant who only seeks to disrupt, and that each of the other Appellants is a mere puppet acting at Mr. Dondero's sole direction and control. That paints a false portrait with respect to the Funds. To lump the Funds together with the other Appellants as one solitary unit, acting jointly at Mr. Dondero's direction and control, is simply incorrect as a factual and legal matter.

The Debtor also makes a (false) blanket assertion that the Funds, as "Dondero Entities," have engaged in bad-faith litigation tactics "and other actions to harass court-appointed fiduciaries or otherwise impede carrying out the Plan," Appellee Br. at 15. This is not true. The record demonstrates that the Funds have not come close to litigating "virtually every issue in the case," nor have they "interfered with court-appointed fiduciaries." Appellee Br. at 16. Rather, the very limited actions the Funds have taken in the bankruptcy case, including pursuing this appeal, have been directly related to preserving their rights as owners of equity interests in the CLOs. The Funds' actions in this respect are understandable, given

[1] The Funds use the same defined terms here as they did in their opening merits brief.

their sizeable economic interests in the CLOs, and those actions have been appropriately tailored to their specific interests.

The Debtor attempts to portray the Funds' appeal of the Confirmation Order and the Plan as another effort to impede the Debtor's reorganization efforts. The Funds objected to, and now appeal, the injunction and exculpation provisions of the Plan, extraordinarily broad releases and protections that the Funds contend unlawfully impede their ability to protect their interests. The Debtor asserts that the only objections to the Plan that were not resolved in advance of the confirmation hearing were those of the "Dondero Entities," evidently overlooking the unresolved objection of another significant party in interest: the United States Trustee.[2] Notably, the United States Trustee's objection to the Plan likewise contested the overly broad and unlawful exculpation and injunction provisions—a fact that undercuts the Debtor's attempt to portray such challenges as baseless.[3]

In its brief, the Debtor attempts to distinguish the exculpation and injunction provisions in the Plan from unenforceable third-party release provisions. However, for the reasons discussed in the Funds' opening merits brief and in this reply, the Funds maintain that the breadth of these provisions together provide nothing less

[2] *See* Confirmation Order ¶ 20, ROA.33.

[3] *See* Confirmation Order ¶ 20, ROA.33-34.

than a full discharge of non-debtor third-parties that the Bankruptcy Code does not countenance. The Debtor also cites to the "exceptional circumstances" presented in the case in an effort to justify these provisions, effectively admitting their exceptional nature and the overreach they permit. Exceptional circumstances do not excuse lower courts' duty to comply with the precedent set by this Court. In this instance, applicable precedent simply does not allow for the exculpation and injunction provisions in the Plan to stand.

I. The plan injunction and exculpation provisions impermissibly discharge non-debtors.

The Debtor argues that the Plan injunction and exculpation provisions are typical and commonplace, while the Bankruptcy Court justified them based on this case's perceived exceptional nature. While other circuits have been persuaded to permit that which was once impermissible to transform from exceptional to typical, this Court has properly declined to do so. Indeed, the transformation evident in these other jurisdictions confirms this Court's wisdom in viewing such provisions with extreme caution.

The injunction and exculpation provisions under the Debtor's plan do not merely provide temporary relief, which may be appropriate in "unusual circumstances," but rather, they are permanent injunctions. This Court has already ruled that permanent injunctions in favor of non-debtor third-parties that

do not provide alternative means of recovery are impermissible because only debtors are entitled to a discharge. *In re Zale Corp.*, 62 F.3d 746, 761 (5th Cir. 1995); 11 U.S.C. § 524(e) ("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."). Moreover, even temporary injunctions may "not be extended post-confirmation in the form of a permanent injunction that effectively relieves the nondebtor from its own liability to the creditor." *In re W. Real Estate Fund Inc.*, 922 F.2d 592, 601-02 (10th Cir. 1990); *see also In re Couture Hotel Corp.*, 536 B.R. 712, 751-52 (Bankr. N.D. Tex. 2015) (discussing *In re Bernhard Steiner Pianos, USA, Inc.*, 292 B.R. 109 (Bankr. N.D. Tex. 2002), *In re Seatco, Inc.*, 257 B.R. 469 (Bankr. N.D. Tex. 2001) and denying confirmation due to impermissible temporary third-party injunction).

