No. 3:21-cv-01585-S

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

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

Debtor.

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

v.

HIGHLAND CAPITAL MANAGEMENT, L.P.,
APPELLEE.

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

APPELLEE'S MOTION FOR SUMMARY AFFIRMANCE

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Appellee Highland Capital Management, L.P. ("Highland") moves for summary affirmance of the appeal brought by the Charitable DAF Fund, L.P. ("DAF") and CLO Holdco, Ltd. ("CLO Holdco" and together with DAF, "Appellants"), challenging the bankruptcy court's denial of Appellants' motion to modify an order that, by then, was almost one year old.

In July 2020, the bankruptcy court appointed one of Highland's independent directors, James P. Seery, Jr., also to serve as its chief executive officer and chief restructuring officer. R.000545 (the "Appointment Order"). That Appointment Order included exculpation and gatekeeper protections unrelated to the discharge of any debt of the debtor. The gatekeeper protection prevented entities from commencing or pursuing claims against Seery without the bankruptcy court's prior authorization, and the exculpation protection limited claims against Seery to those alleging willful misconduct or gross negligence. *Id.* Appellants did not object to or appeal from the Appointment Order.[1]

Instead, one year later, Appellants flagrantly violated the Appointment Order's plain terms by seeking to sue Seery in district court without seeking (let alone obtaining) the bankruptcy court's prior authorization. Only then, after violating the Appointment Order and facing contempt sanctions for doing so, did

[1] Indeed, James Dondero, who is significantly involved with Appellants, negotiated and approved a nearly identical order appointing Seery as an independent director of the debtor six months prior to the Appointment Order.

Appellants belatedly ask the bankruptcy court to modify the Appointment Order, claiming for the first time that the Appointment Order was an interlocutory order that the bankruptcy court had lacked jurisdiction to enter. R.000828. The bankruptcy court correctly denied that relief. R.000004 (the "Order Denying Modification") (attached as Exh. A). The Order Denying Modification rejected Appellants' belated challenge to the Appointment Order as being an impermissible collateral attack barred by *res judicata*. R.0004989-91 (June 25, 2021 Transcript) (attached as Exh. B). The court also rejected Appellants' arguments on the merits, confirming that the Appointment Order's exculpation and gatekeeper protections were commonplace in bankruptcy proceedings and well within the court's authority. *Id.* The court thus found no exceptional circumstances warranting modification of a final order almost a year after its entry. R.004988-89.

Appellants appealed and asked this Court to stay or abate this appeal of the Order Denying Modification pending the Fifth Circuit's resolution of a separate appeal from the bankruptcy court's order confirming Highland's chapter 11 plan of reorganization, which contains similar protections in the plan's exculpation provisions. ECF No. 10. Appellants represented to this Court that the Fifth Circuit's decision in the confirmation appeal was likely to resolve the overlapping legal issues presented by this appeal. *Id.* at 3. The Court granted Appellants' motion and abated the appeal pending the Fifth Circuit's decision. ECF No. 21.

The Fifth Circuit has now issued its decision, resolving the overlapping issues in Appellee's favor. On September 7, 2022, the Fifth Circuit issued its final opinion affirming the bulk of Highland's plan. *NexPoint Advisors, L.P. v. Highland Capital Management, L.P. (In re Highland Capital Management, L.P.)*, No. 21-10449, 2022 WL 4093167 (5th Cir. Sept. 7, 2022) (the "Confirmation Opinion") (attached as Exh. C). In particular, the court of appeals confirmed that the bankruptcy court's Appointment Order is a "final bankruptcy order[]" with "ongoing *res judicata* effects" the "collateral attack" on which appellate courts "lack jurisdiction." *Id.* at *12 n.15. The court also affirmed the plan's gatekeeper provision in full. *Id.* at *10 (holding that "the injunction and gatekeeping provisions are sound"). The only portion of the plan that the Fifth Circuit reversed was its "exculpation of certain non-debtors" in the confirmed plan. *Id.* The court retained the plan's exculpation of Highland's independent directors. *Id.* at *12.

In light of the Fifth Circuit's Confirmation Opinion, Appellants have no viable argument on appeal of the Order Denying Modification. The bankruptcy court's Appointment Order is *res judicata*, and Appellants cannot challenge it for any reason—including arguing that the Appointment Order exceeded the bankruptcy court's jurisdiction. *Id.* at *15; *accord 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).

Nor, in any event, are Appellants' challenges to the gatekeeper or exculpation provisions sound on the merits. The Fifth Circuit's opinion squarely forecloses Appellants' arguments that the bankruptcy court overstepped its jurisdiction when it entered the gatekeeper provisions in the Appointment Order. Its narrowing of the confirmed plan's exculpation clause, on the ground that it amounted in some respects to a post-bankruptcy discharge of non-debtors contrary to 11 U.S.C. § 524(e), has no bearing on the Appointment Order's exculpation of Seery in exchange for his efforts to restructure the debtor during this case.[2]

For both reasons, the bankruptcy court's rejection of the motion to modify was "clearly right as a matter of law," there is "no substantial question as to the outcome of the case," and summary affirmance is appropriate. *Garza Rios v. Garland*, 843 F. App'x 626, 627 (5th Cir. 2021) (per curiam) (quoting *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969)).

[2] Appellants' motion failed to state any basis authorizing modification of the Appointment Order. R.000828-000837. At the bankruptcy court's hearing, Appellants attempted to cast their motion under the auspices of Federal Rule of Civil Procedure 60(b). R.004952-53. Though they struggled to articulate which provision of that rule they invoked, the gist of Appellants' argument was that the scope of the Appointment Order's protections exceeded what Appellants thought was within the bankruptcy court's jurisdiction. *See* R.004957-58, R.004954-57. The Fifth Circuit has now underscored the bankruptcy court's authority to enter gatekeeper protections similar to those issued here, and so Appellants have no argument that they are entitled to relief from those protections under Rule 60(b). 2022 WL 4093167, at *10. As for the exculpation protections—which Appellants challenged only in passing at the bankruptcy court's hearing—the Fifth Circuit also affirmed the bankruptcy court's jurisdiction to enter such provisions. *Id.* at *10-12. Though the court narrowed the exculpation of certain non-debtors in Highland's plan, it did so premised on legal requirements specific to the confirmation of a plan, and not because of any jurisdictional deficit that would afford Appellants any basis for relief under Rule 60(b).

CONCLUSION

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

Dated: September 26, 2022

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CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. Bankr. P. 8013(f)(3)(A) because, excluding the portions excluded by Fed. R. Bankr. P. 8015(g), this document contains 1,055 words.

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/s/ Zachery Z. Annable
Attorney for Appellee
Dated: September 26, 2022

CERTIFICATE OF SERVICE

I hereby certify that, on September 26, 2022, the foregoing Motion for Summary Affirmance was electronically filed using the Court's CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

/s/ Zachery Z. Annable
Attorney for Appellee

EXHIBIT A

The following constitutes the ruling of the court and has the force and effect therein described.

Signed June 29, 2021

United States Bankruptcy Judge

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

In re:	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	§	Case No. 19-34054-sgj11
Debtor.	§	

ORDER DENYING MOTION FOR MODIFICATION OF ORDER AUTHORIZING RETENTION OF JAMES P. SEERY, JR. FILED BY CHARITABLE DAF FUND L.P. AND CLO HOLDCO, LTD.

This matter having come before the Court on the *Motion for Modification of Order Authorizing Retention of James P. Seery, Jr. Due to Lack of Subject Matter Jurisdiction* [Docket No. 2248] (the "Motion")[2] filed by Charitable DAF Fund, L.P. and CLO Holdco, Ltd. in the above-captioned chapter 11 case (the "Bankruptcy Case"); and this Court having considered (a) the Motion; (b) the *Debtor's Objection to Motion for Modification of Order Authorizing Retention of*

[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 ascribed to them in the Motion.

James P. Seery, Jr. Due to Lack of Subject Matter Jurisdiction [Docket No. 2311] (the "Objection") filed by Highland Capital Management, L.P., the above-captioned debtor and debtor-in-possession (the "Debtor"); (c) the documents admitted into evidence during the hearing held on June 25, 2021 with respect to the Motion (the "Hearing"); and (d) the arguments made during the Hearing; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and this Court having found that venue of this proceeding and the Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is hereby **ORDERED** that:

1. The Motion is **DENIED** for the reasons stated on the record during the Hearing.

2. The Court shall retain exclusive jurisdiction to hear and determine all matters arising from the implementation of this Order.

###End of Order###

EXHIBIT B

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

In Re:	**Case No. 19-34054-sgj-11**
	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	Dallas, Texas
	Friday, June 25, 2021
	9:30 a.m. Docket
Debtor.	
	EXCERPT: MOTION FOR MODIFICATION OF ORDER AUTHORIZING RETENTION OF JAMES P. SEERY, JR. DUE TO LACK OF SUBJECT MATTER JURISDICTION (2248)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

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Proceedings recorded by electronic sound recording; transcript produced by transcription service.

DALLAS, TEXAS - JUNE 25, 2021 - 9:36 A.M.

(Transcript excerpt begins at 11:33 a.m.)

THE CLERK: All rise.

THE COURT: All right. Please be seated. We are back on the record, and our last motion this morning is the Motion to Reconsider filed by CLO Holdco and the DAF. Do we have Mr. Bridges and Mr. Sbaiti back with us now?

MR. BRIDGES: Yes, Your Honor. I have changed seats because of audio problems we're having here, but we're both here.

THE COURT: Okay. Well, I think we heard an agreement that you all have agreed that you're going to have an hour and a half each, and I presume that means everything: opening statements, arguments, evidence. So, we'll start the clock. Nate, it's 11:35. So, Mr. Bridges, your opening statement?

OPENING STATEMENT ON BEHALF OF CLO HOLDCO AND THE CHARITABLE DAF, LP

MR. BRIDGES: Thank you, Your Honor. We're here on a motion to modify an order that we'd submit has already been modified by the plan confirmation order, although that order has not yet become effective.

The modification there was to add the phrase "to the extent legally permissible" to the Court's assertion of jurisdiction in what is essentially the same gatekeeper

provision that's at issue here. We submit that change is an admission or at least a strong indication that the unmodified order, at least as applied in some instances, contains legally-impermissible provisions. The entire argument today from our side is about what's not legally permissible in that order.

And that starts with our concerns regarding the application of 28 U.S.C. § 959(a). As Your Honor knows well, 959(a) is a provision of law that the Fifth Circuit and *Collier on Bankruptcy* call an exception to the *Barton* doctrine. I know from the last time we were here that the Court is already aware of what 959(a) says. It's the second sentence, I understand, which the Court pointed to in our previous hearing that creates general equity powers or authorizes the Court to use its general equity powers to exercise some jurisdiction, some control over actions that fall within the first sentence of 959(a). But that second sentence also prohibits explicitly the Court's using general equity powers to deprive a litigant of his right to trial by jury.

Here, we're not under *Barton*, the statutory exception to *Barton* applies, because Mr. Seery is a manager of hundreds of millions of third-party investor property. Instead, we're here under the Court's general equity powers, as authorized by 959(a). And those equity powers cannot deprive the right to

trial by jury.

But the order does deprive trials by jury, first by asserting sole jurisdiction here, where jury trials are unavailable, and secondly, by abolishing any trial rights for claims that do not involve gross negligence or intentional misconduct.

Movants' third cause of action in the District Court case is for ordinary negligence. It comes with a Seventh Amendment jury right. But it's barred by the order because the order only allows colorable claims involving gross negligence or intentional conduct, not ordinary negligence.

Movants' second cause of action in the District Court case is for breach of contract. That comes with a Seventh Amendment jury right, but it's barred by the order because the order only allows colorable claims of gross negligence or intentional misconduct, not negligent or faultless breaches of contractual obligations.

Movants' first cause of action in the District Court case, breach of Advisers Act fiduciary duties, comes with a jury right. It's also barred by the order because the order only allows colorable claims involving gross negligence or intentional misconduct.

You see there what I mean. Congress couldn't have been clearer. Courts cannot deprive litigants of their day in court before a jury of their peers by invoking general equity

powers. Those powers don't trump the constitutional right to a jury trial.

Yet this Court's order purports to do precisely that, not only for the Movants, but also for future potential litigants who may have claims that have not even accrued yet. If those claims are for ordinary negligence or breach of contract or breach of fiduciary duties and don't rise to the level of gross negligence or intentional misconduct, this order says that those claims are barred, and it would deprive them of their day in court.

The Court's general equity powers are simply not broad enough to uphold such an order.

This issue is even more problematic when the causes of action at issue fall within the mandatory withdrawal of the reference provisions of 28 U.S.C. § 157(d). As this Court knows, it lacks jurisdiction over proceedings that require consideration of non-bankruptcy federal law regulating interstate commerce. Some such claims -- Movants' Advisers Act claim, for instance -- do not involve culpability rising to the level of gross negligence or intentional misconduct, but the order purports to bar them nonetheless, despite this Court's lacking jurisdiction over the subject matter of those claims.

Even if there is gross negligence or intentional misconduct, the order states that this Court will have sole

jurisdiction over such claims. And that can't be right if withdrawal of the reference is mandatory.

Opposing counsel will tell you that 157(d) is inapplicable here because they think our claims in the District Court won't require substantial consideration of the Advisers Act or any other federal laws regulating interstate commerce. But their cases don't come anywhere close to making that showing, as the briefing demonstrates.

And in any case, that argument is beside the point. This order is contrary to 157(d) because it asserts jurisdiction over claims that 157(d) does not apply -- I'm sorry, does apply to. And that's true regardless of whether Movants' claims are among those.

The idea that there's no substantial consideration of federal law, however, in the District Court case is undermined by Mr. Seery's testimony in support of his appointment in which he confirmed that the Advisers Act applies to him and that he has fiduciary duties under that Act to the investors of the funds he manages.

Your Honor, importantly, the Advisers Act isn't the typical federal statute with loads of case law under it. It's actually an underdeveloped, less-relied-upon statute, and most -- most of the law under that Act is promulgated by regulation and supervised by the SEC. As a registered investment advisor, Mr. Seery is bound by that Act, which he admits, he

agrees to. But to flesh out what his duties are requires a close exam of more than three dozen regulations under 17 C.F.R. Part 275.

The obligations include robust duties of transparency and disclosure, as well as duties against self-dealing and the necessity of obtaining informed consent, none of which are waivable, these duties.

The proceedings here in this Court reflect an effort to have those unwaivable duties waived. The allegations in the District Court are essentially insider trading allegations that the Debtor and Mr. Seery knew or should have known information that they had a duty under the Advisers Act to disclose to their advisees. Both under the Act and contractually, they had those duties. And, instead, they did not disclose and consummated a transaction that benefited themselves nonetheless.

In considering those claims, the presiding court will have to consider and apply the Advisers Act and the many regulations promulgated under it, in addition to other federal laws regulating interstate commerce. For that reason, withdrawal of the reference on the District Court action is mandatory. That's the two major -- that's two major problems out of four with the order that we're here on today.

First, it deprives litigants of their right to trial, to a jury trial, when Section 959(a) says that can't be done. And,

two, the order asserts jurisdiction -- sole jurisdiction, even -- over proceedings in which withdrawal of the reference is mandatory under 157(d).