In short, non-consensual plan provisions that permanently protect non-debtor and non-committee third-parties from claims and causes of action are not permissible in the Fifth Circuit, whether labeled as temporary injunctions, exculpations, or releases. *See Bank of N.Y. Tr. Co., NA v. Official Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229, 252 (5th Cir. 2009); *Dropbox, Inc. v. Thru, Inc. (In re Thru, Inc.)*, No. 3:17-CV-1958, 2018 WL 5113124, at *21 (N.D. Tex. Oct. 19, 2018) (finding it was clear error for the bankruptcy court to

approve injunction in favor of non-debtor third-parties);[4] *In re Bigler LP*, 442 B.R. 537, 546 (Bankr. S.D. Tex. 2010) (striking injunction with respect to third parties). Regardless of how such provisions are framed, the debts of non-debtor third-parties are not entitled to be discharged under the Bankruptcy Code. *Pac. Lumber*, 584 F.3d at 252 ("Section 524(e) only releases the debtor, not co-liable third parties.").[5]

Here, a comparison of the injunction and exculpation provisions with Section 524 of the Bankruptcy Code reflects that they effectively discharge non-debtors. A discharge voids any judgment for personal liability of the debtor and

[4] The injunction in *Thru* was impermissible even though it was more narrow than the injunction at issue in this case. In *Thru*, the injunction permanently enjoined creditors from taking action on account of claims that arose *prior* to the effective date of the plan. 2018 WL 5113124, at *21. Here, however, no such limitation exists.

[5] Contrary to the Debtor's argument, the clear guiding principle that emerges from *Pacific Lumber* is that "non-consensual non-debtor releases and permanent injunctions" are "broadly foreclosed" in the Fifth Circuit. *Pac. Lumber*, 584 F.3d at 252. The "two principles" that the Debtor alleges emerge from *Pacific Lumber* conflict with the express language in that case, and more importantly, the "fresh start § 524(e) provides to debtors." 584 F.3d at 252-53; Appellee Br. at 28. On this point, it is also hard to reconcile the Debtor's argument that allowing the Funds to enforce their contractual rights and claims that arise post-confirmation with respect to assets in which only the *Funds* own any interest (and not the Debtor) could somehow swamp the Debtor's efforts under the Plan or impede efforts to monetize the Debtor's assets (which exclude the CLO assets).

enjoins actions to "collect, recover or offset such debt as a personal liability of the debtor." 11 U.S.C. § 524(a).

The Plan injunction "permanently" enjoins all Enjoined Parties, with respect to any claim or interest from, among other things, commencing or continuing any type of proceeding against or affecting the Debtor, the Reorganized Debtor, the Litigation Sub-Trust, the Claimant Trust or the property of any of those entities; enforcing, collecting or attempting to recover any judgment against the foregoing parties or their property; and from asserting any right of setoff against any obligation due to the foregoing parties or their property.[6] The Plan also provides for a permanent extension of all injunctions and stays entered during the Chapter 11 case without any end date.[7]

Similarly, the exculpation provision provides that each Exculpated Party (which includes the Debtor's "successors and assigns," employees, its general partner, Strand, the Chapter 11 Directors, and the CEO/CRO, among others) is "exculpated from," and will not "have or incur" liability for post-petition conduct in connection with, among other things, "the funding or consummation of the Plan (including the Plan Supplement) or any related agreements, instruments or other

[6] Plan at IX.F., ROA.160.

[7] Plan at IX.G., ROA.161.

documents," the "implementation of the Plan," and "any negotiations, transactions, and documentation" in connection therewith, so long as such conduct does not constitute bad faith, fraud, gross negligence, or criminal or willful misconduct.[8]

Thus, by permanently enjoining third-parties from enforcing their rights against other non-debtor third-parties, and by permanently exculpating other non-debtor third-parties from liability, the foregoing provisions are the type of "permanent injunction that effectively relieves the nondebtor from its own liability to the creditor" in violation of Section 524(e), which mandates that "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." *W. Real Estate Fund*, 922 F.2d at 601-02; 11 U.S.C. § 524(e).