The fourth major problem is what the Court called specificity at the previous hearing. The Fifth Circuit's *Applewood Chair* case holds that the rule from *Shoaf* does not apply without a "specific discharge or release," and that that release has to be enumerated and approved by the Bankruptcy Court. Thus, the order here can't exculpate Mr. Seery of liability for ordinary negligence and the like in a blanket fashion. The claims being released must be identified.

That's what happened in *Shoaf*. Shoaf's guaranty obligation was explicitly released. That's also what happened in *Espinosa*. Espinosa's plan listed his student loan as his only specific indebtedness. But it's not what happened here. And it couldn't happen here, because the ordinary negligence and similar claims being discharged by the order had not yet accrued and thus were not even in existence at the time the order issued.

Instead, what we have here is a nonconsensual, nondebtor injunction or release that's precisely what the Fifth Circuit refused to enforce in the *Pacific Lumber* case.

So, lack of specificity is the third major problem with the order. And that brings us to the fourth problem, which is the *Barton* doctrine. *Barton* is the only possible basis for

this Court to assert exclusive or sole jurisdiction over anything. Outside of *Barton*, it's plain black letter law that the District Court's jurisdiction is equal to and includes anything that this Court's derivative jurisdiction would also reach.

But the exception to the *Barton* doctrine in 959(a) plainly applies here, leaving no basis for exclusivity with regards to jurisdiction and the District Court. That's because Mr. Seery is carrying on the business of a debtor and managing the property of others, rather than merely administering the bankruptcy estate. The exclusive jurisdiction function of the *Barton* doctrine has no applicability because 959(a) creates that exception here.

Under its general equity powers, yes, 959(a) still authorizes this Court to exercise some control over actions against Mr. Seery, but short of depriving litigants of their day in court. And nothing in 959(a), that exception to *Barton*, says that the Court can nonetheless exercise exclusivity in that jurisdiction. Those general equity powers do not create exclusive or sole jurisdiction. They do not deprive the District Court of its Congressionally-granted original jurisdiction.

Moreover, Mr. Seery is not an appointed trustee entitled to the protections of the *Barton* doctrine in any case. His appointment was a corporate decision that the Court was asked

not to interfere with. The Court was asked to defer under the business judgment rule to the Debtor's appointment of Mr. Seery. And the Court did so.

As we asserted last time, no authority that we can find combines these two unrelated doctrines, the *Barton* doctrine and the business judgment rule. And they don't go together. None of the testimony or the briefing or argument, in the July order, in the January order that preceded it, none of that indicated that Mr. Seery would be a trustee or the functional equivalent of a trustee. The word "trustee" does not appear in any of those briefs or transcripts.

Opposing -- and because of that, the District Court suit is not about -- well, not because of that. The District Court suit simply is not about any trustee-like role that Mr. Seery may have played anyway. Opposing counsel will try to convince you otherwise, will tell you that the District Court case is a collateral attack on the settlement, but it's not. Wearing his estate administrator hat, Mr. Seery can settle claims in this court. Wearing his advisor hat, he has to fulfill his Advisers Act duties and properly advise his clients.

He doesn't have to wear both hats, and it seems highly unusual that he would choose to fill both of those roles simultaneously. But he has chosen both roles. And the District Court case is a hundred percent about his role as an advisor. Did he comply with the Act? Did he do the things

that his advisor role obligated him to do as a manager of that property?

The District Court suit really is only being used to illustrate the issues that we're raising here. It's important, it's timely to address those issues now because of the District Court action, but that's an illustration of the problems with the order. It is not exclusively that that action is what we're attempting to address. Rather, the order exculpating Mr. Seery from ordinary negligence liability and similar liability is problematic, is contrary to the law. On top of that, the Court is asserting jurisdiction over gross negligence and intentional misconduct claims. To the extent that 157(d) applies, it is problematic and contrary to law as well.

THE COURT: Okay. We're occasionally getting some breakup of your sound. So please -- I don't know what you can do to adjust, but it was just now, and intermittently we get a little bit of garbly. So if you could just say your last sentence one more time, and we'll see if it improves.

MR. BRIDGES: Your Honor, I'm not sure I can say this last sentence again.

THE COURT: Okay.

MR. BRIDGES: I was -- I was mentioning that the District Court case is an illustration of our argument. Our argument is not merely that the District Court case should be

exempted or excepted from the order. Our argument is that the order is legally infirm and that the District Court case and the claims there illustrate some of those infirmities, but that the infirmities go beyond just what's at issue in the District Court case.

In sum, there are four problems with the order that render parts of it legally infirm. It deprives the right of a jury trial -- in fact, of any trial -- in contravention of 959(a) for some causes of action.

It asserts jurisdiction -- two, it asserts jurisdiction over claims that are subject to the mandatory withdrawal of the reference provision (garbled) 157(d).

And three, it lacks the specificity required to discharge future claims under *Applewood*.

Finally, Your Honor, number four, the order relies on the *Barton* doctrine, which doesn't apply and which 959(a) creates an exception to.

Movants respectfully submit the order should be modified for those reasons.

MR. SBAITI: Tell him Mark Patrick is here, for the record.

THE COURT: All right. I have a couple of follow-up questions for you. I want to drill down on the issue of your client not having appealed the July 2020 order. Or the HarbourVest settlement order, for that matter. Tell me as

directly as possible why you don't view that as a big problem. Because it's high on my list of possible problems here.

MR. BRIDGES: I understand, Your Honor. The *Applewood Chair* case is our -- our defense to that argument, that without providing specifics as to the claims being discharged in the July order, that *Shoaf* cannot apply to create a res judicata effect from the failure to appeal that order.

THE COURT: But is that really what we're talking about, a discharge of certain claims? We're talking about a protocol that the Court established which wasn't appealed.

MR. BRIDGES: Your Honor, your order does many things. We're talking about a few of them in one paragraph of the order. And in that order -- in that paragraph, yes, it creates a protocol for determining the colorability of some claims, claims that rise to the level of gross negligence or intentional misconduct. It does not create a protocol for claims that fall below that threshold, claims for ordinary negligence, as an example.

THE COURT: Okay.

MR. BRIDGES: For breach of contract that's not intentional, is not grossly negligent, it's just a breach of contract. It can even be faultless. There's still liability. There's still a jury right under the Seventh Amendment for faultless breach of contract.

The protocols in the order do not address such claims other than to bar them. To discharge them. And thus, yes, it's a release, it's a discharge of those claims. It can be viewed as a permanent injunction against bringing such claims. It's what's -- it's what's not allowed by the *Applewood Chair* case and by *Pacific Lumber*.

THE COURT: All right. So you're arguing that was -- the wording of the order was not specific enough to apprise affected parties of what they were releasing, they're releasing claims based on ordinary negligence against Mr. Seery? That's not specific enough?

MR. BRIDGES: Correct. Future unproved claims, the factual basis for which has not happened yet. Those cannot be and were not disclosed with any specificity in this order.

If we compare it to *Shoaf* and to *Espinosa*, in *Shoaf* what we had was a guaranty, Shoaf's guaranty on a transaction that was listed in the actual release, describing what the transaction was that was being -- that the guaranty was being released for.

In *Espinosa*, what we had was a student loan --

THE COURT: Right.

MR. BRIDGES: -- that was listed in the plan specifically, as the only specific indebtedness.

Here, we don't have any of that specificity. What we have is a notice to the entire world, Your Honor, that for an

unlimited period of time any claim for ordinary negligence, for ordinary breach of contract or fiduciary duty against Mr. Seery is barred if it relates to his CEO role. And his CEO role means as a manager of property, exactly precisely what 959(a) is talking about.

Those jury rights (garbled) claims cannot be released, discharged, expunged, done away with, in an order that isn't explicit.

On top of that, even in an explicit order, 959(a) tells the Court it cannot deprive a litigant of its jury trial right.

THE COURT: Well, as anyone knows who's been around a while in this case, my brain sometimes goes down an unexpected trail, and maybe this one is one of those situations. Are there contracts that your clients would rely on in potential litigation?

MR. BRIDGES: Yes, Your Honor.

THE COURT: What are those contracts?

MR. BRIDGES: It is a management contract. I don't think I can give you the specifics at this moment, but I probably can before we're done here today. A management contract in which the Debtor provides advisory and management services to the DAF --

THE COURT: Well, you know, the shared services agreements that we heard so much about in this case? A shared

service agreement? I can't remember, you know, which entities have them and which do not at times. So, --

MR. BRIDGES: The shared services agreement is one of those contracts, Your Honor.

THE COURT: Okay.

MR. BRIDGES: It's not the only one.

THE COURT: And what are the others?

MR. BRIDGES: There's -- the other is the investment advisory agreement.

THE COURT: Those two?

MR. BRIDGES: (no response)

THE COURT: Those are the only two?

MR. BRIDGES: There may be one other, Your Honor. I'm not sure.

THE COURT: Are they in evidence?

MR. BRIDGES: I can find out shortly.

THE COURT: Are they in evidence? We haven't talked about evidence yet, but are they going to be in evidence, potentially?

MR. BRIDGES: They are referenced in the District Court case, the complaint, which is in evidence.

THE COURT: I'm asking, are --

MR. BRIDGES: But those contracts I don't believe are listed as exhibits here in this motion, no.

THE COURT: They are not? Okay.

Well, what my brain is thinking about here is, of the umpteen agreements I've seen -- more than umpteen -- of the many, many agreements I've seen over time in this case, so often there's a waiver of jury trial rights, as I recall, as well as an arbitration clause. I just was curious, hmm, you know, you talked a lot about your clients' jury trial rights: do we know that these agreements have not waived those?

MR. BRIDGES: Your Honor, I think I can answer that by the end of our hearing. I don't have an answer off the top of my head. What I can tell you is a jury right has been demanded in the federal court complaint, which is in evidence, and that opposing counsel has brought no evidence indicating that they have the defense of our having waived the right to a jury trial here.

THE COURT: Okay. Well, I just --

MR. BRIDGES: Or arbitra...

THE COURT: -- would think that you would know that. Does anyone know that on the Debtor's side off the top of your head?

MR. POMERANTZ: I do not, Your Honor.

THE COURT: Uh-huh.

MR. POMERANTZ: And to Mr. Bridges' last point, we have filed a motion to dismiss. We have not answered the complaint. So any time to object to their jury trial right would be in the context of the answer. So the implication

that we have not raised the issue and therefore it doesn't exist is just not a correct implication and connection he's trying to draw.

THE COURT: Okay. All right.

Well, let me also ask you about this. I'm obsessing a little over the *Barton* doctrine and your insistence that it does not provide authority or an analogy here.

Well, for one thing, is there anything in the Fifth Circuit case *Sherman v. Ondova* that you think either helps you or hurts you on that point? I'm intimately familiar with it, although I haven't read it in a while, because it was my opinion that the Fifth Circuit affirmed. And I spent a lot of time thinking about that. It was a trustee, a traditional -- well, no, a Chapter 11 trustee and his counsel. But anything from that case that you think is worthy of pointing out here?

MR. BRIDGES: No, Your Honor. I'm not -- nothing comes to mind. That case is not fresh on my mind.

What I would tell you is that *Barton* doctrine and the business judgment rule are incompatible, and the appointment of a trustee never involves application of the business judgment rule or deference to the Debtor or another party in terms of making that appointment.

The *Barton* doctrine, as it applies to trustees, is viewed as an extension, to some extent, of judicial immunity to the trustee, who is chosen by, selected by the Court and assigned

by the Court to carry out certain functions. That --

THE COURT: Well, let me --

MR. BRIDGES: -- quasi-immunity --

THE COURT: -- stop you there. You say it's an extension of immunity. But isn't it, by nature, really a gatekeeping provision? It's a gatekeeping provision, right? Before you even get to immunity, maybe, in a lawsuit, it's a gatekeeping function that the Supreme Court has blessed, you know, obviously in the context of a receiver, but appellate courts have blessed it in the bankruptcy context. The Bankruptcy Court can be the gatekeeper on whether the trustee or someone I think in a similar position can get sued or not.

And then we had that Fifth Circuit case after *Ondova*. It begins with a V, *Villegas* or something like that. Didn't that, I don't know, further ratify, if you will, the whole *Barton* doctrine by saying, oh, just because they're noncore claims, state law or non-bankruptcy law claims, doesn't mean, after *Stern*, the Bankruptcy Court still cannot serve the gatekeeper function.

Tell me what you disagree. That's my kind of combined reading of all of that.

MR. BRIDGES: Your Honor, I have to parse it out. There's a lot to unpack there. If I can make sure to get in the follow-ups, I can start with saying it's okay for the Court in many instances to act as a gatekeeper.

THE COURT: Okay.

MR. BRIDGES: Both under *Barton* -- under *Barton*, or when the *Barton* exception in 959(a) applies, under the Court's general equitable powers, that gatekeeping functions are not across-the-board prohibited, --

THE COURT: Okay.

MR. BRIDGES: -- and we aren't trying to argue that they're prohibited across the board.

THE COURT: Okay.

MR. BRIDGES: Now, to try to dig into that a little deeper, the order does two things: gatekeeping as to some claims, and, frankly, discharging or barring other claims. Those are two separate functions.

The first one, the gatekeeping, may be, in some circumstances, which we'll come to, many circumstances, may be allowable, may be even mandatory under *Barton*, not even requiring an order from this Court, for the gatekeeping of *Barton* to apply. But nonetheless, allowable in many instances under the Court's general equity powers under 959(a). That part is right about gatekeeping.

It does not create jurisdiction in this Court where 157(d) deprives this Court of jurisdiction. Just because it's related to bankruptcy isn't enough to say that the Court therefore has jurisdiction if, one, if mandatory withdrawal of the reference is required.

Furthermore, Your Honor, that gatekeeping function, under the equity powers authorized by 959(a), will not allow a court to discharge or -- or deprive, is the word I'm looking for -- deprive a litigant of their right to a trial -- a specific kind of trial, a jury trial -- but a trial. And by crafting an order that says certain kinds of claims that do (garbled) jury rights are barred, rather than just providing a gatekeeper provision, flat-out bars them, that doesn't -- that doesn't comply with 959.

THE COURT: Okay.

MR. BRIDGES: Your Honor, if I could add one last thing.

THE COURT: Go ahead.

MR. BRIDGES: The Supreme Court's *Stern* case points out that -- that it's -- well, actually, it's the *Villegas* case from the Fifth Circuit --

THE COURT: The one I mentioned.

MR. BRIDGES: -- points out that *Stern* -- *Stern* -- yes, you did. *Stern* did not create an exception to the *Barton* doctrine. And that gives -- that endorses a *Barton* court's ability to perform gatekeeping, even over claims that *Stern* says there would not be jurisdiction over.

Contrast that with 959(a), which *Collier on Bankruptcy* and the Fifth Circuit have held is an exception to the *Barton* doctrine. Because of that exception, *Barton* no longer

applies, and what you're using in invoking a gatekeeper order is the Court's inherent equitable powers, its general powers in equity. And those equity powers are cabined. They're broad, but they're cabined by 959(a)'s prohibition of doing away with a litigant's right to a trial, a jury trial.

Now, I also -- counsel is telling me I should note for the record that Mr. Mark Patrick is here as a representative of our clients. But Your Honor, I'll -- I will quit now unless you have further questions for me.

THE COURT: All right. I do not at this time. Mr. Morris or Mr. Pomerantz, who's going to make the argument?