This result is not changed by the fact that certain of the beneficiaries of the injunction are successors or agents of the Debtor. Contrary to the Debtor's assertions, the Litigation Sub-Trust and Claimant Trust are still non-debtors, i.e., third-parties, that are not entitled to receive the benefit of a permanent injunction. *Bigler*, 442 B.R. at 546 (injunction inappropriate as applied to Liquidating Trust, which was "a third-party who is not entitled to discharge under the plain language

[8] Plan at IX.C., ROA.157.

of § 524(e) and *Pacific Lumber*."). The Debtor's agents, such as its officers, directors and employees, are also improper subjects for protection by such provisions. *Hernandez v. Larry Miller Roofing, Inc.*, 628 Fed. App'x 281, 285 (5th Cir. Jan. 5, 2016) (unpublished) (discharge does not affect a non-debtor's liability for the debt); *In re Patriot Place, Ltd.*, 486 B.R. 773, 823 (Bankr. W.D. Tex. 2013) (denying confirmation due to overly broad nonconsensual exculpation provision purporting to exculpate former members, officers, directors, employees, advisors, attorneys and agents of the debtor); *Bigler*, 442 B.R. at 541 (noting that "similar protection to non-committee third parties, such as a debtor's directors and officers, is prohibited").

This result is also not changed by the Debtor's argument that the Exculpated Parties are akin to the Committee because they were court-appointed or approved fiduciaries and are disinterested. Most obviously, even if true, this does not change the fact that the Exculpated Parties are non-debtor third-parties. Further, the court in *Pacific Lumber* found that the Committee could be exculpated because of the statutory authorization in Section 1103(c), which authorization is plainly lacking for non-Committee Exculpated Parties. *Pac. Lumber*, 584 F.3d at 253.

Put simply, it was error for the Bankruptcy Court to approve the injunction and exculpation provisions, which, together, improperly release non-debtor third-

parties from liability. "The fresh start § 524(e) provides to debtors is not intended to serve this purpose." *Pac. Lumber*, 584 F.3d at 252-53.

II. The scope of the injunction and exculpation provisions is overly broad.

Even with respect to the Debtor/Reorganized Debtor and the Committee, the lack of any end date with respect to the injunction and the exculpation provisions is problematic. Section 1141(d)(1)(A) of the Bankruptcy Code only discharges the debtor from debts that arise before the date of confirmation. 11 U.S.C. §§ 524, 1141(d)(1)(A) (confirmation of a plan "discharges the debtor from any debt that arose before the date of such confirmation"); *Bigler*, 442 B.R. at 548 ("[A]ny discharge in a rehabilitative plan is limited to claims which arose pre-petition or are specifically enumerated post-petition claims."). Moreover, the immunity afforded to the Committee and its members may not extend to "acts outside the scope of their duty," and it may not "extend outside the time period of the pendency of the case." *Bigler*, 442 B.R. at 546 (striking injunction that provided protection from post-confirmation prosecution of claims with respect to Committee and Liquidating Trust) (citing *Pac. Lumber*, 584 F.3d at 253).

The Debtor argues that the injunction does not prevent the Funds from exercising contractual rights. However, this is exactly what the Plan does. The gatekeeper injunction directly prevents the Funds from exercising contractual

rights or asserting post-confirmation claims arising out of contracts the Debtor *assumed* without first seeking Bankruptcy Court permission. The Plan states: "no Enjoined Party may commence or pursue a claim or cause of action of any kind against any Protected Party that arose *or arises* . . . ."[9] It also expressly subjects the assertion of claims that arise from "the wind down of the business of the Debtor or Reorganized Debtor," or "transactions in furtherance of the foregoing" to gatekeeper approval.[10] These provisions prohibit the Funds from seeking to exercise contractual rights or bringing claims for mismanagement of the CLOs unless the Funds first seek Bankruptcy Court approval to act under portfolio management agreements the Debtor assumed. Blackletter bankruptcy law requires that the parties to an assumed contract, including the Debtor, are bound by all of its terms, not just the terms the Debtor likes.