MR. POMERANTZ: It's me, Your Honor.

OPENING STATEMENT ON BEHALF OF THE DEBTOR

MR. POMERANTZ: And I'll start with the jury trial right. In the last few minutes, we have been able to determine that the Second Amended and Restated Investment Advisory Agreement between the DAF and the Debtor has a broad jury trial waiver under 14(f). And in addition, as I will include in my discussion, there is no private right of action under the Investment Advisers Act.

I think those two points are fatal to Movants' argument, and probably I can get away with not even responding to the others. But since I prepared a lengthy presentation to address the issues that were raised today, and also the half hour that Mr. Bridges spent with Your Honor on June 8th in

which was his first opening statement on the motion for reconsideration, I'll now proceed.

THE COURT: All right.

MR. POMERANTZ: The arguments that the Movants made in the original motion essentially boil down to one legal proposition, that the Court did not have jurisdiction to enter the July 16th order because those orders impermissibly stripped the District Court from jurisdiction, in violation of (inaudible) Supreme Court precedent and 28 U.S.C. Section 157(d).

As with all things Dondero, the arguments continue to morph, and you heard argument at the contempt hearing on June 8th and further argument today that now the prospective exculpation for negligence in the order is also unenforceable and should be modified.

Movants continue to try to distance themselves from the January 9th order and argue that it is not relevant because they seek to pursue claims against Mr. Seery as CEO and not as an independent director. Movants ignore, however, that the January 9th order not only protects Mr. Seery in his role as the independent director, but also as an agent of the board. I will walk the Court through my arguments on that issue in a few moments.

Of course, the Movants had no explanation, Your Honor, for the question of why it took them until May of 2021, 10 months

after the entry of the July 16th order that appointed Mr. Seery as CEO and CRO, and 16 months after the Court appointed the independent board, with Mr. Dondero's blessing and consent, as a substitute for what would have surely been the imminent appointment of a Chapter 11 trustee.

Movants try to distance themselves from the prior orders by essentially arguing that the DAF is a newcomer to the Chapter 11 and is not under Mr. Dondero's control but is rather managed separately and independently by Mr. Patrick, who recently replaced Mr. Scott.

The Movants admit, as they must, that the DAF is the parent and the sole shareholder of CLO Holdco and conducts its business through CLO Holdco, and both entities conduct their business through one individual. It was Grant Scott then; it's Mark Patrick now. So even if Mr. Dondero does not control the DAF and CLO Holdco, which issue was the subject of lengthy testimony in connection with the DAF hearing, both the DAF and the CLO Holdco are bound by the Debtor's res judicata argument, which I will discuss shortly.

In any event, I really doubt the Court is convinced that the DAF operates truly independently of Mr. Dondero any more than the Court has been convinced that the Advisors, the Funds, Dugaboy and Get Good, all operate independently from Mr. Dondero. The only explanation for the delay is that Mr. Dondero has been and continues to be unhappy with the Court's

rulings and has now hired a new set of lawyers in a desperate attempt to evade this Court's jurisdiction. Having failed in their attempt to recuse Your Honor from the case, this is essentially their last hope.

And these new lawyers, Your Honor, have not only filed this DAF lawsuit in the District Court which is the subject of the contempt motion and today's motion, but they also filed another lawsuit in the District Court on behalf of an entity called PCMG, another Dondero entity, challenging yet another of Mr. Seery's postpetition decisions.

And there's no doubt that this is only the beginning. Mr. Dondero recently told Your Honor at a hearing that there were many more sets of lawyers waiting in the wings. And as the Court remarked at the hearing on the Trusts' motion to compel compliance with Rule 2015.3, the Trusts were trying through that motion to obtain information about the Debtor's control entities so that they could file more lawsuits against the Debtor, a concern that Mr. Draper unconvincingly denied.

I would like to focus the Court preliminarily on exactly what the January 9th and July 16th orders do, because Movants try to confuse things by casting the entire order with a broad brush of their jurisdictional overreach arguments, and they misinterpret Supreme Court and Fifth Circuit precedent.

I would like to put up on the screen the language of Paragraph 10 of the January 9th order and Paragraph 35

(garbled) of the July 16th.

Your Honor is very familiar with these orders, I'm sure, having dealt with them in connection with confirmation and in prior proceedings. But to recap, the orders essentially do three things.

First, they require the parties to first come to the Bankruptcy Court before commencing or pursuing a claim against certain parties.

Second, they provided the Court with the sole jurisdiction to make a finding of whether the party has asserted a colorable claim of negligence -- of willful misconduct or gross negligence.

And lastly, the orders provided the Court with exclusive jurisdiction over any claims that the Court determined were colorable.

The protected parties under the January 9th order are the independent directors, their agents and advisors, which, as I mentioned earlier, includes Mr. Seery -- who, at least as of March 2020, was acting as the agent on the board's behalf as the CEO -- for any actions taken under their direction.

The protected parties under the July 16th order are Mr. Seery, as the CEO and CRO, and his agents and advisors.

Movants spend a lot of time in their moving papers and reply arguing that the Court may not assert exclusive jurisdiction over any claims that pass through the gate. They

also spend a lot of time arguing that the Bankruptcy Court does not even have jurisdiction at all to assert -- to adjudicate claims against Mr. Seery because such claims are subject to mandatory withdrawal under Section 157(d).

The Debtor doesn't agree, and has briefed why mandatory withdrawal of the reference is inapplicable. The Debtor has also filed in the District Court a motion to enforce the reference in effect in this district which refers cases in this district arising under, arising in, or related to Chapter 11 to the Bankruptcy Court.

The motion to enforce the reference, Your Honor, which extensively briefs this issue, is contained in Exhibit 3 of the Debtor's exhibits.

We were somewhat surprised that the complaint filed in the District Court wasn't automatically referred to this Court under the standing order in effect in this district, given the related bankruptcy case, the Court's prior approval of the HarbourVest settlement, and the appeal in the District Court of the HarbourVest settlement.

When we dug a little further, we found out that Movants filed a civil case cover sheet accompanying the complaint in the District Court. They neglected in that initial filing to point out that there was any related case to the lawsuit they filed.

Mr. Bridges fell on his sword at the contempt hearing on

June 8th and took complete responsibility for the oversight. I commend him for not trying to argue that the bankruptcy case, the HarbourVest settlement, and the District Court appeal are not related cases that would require disclosure, an argument that surely would have been unsupportable.

But as I said at the contempt hearing, I find it curious that such an important issue was overlooked, an issue which would have likely changed the entire trajectory of the proceedings and landed the DAF lawsuit in this Court rather than the District Court.

And this Tuesday, Your Honor, Movants filed a revised civil cover sheet with the District Court. Although they referenced the bankruptcy case as a related case, they didn't bother to mention the appeal already pending in the District Court regarding the HarbourVest settlement -- surely, a related case.

Your Honor also asked Mr. Bridges at the June 8th hearing whether it was an oversight or intentional that he didn't mention 28 U.S.C. Section 1334 as a basis for jurisdiction in his complaint. Mr. Bridges had no answer for Your Honor then, and has given no answer now. His only comment at the hearing last time was that it must have been Ms. Sbaiti that wrote it because he had no recollection of it.

So, Your Honor, it's no surprise that Movants conveniently found themselves in the District Court, which was their

ultimate strategy from the get go.

In any event, Your Honor, we have briefed the withdrawal of the reference issue. A response by the Movants is due -- CLO Holdco and DAF is due on June 29th. And we hope the District Court will decide soon thereafter whether to enforce the reference.

While I'm happy to argue why Movants' mandatory withdrawal of the reference argument is [not] persuasive, I don't think it's necessary, but I do, again, want to highlight that there is no private right of action under the Investment Advisers Act.

Your Honor, it's not really relevant to today's hearing, since we have argued in opposition to the motion before Your Honor that resolving the issue of the Bankruptcy Court's jurisdiction to adjudicate claims contained in the complaint as they relate to Mr. Seery is premature at this point. The January 9th and July 16th orders first require the Court to determine whether a claim is colorable. It's not until this Court determines if a claim is colorable that the decision on where the lawsuit should be tried is relevant.

Having said that, Your Honor, we read the Movants' reply brief very carefully and noticed in Footnote 6 that the Movants state that modifying the exclusive grant of jurisdiction to adjudicate any claims that pass through the gate to include the language "to the extent permissible by

law," in the same way the Debtor modified the plan, would resolve the motion. So let's look at the provision as it exists in the plans.

Ms. Canty, if you can put up the next demonstrative, please.

This provision provides that 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 provided in Article XI, shall have jurisdiction to determine -- to adjudicate the underlying colorable claim or cause of action.

The Movants request in their reply brief in Footnote 6 that the July 16th order be given the plan treatment. That treatment: sole authority to determine colorability and jurisdiction, and, to the extent legally permissible, to adjudicate underlying claim, only if jurisdiction existed.

After reviewing the reply brief and prior to the June 8th hearing, we decided that we would agree to modify both the January 9th and the July 16th orders to provide that the Bankruptcy Court would only have jurisdiction to adjudicate claims that pass through the colorability gate to the extent permissible by law.

Prior to the June 8th hearing, Mr. Morris and I had a conversation with Mr. Bridges. We conferred about a potential resolution and a proposed modification. Mr. Bridges indicated

they were interested in exploring a resolution and wanted to --

MR. BRIDGES: Objection, Your Honor.

THE COURT: There's an objection?

MR. BRIDGES: Objection, Your Honor. There's a Rule 408 settlement discussion. He's welcome to talk about the results, but he shouldn't be talking about what was -- what was proposed by opposing counsel in a settlement conversation.

THE COURT: Okay. I overrule.

MR. POMERANTZ: Your Honor, this was not --

THE COURT: I don't think this is a 408 issue. Continue.

MR. BRIDGES: Thank you.

MR. POMERANTZ: The stipulation and order which we provided to counsel is attached to my declaration, which is found at Document 2418, and it was filed in connection with a Notice of Revised Proposed Orders that we filed at Docket 2417. And I would like to put up on the screen the relevant paragraphs of the order that we provided to the Movants.

So, you see, we agreed to modify each of the orders at the end to do what the plan says. The Court would only have jurisdiction for claims passing through the gate if the Court had jurisdiction and it was legally permissible.

Movants' counsel, however, responded with a mark-up that went beyond -- went beyond what Movants proposed in Footnote 6

and sought to fundamentally change the January 9th and July 16th orders in ways that were not acceptable to the Debtor and not even contemplated by the original motion.

Ms. Canty, can you put up on the screen the relevant paragraphs of the response we received?

Specifically, Your Honor, you see at the first part they wanted to provide that the only -- the order only applied to claims involving injury to the Debtor, presumably as opposed to alleged injuries to affiliated funds or third parties. They also provided that the Court's ability to make the initial colorability determination was also qualified by "to the extent permissible by law" in the way that the Court -- that the Debtor agreed to modify the ultimate adjudication jurisdiction provision.

Your Honor, Movants haven't even talked about this back and forth. They haven't talked about their about-face. And I'll leave it for Your Honor to read their Footnote 6 that said it would resolve their motion, the back and forth, our proposal, and now Mr. Bridges' modified, morphed arguments that now point out other issues.

In any event, Your Honor, we made the change, and we think it should resolve the motion, or at least it resolves part of the motion. There can't be any argument that the Court is trying to exert exclusive jurisdiction on claims that pass through the gate.

What apparently remains from the arguments raised by the Movants is the argument that the Court does not even have jurisdiction to act as a gatekeeper in the first place because it doesn't have jurisdiction of the underlying lawsuit. And on June 8th and today, they've added a new argument, that the orders impermissibly exculpate Mr. Seery and others, violate their jury trial rights, and are contrary to the Fifth Circuit precedent.

Movants claims that the orders are a jurisdictional overreach, a violation of constitutional proportions, a violation of due process, and inconsistent with several U.S. Supreme Court cases. But, of course, they cite no cases whose facts are even remotely similar to this one. Instead, they are content to rely on general statements regarding bankruptcy jurisdiction, how it is derived from district court jurisdiction and is constitutionally limited, legal propositions which are not terribly controversial or even applicable to these facts.

There are several arguments -- I mean, there are several reasons, Your Honor, why Movants' arguments fail. Initially, Movants have not cited any authority, any statute, or any rule which would allow this Court to revisit the January 9th and July 16th orders. As I will discuss in a moment, Your Honor, *Republic v. Shoaf*, a case the Court is very familiar in and relied on in connection with plan confirmation, bars a

collateral attack on these orders under the doctrine of res judicata.

Similarly, as the Court remarked on June 8th, the Supreme Court's *Espinosa* decision, which rejected an attack based upon Federal Rule of Civil Procedure 60(b)(4) to a prior order that may have been unlawful, prohibits the Court from now reconsidering the January 9th and July 16th orders.

But even if Your Honor rules that res judicata does not apply, there are two independent reasons why the orders were not an unlawful extension of the Court's jurisdiction. The first is because the Court had jurisdiction to enter both of those orders as the ability to determine the colorability of claims is within the jurisdiction of the Court. The second is because the orders are justified by the *Barton* doctrine.

Lastly, Your Honor, Movants' argument that the Court may not act as a gatekeeper to determine the colorability of a claim for which it may not have jurisdiction is incorrect, and as Your Honor has mentioned and as Mr. Bridges unconvincingly tried to distinguish, the Fifth Circuit *Villegas v. Schmidt* case is a case on point and resolves that issue.

Turning to res judicata, Your Honor, it prevents the Court from revisiting these governance orders. CLO Holdco had formal notice of the Seery CEO motion and the opportunity to respond. It failed to do so. It is clearly bound.

As reflected on Debtor's Exhibit 4, CLO Holdco is a

wholly-owned subsidiary of the DAF. The DAF is its sole shareholder. There is no dispute about that. Importantly, at the time of both the January and July orders, Grant Scott was the only human being authorized to act on behalf of CLO Holdco and the DAF. The DAF did not respond to the Seery CEO motion, either.

And why is that important, Your Honor? It's because Movants argue in their reply that the DAF cannot be bound by res judicata because they did not receive notice of the July 16th order. However, Your Honor, that is not the law. Res judicata binds parties to the dispute and their privies, and the DAF is bound to the prior orders even though it did not receive notice.

There are several cases, Your Honor, that stand for this unremarkable proposition. First I would point Your Honor to the Fifth Circuit's opinion of *Astron Industrial Associates v. Chrysler*, found at 405 F.2d 958, a Fifth Circuit case from 1968. In that case, Your Honor, the Fifth Circuit held that the appellant was barred by the doctrine of res judicata from bringing a claim because its parent, which was its sole shareholder, would have been bound by res judicata.

Astron is consistent with the 1978 Fifth Circuit case of *Pollard v. Cockrell*, 578 F.2d 1002 (1978). And the Northern District of Texas in 2000 case of *Bank One v. Capital Associates*, 2000 U.S. Dist. LEXIS 11652, found that a parent

and a sole shareholder of an entity couldn't assert res judicata as a defense when those claims could have been brought against its wholly-owned subsidiary.

And lastly, Your Honor, the 2011 Southern District of Texas case, *West v. WRH Energy Partners*, 2011 LEXIS 5183, held that res judicata applied with respect to a partnership's general partner because the general partner was in privity with the partnership.

These cases are spot on and make sense. DAF is CLO Holdco's parent. Grant Scott was the only live person to represent these entities in any capacity at the relevant times. Accordingly, just as CLO Holdco is bound, DAF is bound.

Allowing DAF to assert a claim when its wholly-owned and controlled subsidiary is barred would allow entities to transfer claims amongst their related entities in order to relitigate them and they would never be finality. And, of course, Jim Dondero, as we know, consented to the January 9th order, which provided Mr. Seery protection in a variety of capacities.

And as Your Honor has pointed out, and as Mr. Bridges didn't have an answer for, neither CLO Holdco nor the DAF or any other party appealed any of the governance orders. And nobody challenged the validity of these orders at the confirmation hearing, where the terms of these orders were

front and center.

And importantly, Your Honor, the orders are clear and unambiguous. They require a Bankruptcy Court [sic] to seek Bankruptcy Court approval before they commence or pursue an action against the independent board, the CEO, CRO, or their agents. And they clearly and unambiguously set the standard of care for actions prospectively: gross negligence or willful misconduct.

The Bankruptcy Court had jurisdiction to enter the governance orders, which, as expressly indicated in the orders, were core proceedings dealing with the administration of the estate. No one challenged this finding of core jurisdiction. And as I will discuss later, the failure to challenge core jurisdiction is waived under applicable Supreme Court and Fifth Circuit precedent.

Your Honor, the Court [sic] does not argue that Movants have waived their right to seek adjudication of a lawsuit that passes through the colorability gate by an Article III Court. The issue is not before the Court, but the changes to the order that the Debtor agreed to make clearly -- clearly will provide Mr. Bridges' clients the ability to make that determination.

The Debtor is, however, arguing that the Movants have waived their right to contest the core jurisdiction of the Bankruptcy Court to make the determination that the claims are

colorable in the first place, and to challenge the exculpation provisions provided to the beneficiaries of those orders.

Accordingly, Your Honor, the elements of res judicata are satisfied. Both proceedings involve the same parties. The prior judgment was entered by a court of competent jurisdiction. The prior order was a final judgment on its merits. And they involved the same causes of action.

Importantly, the members of the independent board, including Jim Seery, relied on the protections contained in the January 9th and July 16th orders and would not have accepted these appointments if the protections weren't included. And how do we know this? Because each of them, both Mr. Seery and Mr. Dubel, both testified at the confirmation hearing on this very topic.

And I would like to put up on the screen an excerpt from Mr. Seery's testimony at confirmation, which is testimony included in the February 2nd, 2021 transcript, which is Exhibit 2 of the Debtor's exhibits.

THE COURT: Okay.

MR. POMERANTZ: And I would like to just read this, Your Honor.

"Q Okay. You mentioned that there were certain provisions of the January 9th order that were important to you and the other independent directors. Do I have that right?"

MR. POMERANTZ: A little bit later on, Mr. Seery testifies:

"A And then ultimately there'll be another provision in the agreement here, I don't see it off the top of my head, but a gatekeeper provision. And that provision" --

"Q Hold on one second, Mr. Seery."

MR. POMERANTZ: Please scroll.

"Q So, Paragraph 4 and 5, were those -- were those -- were those provisions put in there at the insistence of the prospective independent directors?

"A Yes.

"Q Okay. Can we go to Paragraph 10, please? There you go."

Mr. Morris: Is this the other provision that you were referring to?

"A This is -- it's become to be known as the gatekeeper provision, but it's a provision that I actually got from other cases -- again, another very litigious case -- that I thought it was appropriate to bring it into this case. And the concept here is that when you are dealing with parties that seem to be willing to engage in decade-long litigation and multiple forums, not only domestically but even throughout the world, it seemed important and prudent

to me and a requirement that I set out that somebody would have to come to this Court, the Court with jurisdiction over these matters, and determine whether there was a colorable claim. And that colorable claim would have to show gross negligence and willful misconduct -- i.e., something that would not otherwise be indemnifiable" --

MR. POMERANTZ: Hold on one second.

"A So, basically, it set an exculpation standard for negligence. It exculpates the directors from negligence, and if somebody wants to bring a cause against the directors, they have to come to this Court first to get a finding that there's a colorable claim for gross negligence or willful misconduct."

"Q Would you have accepted the engagement as an independent director without the Paragraphs 4, 5, and 10 that we just looked at?

"A No, these were very specific requests. The language here has been smithed, to be sure, but I provided the original language for Paragraph 10 and insisted on the guaranty provisions above to ensure that the indemnity would have some support.

"Q And ultimately did the Committee and the Debtor agree to provide all the protections afforded by Paragraphs 4, 5, and 10?

"A Yes."

MR. POMERANTZ: So, Your Honor, these -- this testimony also applied to as well as the CEO.

The testimony was echoed by Mr. Dubel, another member of the board. And I'm not going to put his testimony on the screen, but it can be found at Pages 272 to 281 of Exhibit 2, which is the February 2nd transcript.

Movants argue, however, that res judicata doesn't apply because the Court didn't have jurisdiction to enter these orders. And they argue that the order stripped the District Court of this jurisdiction. As I previously described, the Debtor is prepared to modify the governance orders to provide that the Court shall retain jurisdiction to -- on claims that pass through the gate only to the extent legally permissible. The modification does not appear to be good enough for the Movants. They continue to argue that the Bankruptcy Court can't even act as the exclusive gatekeeper to determine whether such actions are colorable as a prerequisite for commencing or pursuing an action.

The problem Movants run into is the Fifth Circuit's opinion of *Republic v. Shoaf* and various Supreme Court decisions, including *Espinosa*.

In *Shoaf*, the Fifth Circuit held that a party cannot subsequently challenge a confirmed plan that clearly and unambiguously released a third party, even if the Bankruptcy

Court lacked jurisdiction to approve the release in the first place. Movants' proper recourse was to appeal the governance orders, not to seek to collaterally attack them.

In *Shoaf*, the Fifth Circuit held that the confirmed plan was res judicata with respect to a suit by the creditor against the guarantor. And in so ruling, the Fifth Circuit says that the prong of res judicata standard that requires an order, prior order to be made by a court of competent jurisdiction is satisfied regardless of whether the issue was actually litigated. This is because whenever a court enters an order, it does so by implicitly making a finding of its jurisdiction, a determination that can't be attacked. And in fact, in the January 9th and the July 16th orders, it wasn't implicit, the Court's jurisdiction; it was set out that the Court had core jurisdiction.

Movants try to brush *Shoaf* aside, arguing that is the only case the Debtor cites to support res judicata argument and is a narrow opinion that has been questioned and distinguished. That's just not correct, Your Honor. Movants ignore that we have cited two United States Supreme Court cases, *Stoll v. Gottleib* and *Chicot County Drainage District*, upon which the Fifth Circuit based its *Shoaf* decision. In each case, the U.S. Supreme Court gave res judicata effect to a Bankruptcy Court order that made a ruling party -- that a ruling party later claimed was beyond the Court's jurisdiction to do so.

In *Stoll*, it was a release of guaranty without jurisdiction, like *Shoaf*. In *Chicot*, it was an extinguishment of a bond claim without jurisdiction.

Similarly, Your Honor, the U.S. Supreme Court held in *Espinosa* that a party was not entitled to reconsideration of a Bankruptcy Court order under Federal Rule of Civil Procedure 60(b)(4) discharging a student loan without making the required statutory finding of undue hardship in an adversary proceeding. And the Supreme Court reasoned in that opinion as follows: A judgment is not void, for example, simply because it may have been erroneous. Similarly, a motion under 60(b)(4) is not a substitute for a timely appeal. Instead, 60(b)(4) applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or a violation of due process that deprives a party of notice or the opportunity to be heard.

Federal courts considering Rule 60(b)(4) motions that assert a judgment is void because of a jurisdictional defect generally have reserved it only for the exceptional case in which the court that rendered the judgment lacked even an arguable basis for jurisdiction. This case is not the exceptional -- exceptional circumstance that was referred to by *Espinosa*.

In addition, we argue in our brief, and I'll get to in a few moments, that both of the orders are justified under the

Barton doctrine.

Actually, before I go to that, Your Honor, I think Movants are really trying to distinguish *Espinosa* by arguing that the Court's order exculpating Mr. Seery for negligence liability did not provide people, mom-and-pop investors, with the due process informing them that they would not be able to assert duty claims based upon mere negligence. I think that's the core of Mr. Bridges' argument, that, hey, you entered an order, you gave this exculpation, it was inappropriate, and it couldn't be done.

There are several problems with Movants' argument. First, Movants mischaracterize both the facts and the law in connection with the Debtor's relationship with its investors. The Debtor is the registered investment advisor for HCLOF as well as approximately 15 to 18 CLOs. The only investor in HCLOF other than the Debtor is CLO Holdco. The investors in the CLOs are the retail funds advised by the Dondero advisors and the other -- and other institutional investors. Accordingly, the thousands of investors, the mom-and-pop investors whose due process rights have allegedly been trampled by the January 9th and July 16th orders, are not investors in any funds managed by the Debtor.

And, of course, I have mentioned, as I've mentioned before, no non -- non-Dondero investor, be it a mom-and-pop investor, another institutional investor, anyone unrelated to

Mr. Dondero, has ever appeared in this Court to challenge the Debtor's activities.

But more fundamentally, Your Honor, the Debtor does not owe fiduciary duties to investors in any of the funds that the Debtor advises. The fiduciary duty that the Debtor owes is to the funds themselves, not the investors in the funds.

And while Movants point to Mr. Seery's prior testimony to support the argument that the Debtor owes a duty to investors, Mr. Seery was not testifying as a lawyer and his testimony just cannot change the law.

As to each of the funds that the Debtor manages, HCLOF and the CLOs, they were each provided with actual notice of the January 16th -- the July 16th order and didn't object. And as Your Honor will recall, the Trustees for the CLOs, the party that could potentially have claims for breach of fiduciary duty, they participated in the January 9th hearing. They came to the Court and were concerned about the protocols that the Debtor was agreeing to with the Committee. We revised them. The Trustees didn't object. They didn't object then; they didn't object now. And, in fact, they consented to the assumption of the contracts between the Debtor and the CLOs.

So the argument that the orders, by having this exculpation for future conduct, violated due process rights of anyone and is the type -- essentially, the type of order that *Espinosa* would have contemplated could be attacked, is --

relies on faulty legal and factual premises. No duty to investors. No private right of action. And both -- and all the funds received due process.

In addition, Your Honor, as we argue in our brief and I'll get to in a few moments, both of the orders are justified under the *Barton* doctrine, as Mr. Seery is entitled to protection based upon how courts around the country have interpreted the *Barton* doctrine. As such, Mr. Seery is performing his role both as an agent of the independent board under the January 9th order, as a CEO under the July 16th order, as a quasi-judicial officer. And as Your Honor examined in the *Ondova* opinion which you mentioned, trustees are entitled to qualified immunity for damage to third parties resulting from simple negligence, provided that the trustee is operating within the scope of his duties and is not acting in an *ultra vires* manner.

So, exculpating the independent directors, their agents, and the CEO in the January 9th and July 16th orders was a recognition by this Court that they would be entitled to qualified immunity, much in the same way trustees are.

No doubt that Movants contend that this was error and that the Court overreached. However, the remedy for that overreach was an appeal, not a reconsideration 16 months later. The Court's orders based upon the determination that in this highly contentious case that these court officers needed to be

protected from negligence suits is not the exceptional case where the Court lacked any arguable basis for jurisdiction. Accordingly, this Court must follow *Espinosa*, *Shoaf*, *Stoll*, and *Chicot* and reject the attack on the prior court orders.

The only case Movants cite to challenge the Supreme Court's decision -- to challenge the Supreme Court precedent I mentioned and the Fifth Circuit's *Shoaf* decision is the *Applewood* case. *Applewood* is totally consistent with *Shoaf*. *Applewood* also involved a plan that purported to release a guaranty claim that the guarantor argued was res judicata in subsequent litigation regarding the guaranty. The Fifth Circuit held in that case that the plan was not res judicata. It made that ruling because the plan did not contain clear and unambiguous language releasing the guaranty. In that way, the Fifth Circuit distinguished *Shoaf*.

Applewood and *Shoaf* are consistent. A Bankruptcy Court order will be given res judicata effect, even if the Court didn't have jurisdiction to enter it, if the order was clear and unambiguous. In *Shoaf*, the release was. In *Applewood*, it wasn't.

Movants argued on June 8th and argue now that the *Applewood* case really argues -- really deals with prospective exculpation of claims. I went back and read Mr. Bridges' comments carefully of June 8th. He said *Applewood*, exculpation. Well, that's just not correct. *Applewood* is all

about requiring specificity of a (garbled) to give it res judicata effect. Claims that existed at that time, were they described clearly and unambiguously? Yes? *Shoaf* applies. No? *Applewood* does -- applies.

So how should the Court apply these principles here? The Court approved a procedure for certain claims in the governance orders. The procedure: come to Bankruptcy Court before pursuing a claim against the independent directors and Seery or their agents so that the Court can make a colorability determination. Clear and unambiguous. The governance orders each provide that the Bankruptcy Court had jurisdiction to enter the orders, and the orders were not appealed.

Movants attempt to confuse the Court and argue *Applewood* is on point because the January 9th and July 16th orders do not clearly identify specific claims that Movants now have that are being released. And because they're not specific, then basically it's an ambiguous release and *Applewood* applies.

The problem with the Movants' argument is that neither the January 9th or July 16th orders released claims that existed at that time. If they did, and if there wasn't an adequate description, I might agree with Mr. Bridges that *Applewood* applied. But there were no claims. It was prospective. It was a standard of care. The Court clearly and unambiguously

said what the standard of care would be going forward. Clearly, under *Shoaf* and Supreme Court precedent, they are entitled to res judicata because it's a clear and unambiguous provision. *Applewood* just simply doesn't apply.

Mr. Phillips at the last hearing made an impassioned plea to the Court for a narrow interpretation of the exculpation provisions in the January 9th and July 16th orders, and he argued that the Court could not possibly have intended for the exculpation for negligence to apply on a go forward basis. He thus argued to the Court that the Court should construe the exculpation narrowly and only apply it to potential claims of harm caused to the Debtor, as opposed to harm caused to third parties, which he said included thousands of innocent investors.

Of course, Mr. Phillips made those arguments unburdened by the actual facts and the prior proceedings which led to the entry of these orders, because, as he was the first to admit, he only became involved in the case a month ago.

As the Court recalls, and as reinforced by Mr. Seery's and Mr. Dubel's testimony I just mentioned, the exculpation provisions were included precisely to prevent Mr. Dondero, through any one of the entities he's owned and controlled, the Movants being two of those, from asserting baseless claims against the beneficiaries of those orders, exactly the situation Mr. Seery now finds himself in.

And, again, it bears emphasizing: throughout this case, not one of the purported public investors Mr. Phillips lamented would be prevented from holding Mr. Seery responsible for his conduct has ever appeared in this case to object about anything. And none of the directors of the funds, the funds where the Debtor acts as an investment adviser, have ever stepped foot in this court, either.

Even if the Court declines to apply res judicata, Your Honor, to prevent challenges to the governance orders, the Court has the jurisdiction, had the jurisdiction to include the gatekeeping provisions in those orders. The Bankruptcy Court derives its jurisdiction from 28 U.S.C. Section 157, and bankruptcy jurisdiction is divided into two parts: core matters, which are those arising in or arising under Title 11, and noncore matters, those matters which are related to a Chapter 11 case.