The permanent injunction against interference with Plan implementation is an additional bar to the Funds' exercise of contractual rights and pursuit of consequent claims. The Plan calls for the orderly wind down and liquidation of the Debtor, including the Debtor's managed assets, such as assets of the CLOs. If the Funds were to exercise contractual rights under the portfolio management

[9] Plan at IX.F., ROA.160.

[10] Plan at IX.F., ROA.160-161.

agreements to, among other things, remove the Debtor as portfolio manager, the Debtor would assert that the Funds had interfered with the Plan's implementation and violated the injunction, notwithstanding the irony that the Funds, not the Debtor, own interests in the CLOs.

Rather than properly limit its reach to pre-confirmation claims, causes of action or rights, the Bankruptcy Court confirmed a plan that enjoins parties on a perpetual basis from bringing actions and enforcing rights that arise post-confirmation and with respect to both Debtor and non-debtor parties.[11] It is these post-confirmation rights and claims that the Funds are concerned with and which must be preserved; the Funds do not seek to litigate "old disputes to undermine a confirmed plan," as posited by the Debtor. Appellee Br. at 35.

The Debtor also argues that it is the Funds' own settlement agreement with the Debtor that precludes them from exercising rights under the portfolio management agreement. However, in the settlement agreement, the Funds simply agreed not to terminate any portfolio management agreement or remove the portfolio manager on a "no cause" basis through and including May 31, 2022, and on a "for cause" basis for a period that ends on the later of (i) May 31, 2022, or (ii) a decision by this Court in this appeal (subject to the Funds' ability to seek and

[11] Plan at IX.F., ROA.160-161.

receive approval for such action during this period from the Bankruptcy Court).[12] Therefore, with respect to post-confirmation rights arising from contractual breaches or mismanagement under the portfolio management agreements (i.e., conduct that would justify a "for cause" termination or removal, including refusing to act in accordance with the expressed long-term investment horizon of the Fund holding the majority ownership interest in the particular CLO), it is the Plan that prevents the Funds from exercising such rights. Further, the settlement agreement does not impact the Funds' ability to exercise contractual termination or removal rights after May 31, 2022. Moreover, the settlement agreement expressly contemplates a decision by this Court resolving the issue in the Funds' favor.

In addition, the exculpation provision in the Plan does not merely establish a standard of care for court-appointed representatives and fiduciaries during the bankruptcy case, as argued by the Debtor. The exculpation provision has no end date and excuses the Exculpated Parties for post-confirmation conduct that arises out of implementation of the Plan and related negotiations and transactions.[13] The result is that the exculpation provision is not limited to excusing conduct taken

[12] Order Approving Debtor's Settlement Agreement with Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., Highland Income Fund, NexPoint Strategic Opportunities Fund, and NexPoint Capital, Inc. Case No. 19-34054-sgj11, Dkt. No. 2829.

[13] Plan at IX.C., ROA.157.

during the bankruptcy by estate representatives in their capacities as such; rather, it exculpates the Exculpated Parties from any liability, arising at any point in time, even as it relates to agreements assumed under the Plan and post-confirmation ordinary business matters.

Notwithstanding the Debtor's argument to the contrary, the exculpation provision plainly, and improperly, effects a release of liability for conduct that occurs outside of the course of the bankruptcy, and with respect to estate representatives, outside the scope of their capacities as such. *Bigler*, 442 B.R. at 547. Post-confirmation conduct is not an appropriate subject for an exculpation provision, as "the Chapter 11 process is not intended to provide an ongoing, all-encompassing, and generic liability shield for debtors." *Bigler*, 442 B.R. at 548. Moreover, since the bankruptcy estate no longer exists and the Chapter 11 Directors have been relieved of their duties, there is no reason why the exculpation provision should continue indefinitely into the future.