Bankruptcy Courts may enter final orders in core proceedings, and with the consent of parties, noncore proceedings. If a party does not consent to a final judgment in the noncore matters or waives its right to consent, then the Bankruptcy Court -- or does not waive its right to consent, then the Bankruptcy Court issues a report and recommendation to the District Court.

The seminal Fifth Circuit case on bankruptcy court jurisdiction is the 1987 case of *Wood v. Wood*, 825 F.2d 90.

There, the Fifth Circuit held that the Bankruptcy Court has related to jurisdiction over matters if the outcome of that proceeding could conceivably have any effect on the estate being administered in the bankruptcy.

More recently, the Fifth Circuit, in the 2005 case, in *Stonebridge Tech's*, elaborated on when a matter has a conceivable effect on the estate such as to confer Bankruptcy Court jurisdiction. There, the Fifth Circuit held that an action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action, either positively or negatively, and which in any way impacts upon the handling and the administration of the bankruptcy estate. It is against this backdrop, Your Honor, that the Court should evaluate its jurisdiction to have entered the orders.

So, again, what did the orders do? They established governance over the Chapter 11 debtor with new independent directors being approved. They established the procedures and protocols of how transactions were going to be presented to and approved by the Committee. They vested in the Committee certain related-party claims, and they provided for the procedures parties would have to follow to assert any claims against the independent directors and the CRO and the agents and advisors.

Your Honor, it's hard to imagine that there is a more core

order than the entry of these orders. At the time the orders were entered, the Court was well aware of the potential for acrimony from Mr. Dondero and his related entities, and included the gatekeeper provisions to prevent the Debtor's estate from being embroiled in frivolous litigation against the board and the CEO.

Such protections were clearly within the Court's jurisdiction, both to protect the administration of the estate but also under applicable Fifth Circuit law dealing with vexatious litigants, as set forth in the *Baum* and *Carroll* cases that the Court cited in its confirmation order.

Not that it was hard to predict, but the last several months have reinforced how important the gatekeeping provisions in the order are and how important similar provisions in the plan are.

The Court heard extensive testimony at the confirmation hearing regarding the havoc continued litigation by Mr. Dondero and his related entities would cause, which predictions have unfortunately been borne out by the unprecedented blizzard of litigation involving Mr. Dondero and his related entities that has consumed the Court over the last several months and caused the estate to incur millions of dollars in fees that could have been used to pay its creditors.

And these attacks are continuing. As I mentioned before,

in addition to the DAF lawsuit, Sbaiti & Co. filed an action against the Debtor on behalf of PCMG, another related entity, alleging postpetition mismanagement of the Select Fund.

And to complete the hat trick, they are the lawyers seeking to sue Acis in the Southern District of New York for allegedly post-confirmation matters.

The Court knew then and certainly knows now that the potential for sizable indemnification claims could consume the estate. The Court used that as the potential basis for determining that the orders were within its jurisdiction, just as it used that potential to justify the exculpation provisions in the plan as being consistent with *Pacific Lumber*.

Movants also ignore the cases -- and we cited in our opposition -- where courts in this district, including Judge Lynn in *Pilgrim's Pride* in 2010 and Judge Houser in the *CHC Group* in 2016, approved gatekeeper provisions that provided the Bankruptcy Court with exclusive jurisdiction to adjudicate claims against postpetition fiduciaries.

Movants also ignore cases outside this district, including *General Motors* and *Madoff*, which we cited in our brief as examples of cases where Bankruptcy Courts have been used as gatekeepers to determine if claims are colorable or being asserted against the correct entity.

And there's another reason, Your Honor, why Movants may

now not contest the Court's jurisdiction to have entered those orders. Each of those orders, as I said before, include a finding that the Court had core jurisdiction to enter the orders. No party contested that finding or refused to consent to the core jurisdiction.

Under well-established Supreme Court precedent, parties can waive their right to challenge the Bankruptcy Court's jurisdiction, core jurisdiction, by failing to object. In *Wellness v. Sharif* in 2015, the Supreme Court expressly held that Article III was not violated if parties knowingly and voluntarily consented to adjudication of *Stern v. Marshall*-type alter ego claims, and that the consent need not be express, so long as it was knowing and voluntary.

And *Wellness* confirmed the pre-*Stern* opinion of the Fifth Circuit in the 1995 *McFarland* case, which held that a person who fails to object to the Bankruptcy Court's assumption of core jurisdiction is deemed to have consented to the entry of a final order by the Bankruptcy Court.

Your Honor, I'd now like to turn to the *Barton* doctrine. The Court also has jurisdiction to have entered the orders based upon the *Barton* doctrine. The *Barton* doctrine dates back to an old United States Supreme Court case and provides as a general rule that, before a suit may be brought against a trustee, consent from the appointing court must be obtained.

Movants essentially make two arguments why the *Barton*

doctrine doesn't apply.

First, Movants, without citing any authority, argue that it does not apply to Mr. Seery because he is not a trustee or receiver and was not appointed by the Court. Although the doctrine was originally applied to receivers, it has been extended over time to cover various court-appointed fiduciaries and their agents in bankruptcy cases, including debtors in possession, officers and directors of the debtor, and the general partner of the debtor. And although Mr. Bridges says he couldn't find one case that applied the *Barton* doctrine to a court-retained professional, I will now talk about several such cases.

In *Helmer v. Pogue*, a 2012 case cited in our brief, the District Court for the Northern District of Alabama extensively analyzed the *Barton* doctrine jurisprudence from the Eleventh Circuit and beyond and concluded that it applied to debtors in possession. The *Helmer* Court relied in part on a prior 2000 decision of the Eleventh Circuit in *Carter v. Rodgers*, which held that the doctrine applies to both court-appointed and court-approved officers of the debtor, which is consistent with the law in other circuits.

And subsequently, the Eleventh Circuit again considered -- and in that case, the distinction of a court-appointed as a court-retained professional was -- was not persuasive to the Court, and the Court held that a court-retained professional

can still have *Barton* protection, notwithstanding that he wasn't appointed, the argument that Mr. Bridges tries to make.

And subsequently, --

THE COURT: I wonder, was that -- was that Judge Clifton Jessup, by chance? Or maybe Bennett?

MR. POMERANTZ: Your Honor, this was -- this was the Eleventh Circuit *Carter v. Rodgers*, so I think Judge Jessup was --

THE COURT: Oh, I thought you were still talking about the Alabama case. No?

MR. POMERANTZ: Yeah, the Alabama -- well, the Alabama case referred to the Eleventh Circuit case, *Carter v. Rodgers*, --

THE COURT: Okay.

MR. POMERANTZ: -- and the appointment and -- or retention issue was discussed in the *Carter v. Rodgers* case.

THE COURT: Okay.

MR. POMERANTZ: And subsequently, the Eleventh Circuit again considered the contours of the *Barton* doctrine in *CDC Corp.*, a 2015 case, 2015 U.S. App. LEXIS 9718. In that case, which Your Honor referenced in your *Ondova* opinion, which I will discuss in a few moments, the Eleventh Circuit held that a debtor's general counsel who had been approved by the Court, who was appointed by a chief restructuring officer who was also approved by the Court, was covered by the *Barton*

doctrine for acts taken in furtherance of the administration of the estate and the liquidation of the assets.

And the Eleventh Circuit last year, in *Tufts v. Hay*, 977 F.3d 204, reaffirmed that court-approved counsel who function as the equivalent of court-appointed officers are entitled to protection under *Barton*. While the Court in that case ultimately ruled that counsel could be sued without first going to the Bankruptcy Court, it did so because it determined that the suit between two sets of lawyers would not have any effect on the administration of the estate.

So, Your Honor, not only is there authority, there is overwhelming authority that Mr. Seery is entitled to the protections.

In *Gordon v. Nick*, a District -- a case from 1998 from the Fourth Circuit, the Court that the *Barton* doctrine applied to a lawsuit against a general partner who was responsible for administering the bankruptcy estate.

And as I mentioned, Your Honor, and as Your Honor mentioned, Your Honor had reason to look at the *Barton* doctrine in length and in depth in the 2017 *Ondova* opinion. And in the course of the opinion, Your Honor discussed one of the policy rationales for the doctrine, which you took from the Seventh Circuit's *Linton* opinion, and you said as follows: "Finally, another policy concern underlying the doctrine is a concern for the overall integrity of the bankruptcy process

and the threat of trustees being distracted from or intimidated from doing their jobs. For example, losers in the bankruptcy process might turn to other courts to try to become winners there by alleging the trustee did a negligent job."

Here, the independent board was approved by the Court as an alternative to the appointment of a Chapter 11 trustee. And it and its agent, including Mr. Seery as the CEO, even before the July 16th order, were provided protections in the form of the gatekeeper order and exculpation.

I'm sure the Court has a good recollection of the January 9th hearing -- we've talked about it a lot in the proceedings before Your Honor -- where the Debtor and the Committee presented the governance resolution to Your Honor. And as Your Honor will recall, the appointment of the board was a hotly-contested issue among the Debtor and the Committee and was heavily negotiated. And the appointment of the independent board was even contested by the United States Trustee at a hearing on January 20th, 2020.

I refer the Court to the transcripts of the hearings on January 9th and January 20th of 2020, which clearly demonstrate that appointing this board and giving it the rights and protections and its agents the rights and protections was not your typical corporate governance issue, but it was essentially the Court's alternative to appointing a trustee. And recognizing that the members of the independent

board were essentially officers of the Court, the Court approved the gatekeeper provision, requiring parties first to come and seek the Court's permission before suing them, in order to prevent them from being harassed by frivolous litigation.

And the independent board was given the responsibility in the January 9th order to retain a CEO it deemed appropriate, and it did so by retaining Mr. Seery.

Recognizing the *Barton* doctrine as it applies to Mr. Seery is consistent with a legion of cases throughout the United States, and Movants' argument that Mr. Seery is not court-appointed is just wrong.

Second, Your Honor, Movants cite without any authority, argue that even if the *Barton* doctrine applied there is an exception which would allow it to pursue a claim against Mr. Seery without leave of the Court.

The Debtor agrees the 28 U.S.C. § 959 is an exception to the *Barton* doctrine. Section 959(a) provides that 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.

As the Court also pointed out at the June 8th hearing, and Mr. Bridges alluded to in his argument, the last sentence of 959(a) provides that such actions -- clearly referring to

actions that may be pursued without leave of the appointing court -- shall be subject to the general equity power of such court, so far as the same may be necessary to the ends of justice.

And Mr. Bridges made a plea, saying you can't take away my jury trial right there. You just cannot do that. Well, I have two answers to that, Your Honor. One, they relinquished their jury trial right. We've established that. Okay?

The second is allowing Your Honor to act as a gatekeeper has nothing to do with their jury trial right. Allowing Your Honor to act as a gatekeeper allows you to determine whether the action could go forward, and it'll either go forward in Your Honor's court or some other court.

And the argument that the exculpation was essentially a violation of 959 is just -- is just -- it just is twisting what happened. You have an exculpation provision. We already went through the authority the Court had to give an exculpation. With respect to these litigants who are before Your Honor -- we're not talking about anyone else who's coming in to try to get relief from the order; we're talking about these litigants -- we've already established that they were here, they're bound by res judicata. So their 959 argument goes away.

And as the Court -- and separate and apart from that, the issue at issue in the District Court litigation is -- is not

even subject to 959.

Mr. Bridges says, well, of course it is because it deals with the administration of the estate. I'd like to refer to what the Court said -- this Court said in its *Ondova* opinion: The exception generally applies to situations in which the trustee is operating a business and some stranger to the bankruptcy process might be harmed, such as a negligence claim in a slip-and-fall case, and is inapplicable to suits based upon actions taken to further the administering or liquidating the bankruptcy estate.

And your *Ondova* opinion is consistent with the Third and Eleventh Circuit opinions Your Honor cited in your opinion, as well as numerous other --

(Interruption.)

MR. POMERANTZ: -- from the -- from around the country, including cases from the First, Second, Sixth, Seventh, and Ninth Circuits. And I'm not going to give all the cites to those cases, but it's not a -- it's not a remarkable proposition that Your Honor relied on in *Ondova*.

In addition, several of these cases, including the Eleventh Circuit's *Carter* opinion, have been cited with approval by the Fifth Circuit in *National Business Association v. Lightfoot*, a 2008 unpublished opinion for this very point. The *Barton* exception of 959 does not apply to actions taken in the administration of the case and the liquidation of assets

in the estate.

Suffice it to say that it's clear that the Section 959 exception to *Barton* has no applicability in this case. Movants, hardly strangers to the bankruptcy case, want to sue Mr. Seery for acts taken relating to a settlement of very complex and significant claims against the estate. They want to sue a court-appointed fiduciary for doing his job, resolving claims against the estate and his management of the bankruptcy estate. And they want to do this outside of the Bankruptcy Court.

Settlement of the HarbourVest claim, which is where this claim arises under -- whether it's a collateral attack now or not, and we say it is, is for another issue -- but it clearly arises in the context of settlement of the HarbourVest claim, is the quintessential act to further the administration and liquidation of the bankruptcy estate, and certainly doesn't fall within the 959 exception.

Movants seem to be arguing that 959(a) makes a distinction between claims against Mr. Seery that damaged the Debtor and claims against Mr. Seery that damaged third parties. However, the Movants make up that distinction, and it's not in the statute, it's not in the case law. The focus is not on who the conduct damages, but it's rather on whether the conduct was taken in connection with the administration or the liquidation of the estate.

And even if the Debtor is wrong, Your Honor, which it's not, the savings clause allows the Court to determine whether leave to be -- sue will be granted. Given that these claims are asserted by Dondero-related entities, if not controlled entities, no serious argument exists that the equities do not permit this Court to determine if leave to sue is appropriate.

Accordingly, Movants' argument that the orders create this tension with 959 is simply an over-dramatization. And in any event, Your Honor, there's a basis independent of *Barton* that supports the jurisdiction to enter the orders, as I mentioned.

But even if the orders only relied on *Barton*, there is an easy fix to Movants' concerns: let them come to court and argue that the type of suit they are bringing allegedly falls within the exception of 959.

Your Honor, Movants argue that the Bankruptcy Court may not act as a gatekeeper if it would not have jurisdiction to deal with the underlying action. They essentially argue that an Article I judge may not pass on the colorability of a claim, that it should be decided by an Article III judge. This is the same argument, Your Honor, that Your Honor rejected in connection with plan confirmation and which I touched on earlier.

And the reason why Your Honor rejected it is because there's no law to support it. In fact, there is Fifth Circuit law that holds to the contrary. And we talked about a little

bit the Fifth Circuit case decided is *Villegas v. Schmidt* in 2015. And *Villegas* is a simple case. Schmidt was appointed trustee over a debtor and liquidated its estate and the Bankruptcy Court approved his final fees. Four years later, Villegas and the prior debtor sued Schmidt in District Court, the district in which the Bankruptcy Court was pending, arguing that he was negligent in the performance of his duties. The District Court dismissed the case because Villegas failed to obtain Bankruptcy Court approval to bring the suit under the *Barton* doctrine.

On appeal, Villegas argued *Barton* didn't apply for two reasons. First, that *Stern v. Marshall* created an exception to the *Barton* doctrine for claims that the Bankruptcy Court would not have the jurisdiction to adjudicate. And second, that *Barton* did not apply if the suit is brought in the District Court, which exercises supervisory authority over the Bankruptcy Court that appointed the trustee. Pretty much the argument that was made by Movants at the contempt hearing.

The Fifth Circuit rejected both arguments. It held that the existence of a *Stern* claim does not impact the Bankruptcy Court's authority because *Stern* did not overrule *Barton* and the Supreme Court had cautioned circuit courts against interpreting later cases as impliedly overruling prior cases.

More importantly, the Fifth Circuit pointed to a post-*Stern* 2014 case, *Executive Benefits v. Arkison*, 573 U.S. 25

(2014), which held that *Stern* does not decide how a Bankruptcy Court or District Courts should proceed when a *Stern* creditor is identified, as support for the argument that *Barton* is still good law, even dealing with a *Stern* claim.

Second, the Fifth Circuit, joining every circuit to have addressed the issue, ruled that the District Court and the Bankruptcy Court are distinct from one another and the Bankruptcy Court has the exclusive authority to determine the colorability of *Barton* claims and that the supervisory District Court does not.

Movants didn't address *Villegas* in their reply. Briefly tried to distinguish it, unconvincingly, today. The bottom line is *Villegas* is directly applicable. Your Honor cited it in the *Ondova* opinion for precisely the proposition that *Barton* applies whether or not the Court has authority to adjudicate the claim.

Accordingly, Your Honor, it was within the Court's jurisdiction to require a party to seek approval of Your Honor on the colorability of a claim before an action may be commenced or pursued against the protected parties, even if Your Honor wouldn't have authority to adjudicate the claim at the end of the day.

In fact, some courts have even addressed the proper procedure for doing so, requiring the putative plaintiff to not only seek leave of Bankruptcy Court but also to provide a

draft complaint and a basis for the Court to determine if the claim is colorable.

Movants have done neither, and they should not be permitted to modify the final orders of the Court as a workaround.

Your Honor, that concludes my presentation. I'm happy to answer any questions Your Honor may have.

THE COURT: All right. Not at this time. All right. I'm going to figure out, do we need a break or not, depending on what Mr. Bridges tells me. I assume we're just doing this on argument today. I think that's what I heard. No witnesses or exhibits.

MR. BRIDGES: That is correct, Your Honor.

THE COURT: Okay. Mr. Bridges, how long do you expect your rebuttal to take so I can figure out does the Court need a break?

MR. BRIDGES: Fifteen minutes plus whatever it takes to submit agreed-to exhibits.

THE COURT: Okay. Let's take a five-minute bathroom break. We'll come back. It's -- what time is it? It's 1:11 Central time. We'll come back in five minutes.

THE CLERK: All rise.

(A recess ensued from 1:11 p.m. until 1:17 p.m.)

THE CLERK: All rise.

THE COURT: All right. Please be seated. We're

going back on the record in the Highland matters.

Mr. Bridges, time for your rebuttal. I want to ask you a question right off the bat. Mr. Pomerantz pointed out something that was on my list that I forgot to ask you when you made your initial presentation. What is the authority you're relying on? You did not cite a statute or a rule *per se*, but I guess we can probably all agree that Bankruptcy Rule 9024 and Federal Rule 60 is the authority that would govern your motion, correct?

MR. BRIDGES: I don't agree, Your Honor. I don't believe this is a final order that we're contesting here. And I think that's demonstrated by the Court's final confirmation -- plan -- plan confirmation order that seeks to modify this order or will modify this order upon being -- being effective. So I don't think so.

In the alternative, if we are challenging a final order, then I think you're right as to the rules that would be controlling.

THE COURT: All right. Well, let me back up. Why exactly do you say this would be an interlocutory order as opposed to a final order?

MR. BRIDGES: Because of its nature, Your Honor. While the appointment in the order or the approval of the appointment in the order might, as a separate component of the order, have -- have finality, the provisions -- the provisions

in it relating to gatekeeping and exculpation are, we think, by their very nature, quite obviously interlocutory and not permanent. They don't seem to indicate an intention by any of the parties that, 30 years from now, if Mr. Seery is still CEO at Highland, long after the bankruptcy case has ended, that nonetheless parties would be prohibited from bringing claims, strangers to this action would be prohibited from bringing claims related to his CEO role.

I think the nature of it demonstrates that, the modifications to it, and even the inclusion of it in the final plan confirmation, as well as -- can't read that.

THE COURT: Can you give me some authority? Because as we know, there's a lot of authority out there in the bankruptcy universe on what discrete orders are interlocutory in nature that a bankruptcy judge might routinely enter and which ones are final. You know, it would just probably, if I flipped open *Collier's*, I could -- you know, it would be mind-numbing.

So what authority can you rely on? I mean, is there any authority that says an employment order is not a final order? That would be shocking to me if you have cases to that effect, but, I mean, of course, sometimes we do interim on short notice and then final. But this would be shocking to me if there is case authority to support the argument this is not a final order. But I learn something new every day, so maybe I

would be shocked and there is.

MR. BRIDGES: Your Honor, I'd point you to *In re Smyth*, 207 F.3d 758, and *In re Royal Manor*, 525 B.K. 338 [sic], for the proposition that retaining a bankruptcy professional is an interlocutory order.

THE COURT: Okay. Stop for a moment. The *Smyth* case. Which court is that?

MR. BRIDGES: Fifth Circuit.

THE COURT: Okay. So tell me the facts. I'm surprised I don't know about this case. But, again, I don't know every case. So, it held that an employment order is an interlocutory order?

MR. BRIDGES: Appointing counsel. A professional in the bankruptcy context, Your Honor.

THE COURT: Counsel for a debtor-in-possession? An order approving counsel was an interlocutory order?

MR. BRIDGES: Yes, or the Trustee's counsel.

THE COURT: Or the Trustee's counsel? Okay. What were the circumstances? Was this on an expedited basis and there wasn't a follow-up final order, or what?

MR. BRIDGES: Your Honor, I don't have -- I don't have that at the tip of my memory. I'm sorry.

THE COURT: Okay. And the other one, 525 B.R. 338, what court was that?

MR. BRIDGES: It's a Bankruptcy Court within the

Sixth Circuit. I'm not certain which district.

THE COURT: All right. Well, maybe one of you two over there can look them up and give me the context, because that is surprising authority. Or other lawyers on the WebEx maybe can do some quickie research.

Okay. We'll come back to that. But assuming that this was a final order, which I have just been presuming it was, Rule 60 is the authority you're going under? 9024 and Rule 60, correct?

MR. BRIDGES: Your Honor, we have not invoked those rules. Alternatively, I think you're right that they would control if we are wrong about the interlocutory nature of the order.

THE COURT: Well, you have to be going under certain -- some kind of authority when you file a motion. So I'm --

MR. BRIDGES: As an alternative --

THE COURT: I'm approaching this exactly, I assure you, as the District Court or a Court of Appeals would. You know, you start out, what is the legal authority that is being invoked here?

MR. BRIDGES: Well, --

THE COURT: So I just assume Rule 60. I can't, you know, come up with anything else that would be the authority.

MR. BRIDGES: Yes, Your Honor. You also have inherent power to modify orders that are in violation of the

law. And we pointed you to --

THE COURT: Now, is that right? Is that really right? Why do we have Rule 60 if I can just willy-nilly, oh, I feel like I got that wrong two years ago? I can't do that, can I? Rule 60 is the template for when a court can do that. Parties are entitled to rely on orders of courts. And that's why we have Rule 60, right? So, --

MR. BRIDGES: Your Honor, I think -- I think that we're miscommunicating. I'm trying not to rely on Rule 60 in the first instance because in the first instance we view this as not a final order. So, in the first instance, --

THE COURT: I got that. And I've got my law clerks looking up your cases to see if they convince me. But I'm asking you to go to layer two. Assuming I don't agree with you these are final orders, what is your authority for the relief you're seeking?

MR. BRIDGES: Yes, Your Honor. Rule 60 would apply in the alternative.

THE COURT: All right.

MR. BRIDGES: That's correct.

THE COURT: So, which provision? Which provision of Rule 60? (b) what?

MR. BRIDGES: Your Honor, I'm not prepared to concede any of them. I don't have the rule in front of me.

THE COURT: You're not prepared to concede what?

MR. BRIDGES: Any of the provisions of Rule 60. Just (b)(1), (b)(2), especially, but I'm -- I'm -- Rule 60 is our basis, as is the particulars (b)(1), (2), (6) --

(Garbled audio.)

THE COURT: Okay. You're breaking up. Can you restate?

MR. BRIDGES: (b)(1), (2), and (6), as -- as well as any other provision, Your Honor, of Rule 60.

THE COURT: Okay. Well, so (1), mistake, inadvertence, surprise, excusable neglect. Which one of those?

MR. BRIDGES: All of the above, Your Honor.

THE COURT: Surprise? Who's surprised?

MR. BRIDGES: Your Honor, I think every potential litigant who discovers that your order purports to bar prospective unaccrued claims at the time the order issued would be surprised.

Frankly, I think Mr. Seery would be surprised, given his testimony that he owes fiduciary duty -- duties that he must abide by and that he appears to have, as I continue to represent to clients, to advisees, and to the SEC, that those duties are owing.

THE COURT: Okay. I'm giving you one more chance here to make clear on the record what provision of Rule 60(b) are you relying on, okay? I need to know. It's not in your

pleading.

MR. BRIDGES: Your Honor, --

THE COURT: So tell me specifically. I can only --

MR. BRIDGES: -- (b)(1) --

THE COURT: -- come up with a result here if I know exactly what's being presented.

MR. BRIDGES: Your Honor, (b)(1), (b)(2), and (b)(6) --

THE COURT: Which, okay, there are multiple parts to (1). You're saying somebody's surprised by the ruling. I don't know who. Really, all that matters is your client, the Movants. You're saying, even though they participated, --

MR. BRIDGES: Yes, Your Honor.

THE COURT: -- got notice, they're somehow surprised? Why are they surprised?

MR. BRIDGES: Yes, Your Honor.

THE COURT: Do you have evidence of their surprise?

MR. BRIDGES: Your Honor, our brief shows the intentions of all involved were not the interpretation of that order being advanced at this -- at this point in time. And so, yes, I believe that is evidence. The transcripts of the hearings I believe evidence that as well, that the understanding of everyone involved was not that future -- unspecified future claims that had not accrued yet would be released under (b)(1). Yes, Your Honor.

THE COURT: Okay.

MR. BRIDGES: Under (b)(2), --

THE COURT: I don't have any evidence of that. All I have is the clear wording of the order. Okay. Let me just -- just let me go through this.

Assuming Rule 60 (1) through (6) are what you're arguing here, what about Rule 60(c): a motion under Rule 60(b) must be made within a reasonable time? We're now 11 months --

MR. BRIDGES: Your Honor, --

THE COURT: We're now 11 months past the July 2020 order. What is your authority for this being a reasonable time?

MR. BRIDGES: Yes, Your Honor. If I may back up one step before answering your question. Under (b)(2), we're relying on newly-discovered evidence that was discovered in late March and caused both the filing of this motion and the filing of the District Court action.

Under (b)(4), we believe that the order is --

THE COURT: Let me stop. Let me stop. What is my evidence that you're putting in the record that's newly discovered?

MR. BRIDGES: The evidence is detailed in the complaint that is in the record. You know, --

THE COURT: That's not evidence.

MR. BRIDGES: -- honestly, Your Honor, --

THE COURT: That is not evidence. Okay? A lawyer-drafted complaint in another court is not evidence. Okay?

MR. BRIDGES: Your Honor, I think, to be technical, that there is not a record yet, that we have evidence yet to be admitted on our exhibit list. I believe in this circumstance -- I understand that, in general, allegations in a pleading are not evidence. In this instance, when we're talking about whether or not new facts led to the filing of a lawsuit, I do believe that the allegations in the lawsuit are evidence of those new facts.

THE COURT: All right. Go on.

MR. BRIDGES: Under (b)(4), we believe the order is, in part, void. It is void because of the jurisdictional and other defects noted in our argument.

And also, under (b)(6) (garbled) ground for relief that we're appealing to the equitable powers of this Court to correct errors and manifest injustice towards not just the litigants here but to correct the order of the Court to make it comply with -- with the law, with the statutes promulgated by Congress and to respect the jurisdiction of the District Court.

THE COURT: All right. Do you agree with Mr. Pomerantz that the case law standard for Rule 60(b)(4) is exceptional circumstances? It's only applied so that a judgment is voided in exceptional circumstances. Do you

disagree with that case authority?

MR. BRIDGES: I would -- I would agree, in part, that unusual circumstances is not the ordinary case. I'm not entirely sure what you mean by exceptional, but I think we're on the same page.

THE COURT: Okay. It's not what I mean. That's just the case law standard. And I'm asking, do you agree with Mr. Pomerantz that that is the standard set forth in case law when applying 60(b)(4)? There have to be some sort of exceptional circumstances where there's just basically no chance the Court had authority to do what it did.

MR. BRIDGES: Out of the ordinary would be the phrase I would use, Your Honor.

THE COURT: Okay. So I guess then I'll go from there. Is it your argument that gatekeeping provisions in the bankruptcy world are out of the ordinary?

MR. BRIDGES: The exculpation of Mr. Seery for liability falling short of gross negligence or intentional wrongdoing in connection with his continuing to conduct the business of the Debtor as an investment advisor subject to the Advisers Act, yes, I would say that is out of the ordinary, that it is extraordinary, that it is --

THE COURT: Okay. What is your authority or evidence on that? Because this Court approves exculpation provisions regularly in connection with employment orders, and pretty

much every judge I know does. In fact, I'm wondering why this isn't just a term of compensation. You know, he's going to do x, y, z in the case. His compensation is going to be a, b, c, d, e. And by the way, we're going to set a standard of liability for his performance as CEO or investment banker, financial advisor, whatever, so that no one can sue him regarding his performance of his job duties unless it rises to the level of gross negligence, willful misconduct.

It's a term of employment that, from my vantage point, seems to be employed all the time. So it would be anything but exceptional circumstances. Do you have authority or evidence --

MR. BRIDGES: Your Honor, frankly, --

THE COURT: -- to the contrary?

MR. BRIDGES: Your Honor, frankly, I'm astonished at your view of that situation, that it would merely be a term of his employment, that vitiates the entire fiduciary duty standard created by the Advisers Act that tells him, with hundreds of millions of dollars of assets under management for people he's advising as a registered investment advisor, people he's advising who believe that he has a fiduciary duty to them and that it's enforceable, that the SEC, who monitors, believes he has an enforceable fiduciary duty to those people, and that he's testified that he has fiduciary duties to those people, and that Your Honor is saying no, just as a regular

term of employment we have undone the Advisers Act's imposition of an unwaivable fiduciary duty.

Your Honor, the order is void to the extent that it attempts to do so.

This is not an ordinary employment agreement, Your Honor. This is an attempt to exculpate someone from the key thing that our entire investment system depends upon, regulation by the SEC and the requirement in investment advisors to act as fiduciaries when they manage the money of another.

It would be the equivalent of telling lawyers who are appointed in a bankruptcy proceeding that they don't have any duties to their client, or at least not fiduciary duties. That the lawyers merely owe a duty not to be grossly negligent to their clients. That's not an ordinary term of employment, Your Honor.