As explained elsewhere, the Funds reiterate that their concern is not with respect to conduct that may have occurred during the bankruptcy case but, rather, with events that may arise in the future. In this respect, the Debtor states that the exculpation provision has no impact on contractual rights. However, the plain language of the exculpation provision exculpates the Exculpated Parties from,

among other things, any claims, obligations, rights, and liabilities in connection with or arising out of any agreements or other documents relating to the Plan; the consummation or implementation of the Plan; and negotiations, transactions and documentation relating to the same.[14] This post-confirmation protection is of grave concern to the Funds because it releases the Exculpated Parties from claims for negligence and ordinary breach of contract. Notably, one of the cases cited by the Debtor, *In re Aegean Marine Petroleum Network, Inc.*, 599 B.R. 717, 721 (Bankr. S.D.N.Y. 2019), involved a similar exculpation provision that exculpated parties from "any restructuring transaction, contract, instrument, release, or other agreement or document created or entered into in connection with the disclosure statement or the Plan." Critically, the bankruptcy court in that case expressed the *precise concern the Funds have pointed to here*, and the bankruptcy court required that the exculpation provision be narrowed accordingly:

> I think, as I said during argument, that to some extent, the wording of this provision is too broad. Certainly, for example, the exculpation provision should not bar the enforcement of contracts that were entered into in the course of the case and that were approved by the Court, but literally that is what the proposed language would do. I believe that an appropriate exculpation provision should say that it bars claims against the exculpated parties based on the negotiation, execution, and implementation of agreements and transactions that were approved by the Court.

[14] Plan, Article IX.C., ROA.157.

Aegean, 599 B.R. at 721. Accordingly, because the exculpation and injunction provisions unlawfully release the Protected Parties and the Exculpated Parties from conduct into perpetuity and that has no relationship to the bankruptcy case, the Bankruptcy Court erred in approving such provisions.

III. *Res Judicata* does not save the exculpation provision.

As discussed in the Funds' opening brief, the Funds disagree with the Debtor's position that the January 9 and July 16 Orders have *res judicata* effect, rendering the improper plan provisions immaterial. Indeed, if the plan provisions do not matter, why did the Debtor litigate so intensely to ensure their approval by the Bankruptcy Court? Among other reasons, the Debtor litigated for the approval of these plan provisions because the Debtor understands that the Funds are *not* bound by the 2020 Orders and the Debtor knows, its tortured argument to the contrary notwithstanding, that the Funds are *not* in privity with Mr. Dondero.

Mr. Dondero is not the Funds' representative. In order for a non-party to be adequately represented, the party in the prior suit must be "so closely aligned to her interests as to be her virtual representative." *Eubanks v. FDIC*, 977 F.2d 166, 170 (5th Cir. 1992). The question of virtual representation is strictly confined. *Meza v. General Battery Corp.*, 908 F.2d 1262, 1272 (5th Cir. 1990). A virtual representative for a party to a later proceeding must have "an express or implied

legal relationship in which parties to the first suit are accountable to non-parties who file a subsequent suit raising identical issues." *Id.* (quoting *Benson & Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1175 (5th Cir. 1987)) (no virtual representation where plaintiff did not consent to the representation of the alleged virtual representative, and alleged virtual representative had no contractual duty or statutory obligation to provide such representation); *Benson & Ford*, 833 F.2d at 1175 (discussing case law and noting that virtual representation has not been found where parties have their own distinct and personal causes of action). Moreover, "the general rule is 'that a nonparty is not obligated to seize an available opportunity to intervene in pending litigation that presents question [sic] affecting the nonparty.'" *Id.* at 1176 (quoting 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4452, at 446 (1981)).

As discussed in detail in their opening merits brief, there was no evidence before the Bankruptcy Court that demonstrated that the Funds are owned or controlled by Mr. Dondero; rather, each Fund is governed by a complex statutory regime that mandates an independent board of trustees or board of directors. It is their respective boards, not Mr. Dondero, that determine how the Funds act (which must be solely in the interests of the Funds and the Funds' investors). Mr.

Dondero was not the Funds' virtual representative nor their privy for purposes of the 2020 Orders.

Further, the Bankruptcy Court—and the Debtor—overstate the holding of *Republic Supply Co. v. Shoaf*, 815 F.2d 1046 (5th Cir. 1987), as support for the *res judicata* effect of the 2020 Orders' exculpation provisions. *Shoaf* stands for the narrow proposition that a confirmed plan has *res judicata* effect with respect to an express and specific release that was not appealed. 815 F.2d 1046; *In re Applewood Chair Co.*, 203 F.3d 914, 918-19 (5th Cir. 2000). However, *res judicata* does not apply to preclude suits where the order in question contains only a *general* release, as opposed to a specific release of a party's liability. *Applewood*, 203 F.3d at 919; *Pac. Lumber*, 584 F.3d at 252 n.27 (noting that "*Applewood* did not find specific releases satisfy § 524(e), instead it held that this court would only give res judicata effect to specific clauses."). Here, the 2020 Orders do not release the Chapter 11 Directors or Mr. Seery from any specific liability, but rather, contain general exculpation provisions that are not *res judicata* under *Shoaf*.

Nevertheless, even assuming the 2020 Orders do preclude the Funds' ability to sue the Chapter 11 Directors or Mr. Seery, they do not preclude the Funds' ability to exercise their contractual rights under assumed agreements. The 2020 Orders merely limit claims or causes of action against any of the Chapter 11

Directors, their agents or Mr. Seery (in his capacity as the Debtor's CEO/CRO) to those alleging willful misconduct or gross negligence and approved by the Bankruptcy Court, as gatekeeper, to proceed. The 2020 Orders protect particular parties—the Chapter 11 Directors and the Debtor's CEO/CRO—from *personal* liability for their actions, but they do not, under any reasonable interpretation, preclude the Funds from enforcing their post-petition rights under contracts that were assumed by the Debtor. Moreover, the Chapter 11 Directors have disbanded, such that any claims and rights that arise in the future could not be due to conduct of the Chapter 11 Directors or their agents or employees. Thus, although the 2020 Orders do not unlawfully impair the Funds' rights, the exculpation provision does.

Accordingly, the Bankruptcy Court erred by determining that the 2020 Orders were *res judicata* with respect to the exculpation provision. And, even if it did not err in such holding, the exculpation provision unlawfully extends the 2020 Orders to an impermissible scope.

IV. The gatekeeper provision is unlawful.

The Debtor argues that the gatekeeper provision is lawful because the Bankruptcy Court has jurisdiction to act as a gatekeeper in furtherance of the confirmed Plan, and because it is supported by the doctrine enunciated in *Barton v. Barbour*, 104 U.S. 126 (1881). The Funds disagree. As discussed in the Funds'

principal brief, the gatekeeper injunction is unlawful because it attempts to bestow exclusive jurisdiction in the Bankruptcy Court where no such jurisdiction exists.

The Debtor argues that the gatekeeper provision has no effect on legitimate contractual rights. The Funds disagree. The gatekeeper injunction deprives the Funds of their ability to act expeditiously to enforce the portfolio management agreements because they will be required to obtain the Bankruptcy Court's blessing in order to exercise their contractual rights and remedies under such agreements—assuming that approval would be forthcoming. Under the gatekeeper provision of the Plan, no party may pursue a claim or cause of action that relates to the administration of the Plan or property to be distributed under the Plan or the wind down of the business, or transactions in further of the foregoing, among other things, without the Bankruptcy Court first determining that a colorable claim exists.[15]

However, this Court has determined that post-confirmation disputes over contract interpretation or enforcement fall outside of bankruptcy courts' jurisdiction:

> The fact that the account management contract existed throughout the reorganization and was, by implication, assumed as part of the plan is of no special significance. And even if such circumstances might bear on post-confirmation bankruptcy court jurisdiction, no facts or

[15] Plan at IX.F., ROA.160-161.

> law deriving from the reorganization or the plan was necessary to the claim asserted by Craig's against the Bank. Finally, while Craig's insists that the status of its contract with the Bank will affect its distribution to creditors under the plan, the same could be said of any other post-confirmation contractual relations in which Craig's is engaged. In sum, the state law causes of action asserted by Craig's against the Bank do not bear on the interpretation or execution of the debtor's plan and therefore do not fall within the bankruptcy court's post-confirmation jurisdiction.

Bank of La. v. Craig's Stores of Tex., Inc. (In re Craig's Stores of Tex., Inc.), 266 F.3d 388, 391 (5th Cir. 2001) (citing 11 U.S.C. § 1142(b)).