THE COURT: All right. So I guess we're back to my question, was this brought within a reasonable time under Rule 60(c)?

MR. BRIDGES: It was brought very quickly after the new evidence was discovered at the end of March, Your Honor, yes.

THE COURT: Okay. Well, I guess I'll just ask you one more question before you continue on with your rebuttal argument. I mean, again, I want your best argument of why *Villegas* doesn't absolutely permit the gatekeeping provisions

that you're challenging. And many cases were cited by Mr. Pomerantz in his brief where courts have extended the *Barton* doctrine to persons other than trustees. And so what is your best rebuttal to that?

MR. BRIDGES: Your Honor, we've already given it. I'm afraid --

THE COURT: Okay. If you don't want to say more, --

MR. BRIDGES: -- what I have is not --

THE COURT: -- I'm not going to make you say more.

MR. BRIDGES: I --

THE COURT: I'm just telling you what's on my brain.

MR. BRIDGES: I do. I want to -- I am apologizing in advance for repeating, but yes, *Villegas*, *Villegas*, however that case is pronounced, says that *Stern* is not an exception to the *Barton* doctrine.

THE COURT: Uh-huh.

MR. BRIDGES: 959(a) is an exception to the *Barton* doctrine. You are not operating under the *Barton* doctrine here. Even counsel's brief, the Debtor's brief, doesn't say *Barton* applies. It says it's consistent with *Barton*.

Your Honor, in our previous hearing, you directed me to the second sentence of 959(a) because you believe it's what empowers you to do the gatekeeping. It limits the gatekeeping that you can do by protecting jury rights, the right to trial, says you cannot discharge, undo, deprive a litigant of their

right to a trial, a jury trial.

THE COURT: Well, you mentioned it again, jury trial rights. Do you have any argument --

MR. BRIDGES: Yes, Your Honor.

THE COURT: -- of why that hasn't flown out the window?

MR. BRIDGES: Yes, Your Honor. I am told that Section 14(f) that counsel for the Debtor referred to is not a waiver of jury rights at all. It is an arbitration agreement. Your Honor is probably familiar how arbitration agreements work, is that they need not be elected. They need not be invoked by the parties. When they are, they create a situation where arbitration may be required. But a waiver of a jury right outside of arbitration is not part of this arbitration clause, or of any. The issue is not briefed or in evidence before the Court. We're relying on representations of counsel as to what that provision contains. That Mr. Seery wasn't even a party to that agreement, the advisory agreement, with the Charitable DAF. The arbitration agreement is subject to defenses that are not at issue here before the Court. That Movants' rights, their contractual rights to invoke the arbitration clause, also appear to be terminated by the orders' assertion of sole jurisdiction in this matter.

Your Honor, yes, our jury rights survive Section 14(f) in the advisory agreement with the DAF for all of those potential

reasons.

On top of that, it doesn't go to all of our causes of action. It goes to the contract cause of action. And to the extent they can argue that the other claims are subject to arbitration, that also is a defense and -- defensible and complex issue requiring the application of the Federal Arbitration Act, requiring consideration of the Federal Arbitration Act, which this Court doesn't have jurisdiction to do under 157(d).

THE COURT: What? Repeat that.

MR. BRIDGES: Yes. This Court does not have jurisdiction to determine whether or not arbitration -- arbitration is enforceable due to the mandatory withdrawal of the reference provisions of 157(d).

THE COURT: That's just not consistent with Fifth Circuit authority. *National Gypsum*. What are some of these other arbitration cases? I've written an article on it. I can't remember them. That's just not right. Bankruptcy courts look at arbitration clauses all the time. Motions to compel arbitration.

MR. BRIDGES: Your Honor, under 157(d), in the circumstances of this case, if the Court is going to take into consideration an arbitration clause under the Federal Arbitration Act, when that clause is not in evidence and is not before the Court, then Movants respectfully move to

withdraw the reference of your consideration of that issue and of any proceeding and ask that you would issue only a report and recommendation rather than an order on that issue.

THE COURT: Okay. I regret that we even got off on this trail. I'm sorry. So just proceed with your rebuttal argument as you had envisioned it, Mr. Bridges.

MR. BRIDGES: Thank you, Your Honor.

Debtor's counsel says there's no private right of action under the Advisers Act. That is both inaccurate and misleading. The Advisory Act creates, imposes fiduciary duties that state law provides the cause of action for. It is a state law breach of fiduciary duty claim regarding -- regarding fiduciary duties imposed as a matter of law by the Investment Advisers Act that is Count One in the District Court action.

Furthermore, that Act does create a private right of action for rescission. That would be rescission of the advisory agreement with the Charitable DAF, not rescission of the HarbourVest settlement.

Second, Your Honor, the notion that this Court has related to jurisdiction is irrelevant and beside the point. I would like to note for the record that the District Court civil cover sheet that omitted to state that this was a related action has been corrected, has been amended, and that that has taken place.

Counsel for the Debtor also appears to agree with us that the order ought to be modified for having asserted exclusive jurisdiction over colorable claims to the extent it's not legally permissible to do. And in trying to invoke the discussions between us as to how the orders might be fixed, what counsel does is tries to cabin the legally-permissible caveat to just the second half of the paragraph at issue. It is both -- both portions, the gatekeeping and the subsequent hearing of the claims, that should be limited to the extent it would be impermissible legally for this Court to make those decisions.

On top of that, Your Honor, merely stating "to the extent legally permissible" would result in a considerable amount of ambiguity in the order that would lead it, I fear, to be unenforceable as a matter of law.

Next, Your Honor, when Debtor's counsel talks about the authority in this case, it feels like we're ships passing in the night. He says that we're wrong in asserting that no case we can find involves both the *Barton* doctrine and the application of the business judgment rule where the Court is asked to defer, and he mentions cases that apply the *Barton* doctrine to an approval rather than an appointment. The Court is asked to --

(Garbled audio.)

THE COURT: I lost you for a moment. Could you

repeat the last 30 seconds?

MR. BRIDGES: Thank you, Your Honor. Yes. He points -- opposing counsel points us to case law where the *Barton* doctrine has been applied despite the Bankruptcy Court having merely approved rather than appointed the trustee or the, I'm sorry, the professional. But in doing so, he doesn't reference any case that has done so in the context of business judgment rule deference. It's like we're ships passing in the night.

What we're saying isn't that a mere approval can never rise to the level of the *Barton* doctrine. What we're saying is that, in combination with the business judgment rule deference, the two cannot go together. There's no authority for saying that they do.

We -- I further feel like we're ships passing in the night when he talks about *Shoaf*. Counsel says that in *Shoaf* there was a confirmed final plan and it specifically identified the released guaranty. And yeah, that distinguishes it from this case, just as it distinguished -- just as the *Applewood Chair* case distinguished it when there's not that specific identification. And here, we don't even have a final plan confirmation at the time these orders are being issued. Without that express -- express notion of what the claims are being discharged, *Shoaf* doesn't apply.

There, there was a guaranty to a party on a specific

indebtedness that was listed, identified with specificity, and disappeared as a result of the judgment, as a result of the judgment in the underlying case. Here, we're talking about any potential claim that might arise in the future. As of the July order's issuance, it didn't apply on its -- either it didn't apply to future claims that had not yet accrued or else in violation of *Applewood Chair*, it was releasing claims without identifying them.

Who does Seery owe a fiduciary duty to? Is it, as Debtor's counsel says, only to the funds and not to the investors, or does he also owe those duties to the investors as well? Your Honor, that is going to be a hotly-contested issue in this litigation, and it involves -- it requires consideration of the Advisers Act and the multitude of accompanying regulations. To just state that his fiduciary duties are limited in a way that couldn't affect anyone that is -- whose claims are precluded by the July order is both wrong on the law and is invoking something that will be a hotly-contested issue that falls under 157(d), where, again, this Court doesn't have the jurisdiction to decide that, other than in a report and recommendation.

The order is legally infirm because it's issued without jurisdiction for doing that as well.

Finally, Your Honor, I think (garbled) wrong direction with a statement that suggests that Mr. Seery is an agent of

the independent directors under the January order. He is, in fact, not an independent agent -- not an agent of any of the independent directors, but, at most, of the company that is controlled by the board, not -- not of individual directors who could confer on him -- who could confer on him any immunity that they have obtained from the January order just by having appointed him.

The proposed order from the other side failed to address either the ambiguity in the order or its attempt to exculpate Mr. Seery from the liability, including liability for which there is a jury trial right, and it is not a fix to the problem for that reason.

In order to make the order enforceable and to fix its infirmities, the Court would have to do significantly more. It would have to both apply the caveat from the final confirmation plan order, rope that caveat to the first part of the relevant paragraph, as well as the second part, and it would have to provide directive clarity to be enforceable rather than too vague.

Your Honor, I think that's all I have.

THE COURT: Okay. Just FYI, my law clerk pulled the *Smyth* case from 21 years ago from the Fifth Circuit. And while it more prominently deals with the issue of whether trustees -- in this case, it was a Chapter 11 trustee -- could be subjected to personal liability for damages to the

bankruptcy estate --

(Echoing.)

THE COURT: Someone, put your phone on mute. I don't know who that is.

It dealt with, you know, the standard of liability, that the trustee could not be sued for matters not to the level of gross negligence.

But it does say, in the very last paragraph, to my shock and amazement, that -- it's just one sentence in a 10-page opinion -- orders appointing counsel -- and it was talking about the trustee's lawyer he hired to handle appeals to the Fifth Circuit -- orders appointing counsel under the Bankruptcy Code are interlocutory and are not generally considered final and appealable. And it cites one case from 1993, the Middle District of Florida. Live and learn. There is one sentence in that opinion that says that. But I don't know that it's hugely impactful here, but I did not know about that opinion and I'm rather surprised.

All right. You were going to walk me through evidence, you said?

MR. BRIDGES: Well, do I -- Your Honor, do you want to do that first before I submit --

THE COURT: Yes, please.

MR. BRIDGES: -- my rebuttal argument?

THE COURT: Please.

MR. BRIDGES: Okay.

THE COURT: Uh-huh.

MR. BRIDGES: Your Honor, we would submit and offer Exhibits 1 through 44, with the exception of those that have been withdrawn, that are 2, 13 --

THE COURT: Okay. Slow down. Slow down. I need to get to the docket entry number we're talking about. Are we talking -- are your -- the Debtor's exhibits are at 2412. But Nate, I misplaced my notes. Where are Charitable DAF and Holdco's?

THE CLERK: I have 2411.

THE COURT: 2411? Is that it?

MR. BRIDGES: 2420, Your Honor.

THE COURT: 2420? Okay. Give me a minute. (Pause.) 2420?

MR. BRIDGES: Yes, Your Honor.

THE COURT: Okay, I'm there. And it's which exhibits?

MR. BRIDGES: It's Exhibits 1 through 44, Your Honor, with four exceptions. We have agreed to withdraw Exhibit 2, 13, 14, and 29.

THE COURT: All right.

MR. BRIDGES: Also, Your Honor, we'd like to submit Debtor's Exhibit 1, which is under Exhibit 49 on our list, would be anything offered by the other side. But we'd like

to make sure that Debtor's Exhibit 1 gets in the record as well.

THE COURT: Let me back up. When I pull up the docket entry you just told me, I have Exhibits 44, 45, and 46 only. Am I misreading this?

MR. BRIDGES: I have a chart showing Exhibits 1 through 49 titled Docket 2420 filed 6/7/21.

THE COURT: Okay. The docket entry number you told me, 2420, it only has three exhibits: 44, 45, and 46. So, first off, I understand -- are you offering 45 and 46 or not?

MR. BRIDGES: No, Your Honor.

THE COURT: Okay. So you said you were offering 1 through 44 minus certain ones. 44 is here.

MR. BRIDGES: Yes.

THE COURT: But I've got to go back to a different docket number.

THE CLERK: It's actually 2411.

THE COURT: It's at 2411. That has all the others?

THE CLERK: Yes.

THE COURT: Okay.

So, Mr. Pomerantz, do you have any objection to Exhibits 1 through 44, which he's excepted out 2, 13, 14, and 29, and then he's added Debtor's Exhibit 1? Any objection?

MR. POMERANTZ: I don't believe so. I just would confirm with John Morris, who has been focused on the

exhibits, just to confirm.

THE COURT: Mr. Morris?

MR. MORRIS: No objection, Your Honor. It's fine.

THE COURT: Okay. They're admitted.

(Movants' Exhibits 1, 3 through 12, 15 through 28, and 30 through 44 are received into evidence. Debtor's Exhibit 1 is received into evidence.)

THE COURT: So, any --

MR. BRIDGES: Thank you, Your Honor.

THE COURT: Anything you wanted to call to my attention about these?

MR. BRIDGES: Your Honor, the things that we mentioned in the argument, for sure, but especially that the word "trustee" is not used in the January hearing's transcript, nor is it under discussion in that transcript that it would be a trustee-like role being played by the Strand directors, as well as the transcript of the July hearing on the order at issue here, Your Honor, where you are asked to defer both in that transcript and in the motion, the motion that was at issue in that hearing, you are asked to defer to the business judgment of the company.

And finally, Your Honor, I'd ask you to look at the allegations in the District Court complaint.

THE COURT: All right.

Mr. Pomerantz or Morris, let's see what exhibits you're

wanting the Court to consider. Your exhibits, it looks like, are at Docket Entry 2412.

MR. MORRIS: As subsequently amended at 2423.

THE COURT: Oh. All right. So which ones are you offering?

MR. MORRIS: We're offering all of the exhibits on 2423, which is 1 through 17.

(Echoing.)

THE COURT: Whoops. We got some distortion there. Say again?

MR. MORRIS: Yeah. All of the exhibits that are on 2423, which are Exhibits 1 through 17. But I want to make sure that, as I did earlier, that that has the exhibits that we're relying on. Does that --

(Pause.)

THE COURT: Okay. Let me make sure I know what's going on here. You're double-checking your exhibits, Mr. Morris?

MR. MORRIS: Yes, Your Honor.

THE COURT: Okay.

(Pause.)

MR. MORRIS: Your Honor, we start with Docket No. 2419, --

THE COURT: Okay.

MR. MORRIS: -- which was the amended exhibit list.

And that actually had Exhibits 1 through 17. And then that was amended at Docket 2423. So, the exhibits on both of those lists.

THE COURT: Well, they're one and the same, it looks like, right?

MR. MORRIS: Yes.

THE COURT: Okay. So you're offering those?

MR. MORRIS: I think -- yeah.

THE COURT: Any objection?

MR. BRIDGES: No objection.

THE COURT: All right. They're admitted.

(Debtor's Exhibits 1 through 17 are received into evidence.)

MR. POMERANTZ: Your Honor, if I may take a few moments to respond to Mr. Bridges' reply?

THE COURT: All right. Is he still within his hour and a half?

THE CLERK: At an hour and one minute.

THE COURT: Okay. All right. You have a little time left, so go ahead.

MR. POMERANTZ: Thank you, Your Honor.

So look, I -- it sort of was really not fair to us. Mr. Bridges was really making things up on the fly. He was changing the theories of his case and responding to Your Honor. But I'm going to do my best to respond to the

arguments made, many of which I sort of anticipated.