Expansive bankruptcy court jurisdiction is not needed post-confirmation, since the bankruptcy estate no longer exists. *Craig's Stores*, 266 F.3d at 390. At this point, "the debtor may go about its business without further supervision or approval. . . . It may not come running to the bankruptcy judge very time something unpleasant happens." *Craig's Stores*, 266 F.3d at 390 (quoting *Pettibone Corp. v. Easley*, 935 F.2d 120, 122 (7th Cir. 1991)). Accordingly, it is inappropriate to require the Funds to seek the Bankruptcy Court's approval to pursue post-confirmation rights and claims that are unrelated to the bankruptcy case or the Debtor's interest in any property and will not impact administration of the Plan, as these are claims that would otherwise fall outside of the Bankruptcy Court's jurisdiction. The cases cited by the Debtor are inapposite.

Further, even if it may sometimes be appropriate to institute a gatekeeper to shepherd potential claims against court-appointed officers for conduct *during* a bankruptcy case under the *Barton* doctrine, the gatekeeper injunction here is not limited to such claims against such parties. Rather, it includes all Protected Parties - including the Debtor, its employees, Strand,[16] the Reorganized Debtor, the Claimant Trust and the Litigation Sub-Trust. It also extends post-confirmation, after the bankruptcy estate ceases to exist. In these respects, the gatekeeper injunction is overly broad and is not justified by the *Barton* doctrine.

The Funds note that the Debtor has not pointed to any cases in which *Barton*-like protection has been afforded to reorganized debtors. *See* Appellee Br. at 43-44. To the contrary, post-confirmation (*i.e.*, post-discharge), reorganized chapter 11 debtors are not protected by an "ongoing, all-encompassing, and generic liability shield." *Bigler*, 442 B.R. at 548; *see also In re Pilgrim's Pride Corp.*, 2010 WL 200000, at *5 n.14 (Bankr. N.D. Tex. Jan. 14, 2010) (noting that bankruptcy courts may retain jurisdiction to settle disputes "pertaining to the performance by a *debtor in possession* of its duties under sections 1107 and 1106 of the Code.") (emphasis

[16] The gatekeeper provision only applies to claims or causes of action against the employees or Strand with respect to actions taken through the Plan's Effective Date.

added); *Craig's Stores*, 266 F.3d at 389 ("bankruptcy court jurisdiction does not last forever").

Relatedly, the Reorganized Debtor's indemnification obligations cannot serve as a justification for the gatekeeper injunction with respect to its *own* conduct, such as mismanagement of CLO assets or other breach of the portfolio management agreements, because it is not possible for the Reorganized Debtor to indemnify itself.

In sum, the gatekeeper provision unlawfully restricts the Funds' contractual rights under assumed contracts, is unsupported by law, and it should be stricken.

CONCLUSION

For the reasons discussed in this reply and in the Funds' opening merits brief, the Funds request that the Court vacate the Bankruptcy Court's Confirmation Order or vacate that Order to the extent it approves the exculpation and injunction/gatekeeper provisions in the Plan and remand the matter to the Bankruptcy Court for further proceedings consistent with the Court's holdings. The Funds further request that the Court vacate the Bankruptcy Court's factual findings that (a) the Funds are entities "owned and/or controlled by [Mr. Dondero]" and (b) "the Bankruptcy Court was not convinced of [the Funds'] 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."

October 27, 2021

Respectfully submitted,

A. Lee Hogewood, III
Emily Mather
K&L GATES LLP
4350 Lassiter at North Hills Ave.
Suite 300
Raleigh, N.C. 27609
(919) 743-7306
lee.hogewood@klgates.com
emily.mather@klgates.com

/s/ David R. Fine
David R. Fine
K&L GATES LLP
Market Square Plaza
17 North Second Street
18th Floor
Harrisburg, PA 17101
(717) 231-4500
(717) 231-4501 (facimile)
david.fine@klgates.com

Counsel for Appellants Highland Income Fund, NexPoint Strategic Opportunities Fund, Highland Global Allocation Fund and NexPoint Capital, Inc.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel certifies that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B)(ii) because it contains 4,972 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2010 and is set in Equity font in a size equivalent to 14 points or larger.

October 27, 2021 /s/ David R. Fine

CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2021, I electronically filed the attached brief using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

October 27, 2021 /s/ David R. Fine