I'll first start with the issue that Your Honor raised, which was whether this is under Rule 60 or not. Mr. Bridges identified a couple of cases, said that the order was interlocutory, said that somehow the orders have anything to do with a plan confirmation order. They do not. Your Honor didn't hear that argument at the plan confirmation. The January 9th and July 16th orders are old and cold. There's an exculpation provision in the plan. There's a gatekeeper in the plan. The provisions do not overlap entirely. The gatekeeper applies prospectively. The exculpation provision includes additional parties.

So the arguments that basically the plan had anything to do -- and the fact that the plan is not a final order -- has anything to do with the January 9th and July 16th orders is just wrong. It's just wrong.

More fundamentally, Your Honor, as Your Honor pointed out, the *Smyth* case is a professional employment order. And ironically, if you abide by the *Smyth* case, that order is never appealable because it's interlocutory.

But more fundamentally, Your Honor, that's dealing with 327 professionals. And again, there's not much analysis in the *Smyth* case, but we're not dealing with a 327 professional. We're dealing with orders that were approved under 363.

So the premise of the argument that Rule 60(b) -- 60 doesn't apply and they have other arguments just doesn't make any sense.

Okay. So now that gets us to Rule 60. And Your Honor, Your Honor hit the nail on the head. They haven't presented any evidence. Allegations in a complaint aren't evidence. They can't stand up there and say surprise evidence. They had the opportunity -- and this hearing's been continued a few weeks -- they had the opportunity to bring it up, and it's -- they had the opportunity to claim that there was surprise, but they just didn't. Okay?

So to go on to the Rule 60 arguments. Surprise. Surprise and reasonable delay are really -- go hand in hand with Mr. Bridges' argument. He says, well, we didn't find out that -- months after the order was entered that he violated a duty to us, so we are surprised by that, and it's a reasonable time. Well, Your Honor, the order provided for an exculpation. CLO Holdco and DAF knew that it applied to an exculpation. They were bound. They knew based upon that order that they would not be able to bring claims for normal negligence. There is no surprise.

If you take Mr. Bridges' argument to its conclusion, he could wait until the end of the statute of limitations after an order and have come in four years from now and say, Your Honor, we just found out facts so we should go back four

years before. That, Your Honor, that's not how the surprise works. That's not how the reasonable time works.

Mr. Bridges did not contest that they're bound by res judicata. He did not contest that the exculpation itself was clear and unambiguous. Of course he argued Your Honor couldn't enter an order saying there was exculpation, again, with no authority. And he seemed surprised, as I suspect he should, since he's not a bankruptcy lawyer, that retention orders, whether it's investment bankers, financial advisors, include exculpations all the time. So there's no grounds under surprise.

There's no grounds -- the motions are late under 60(c).

And they're not void. I went through a painstaking analysis, Your Honor, and I described in detail what the *Espinosa* case held, and the exceptional circumstances which Mr. Bridges tried to get away from as much as he could. Maybe he can try to get away from language in a district Court opinion, in a Bankruptcy Court opinion, in a Circuit Court opinion. You can't get away from language in a Supreme Court opinion. The Supreme Court opinion said exceptional circumstances, where there was arguably no basis for jurisdiction for what the Court did. They have not even come close to convincing Your Honor that there was absolutely no basis.

Now, they disagree. We granted, we think it's a good-

faith disagreement, but they haven't come close to establishing the *Espinosa* standard, so their motion under 60 does not -- it fails.

And I don't think -- look, these are good lawyers. Mr. Bridges and Mr. Sbaiti are good lawyers. They didn't just inadvertently not mention Rule 60. They never mentioned it because they knew they had no claim under Rule 60.

Your Honor, Mr. Bridges has made comments about the fiduciary duty of Mr. Seery, about what the Investor's Act provides. He's just wrong on the law. Now, Your Honor doesn't have to decide that. Whichever court adjudicates the DAF lawsuit will have to decide it. But there is no private cause of action for damages. There are no fiduciary duties to the investors.

And what Mr. Bridges doesn't even mention, in that the investment agreement that's so prominent in his complaint, they waived claims other than willful misconduct and gross negligence against Highland. They waived those claims. So for Mr. Bridges to come in here and argue that there's some surprise, when he hasn't even bothered to look at the document that's underlying the contractual relationship between the DAF and the Debtor, is -- you know, I'll just say it's inadvertence.

Your Honor, Mr. Bridges tried to argue that Mr. Seery is not a beneficiary of the January 9th order. He's not an

agent. Well, again, Your Honor, Mr. Bridges wasn't there. Your Honor and we were. On January 9th, an independent board was picked, and at the time Mr. Dondero ceased to become the CEO. So you have three gentlemen coming in -- Mr. Seery, Mr. Dubel, and Mr. Nelms -- coming in to run Highland, in a very chaotic time. They had to act through their agents. There was no expectation that this board was going to actually run the day-to-day operations of the Debtor. Of course not. They needed someone to run. And they picked Mr. Seery. And the argument that well, he's an agent of the company, he's not an agent of the board, that just doesn't make sense. The independent board had to act. The directors had to act. And the directors, how do they deal with that? They acted through Mr. Seery. So he is most certainly governed by the January 9th order.

Your Honor, I want to talk about the jury trial right. Mr. Bridges said that Paragraph 14 is an arbitration clause and not a jury trial waiver. Now, again, I will forgive Mr. Bridges because I assume he didn't read the provision, okay, and he -- somebody told him that, and that person just got it wrong. But what I would like to do is read for Your Honor Paragraph 14(f). It doesn't have to do with arbitration. It's a waiver of jury trial. 14(f), Jurisdiction Venue, Waiver of Jury Trial. The parties hereby agree that any action, claim, litigation, or proceeding of any kind

whatsoever against any other party in any way arising from or relating to this agreement and all contemplated transactions, including claims sounding in contract, equity, tort, fraud, statute defined as a dispute shall be submitted exclusively to the U.S. District Court for the Northern District of Texas, or if such court does not have subject matter jurisdiction, the courts of the State of Texas, City of Dallas County, and any appellate court thereof, defined as the enforcement court. Each party ethically and unconditionally submits to the exclusive personal and subject matter jurisdiction of the enforcement court for any dispute and agrees to bring any dispute only in the enforcement court. Each party further agrees it shall not commence any dispute in any forum, including administrative, arbitration, or litigation, other than the enforcement court. Each party agrees that a final judgment in any such action, litigation, or proceeding is conclusive and may be enforced through other jurisdictions by suit on the judgment or in any manner provided by law.

And then the kick, Your Honor, all caps, as jury trial waiver always are: Each party irrevocably and unconditionally waives to the fullest extent permitted by law any right it may have to a trial by jury in any legal action, proceeding, cause of action, or counterclaim arising out of or relating to this agreement, including any exhibits, schedules, and appendices attached to this agreement or the transactions contemplated

hereby. Each party certifies and acknowledges that no representative of the owner of the other party has represented expressly or otherwise that the other party won't seek to enforce the foregoing waiver in the event of a legal action. It has considered the implications of this waiver, it makes this waiver knowingly and voluntarily, and it has been induced to enter into this agreement by, among other things, the mutual waivers and certifications in this section.

Your Honor, I will forgive Mr. Bridges. I assume he just did not read that. But to represent to the Court that that language does not contain a jury trial waiver is -- is just wrong.

THE COURT: All right. I'm going to stop right there. And you were reading from the Second Amended and Restated Shared Services Agreement between Highland --

MR. POMERANTZ: Not shared services. I'm reading from the Second Amended and Restated Investment Advisory Agreement --

THE COURT: Investment --

MR. POMERANTZ: -- between the Charitable DAF, the Charitable DAF GP, and Highland Capital Management. The agreement whereby the Debtor was the investment advisor to the Charitable DAF Fund and the Charitable DAF GP.

THE COURT: All right. Well, Mr. Bridges, I'm going to bounce quickly back to you. This is your chance to defend

your honor.

MR. BRIDGES: Yeah, we're -- we're looking at a different agreement, where -- where literally the words that were read to you are not in the agreement in front of us and it is news to me. So, Your Honor, this is a problem --

THE COURT: What is the agreement you're looking at?

MR. BRIDGES: It is the Amended -- I assume that means First Amended -- Restated Advisory Agreement.

MR. POMERANTZ: Your Honor, we are happy to file this agreement with the Court so the Court has the benefit of it in connection with Your Honor's ruling.

THE COURT: Okay. I would like you to do that. Uh-huh.

MR. BRIDGES: I'd like -- I'd like to request -- I'll withdraw that.

THE COURT: Okay. Go on, Mr. Pomerantz.

MR. POMERANTZ: Mr. Bridges, if you could put us on mute. If you could put us on mute, Mr. Bridges, so I don't hear your feedback. Thank you.

Mr. Bridges also complains about the language "to the extent permissible by law." As Your Honor knows and as has been my practice over 30 years, that language is probably in every plan where there's a retention of jurisdiction: to the extent permissible by law. And Mr. Bridges says that this will create ambiguity in the order that couldn't be enforced.

There's no basis for that. Our including the language "to the extent permissible by law" in the orders, as we are prepared to do, is consistent with the plan confirmation order where we addressed that issue. And we addressed that issue because we didn't want to put Your Honor in a position where thereby Your Honor may have an action before Your Honor that passes the colorability gate that Your Honor may not be able to assert jurisdiction. And since jurisdiction can't be waived in that regard, we will agree to amend that.

There's nothing ambiguous about that, and there's no reason, though, that clause has to modify the Court's ability to act as a gatekeeper, because, as we've argued *ad nauseam*, gatekeeper provisions where the Court has that ability is not only part of general bankruptcy jurisprudence but also part of the Bankruptcy Code.

Counsel says that *Barton* doesn't apply because the business judgment of Your Honor was used in retaining Mr. Seery as opposed to in some other capacity. There's no basis for that, Your Honor. A court-appointed -- a court-approved CEO, CRO, professional, they are all entitled to protection under the *Barton* act. And the argument -- and again, this is separate and apart from whether he's entitled to protection under the January 9th order. But the argument that because it was the business judgment -- again, business judgment in doing something that Your Honor expressly contemplated under the

January 9th corporate governance order -- there's just no law to support that. And I guess he's trying to get around the plethora of cases that deal with the situation where *Barton* has been extended.

Your Honor, Mr. Bridges, again, in arguing that we're ships passing in the night on *Shoaf* and *Applewood* and *Espinosa*, no, we're not ships passing in the night. We have a difference in agreement on what these cases stand for. These cases stand for the proposition that a clear and unambiguous provision, plain and simple, if it's clear and unambiguous, it will be given res judicata effect. The release in *Shoaf*, clear and unambiguous. The release in *Applewood*, not. The issue here is the exculpation language. That was clear and unambiguous. It applied prospectively. The argument makes no sense that we didn't identify -- we didn't identify claims that might arise in the future, so therefore an exculpation clause doesn't apply? That doesn't make any sense.

Your Honor clearly exculpated parties. Mr. Dondero knew it. CLO Holdco knew it. The DAF knew it. So the issue Your Honor has to decide is whether that exculpation was a clear and unambiguous provision such that it should be entitled to res judicata effect. And we submit that the answer is unequivocally yes.

That's all I have, Your Honor.

THE COURT: All right. Well, --

MR. MORRIS: Your Honor? I apologize.

THE COURT: Okay.

MR. MORRIS: This is John Morris.

THE COURT: Yes?

MR. MORRIS: I just want to, with respect to the exhibits, I know there was no objection, but I had cited to Docket Nos. 2419 and 2423. The original exhibit list is at Docket No. 2412. So it's the three of those lists together. 2412, as amended by 2419, as amended by 2423. Thank you very much.

THE COURT: All right. Thank you. All right.

MR. BRIDGES: Your Honor, I still have no objection to that, but may I have the last word on my motion?

THE COURT: Is there time left?

THE CLERK: Yes.

THE COURT: Okay. Go ahead.

MR. BRIDGES: I just need a minute, Your Honor. They agreed to change the order. They proposed it to us. They proposed it in a proposed order to you. They can't also say that it cannot be changed.

Secondly, Your Honor, in *Milic v. McCarthy*, 469 F.Supp.3d 580, the Eastern District of Virginia points out that the Fourth Circuit treats appointment of estate professionals as interlocutory orders as well.

That's all. Thank you, Your Honor.

THE COURT: All right. Here's what we're going to do. We've been going a very long time. I'm going to take a break to look through these exhibits, see if there's anything in there that I haven't looked at before and that might affect the decision here. So we will come back at 3:00 o'clock Central Time -- it's 2:22 right now -- and I will give you my bench ruling on this. All right.

So, Mike, they can all stay on the line, right?

Okay. You can stay on, and we'll be back at 3:00 o'clock.

THE CLERK: All rise.

(A recess ensued from 2:22 p.m. to 3:04 p.m.)

THE CLERK: All rise.

THE COURT: All right. Please be seated. All right. Everyone presented and accounted for. We're going back on the record.

MR. POMERANTZ: Your Honor, before you start, this is Jeff Pomerantz. We had sent to your clerk, and hopefully it got to you, a copy of the Second Amended and Restated Investment Advisory Agreement. We also copied Mr. Sbaiti with it as well. And we would also like to move that into evidence, just so that it's part of the Court's record.

THE COURT: All right.

MR. BRIDGES: We would object to that, Your Honor. We haven't had an opportunity to even verify its authenticity yet.

THE COURT: All right. Well, I'll tell you what. I'm going to address this in my ruling. So it's not going to be part of the record for this decision, and yet -- well, I'll get to it.

All right. So we're back on the record in Case Number 19-34054, Highland Capital. The Court has deliberated, after hearing a lot of argument and allowing in a lot of documentary evidence, and the Court concludes that the motion of CLO Holdco, Ltd. and The Charitable DAF to modify the retention order of James Seery, which was entered almost a year ago, on July 16th, 2020, should be denied.

This is the Court's oral bench ruling, but the Court reserves discretion to supplement or amend in a more fulsome written order what I'm going to announce right now, pursuant to Rule 7052.

First, what is the Movants' authority to request the modification of a bankruptcy court order that has been in place for so many months, which was issued after reasonable notice to the Movants, and after a hearing, which was not objected to by the Movants, or appealed, when the Movants were represented by sophisticated counsel, I might add, and which order was relied upon by parties in this case, most notably Mr. Seery and the Debtor, and in fact was entered after significant negotiations involving a sophisticated court-appointed Unsecured Creditors' Committee with sophisticated

professionals and sophisticated members, and after negotiation with an independent board of directors, court-appointed, one of whose members is a retired bankruptcy judge? What is the Movants' authority?

Movants fumbled a little on that question, in that the exact authority wasn't set forth in the motion. But Movants' primary argument is that Movants think the Seery retention order was an interlocutory order and that the Court simply has the inherent authority to modify it as an interlocutory order.

The Court disagrees with this analysis. I do not think the Fifth Circuit's *Smyth* case dictates that the Seery retention order is still interlocutory. The Seery retention order was an order entered pursuant to Section 363 of the Bankruptcy Code, not a Section 327 professionals to a debtor-in-possession, professionals to a trustee employment order such as the one involved in the *Smyth* case.

But even if the Seery retention order is interlocutory -- the Court feels strongly that it's not, but even if it is -- the Court believes it would be an abuse of this Court's inherent discretion or authority to modify that order almost a year after the fact and under the circumstances of this case.

Now, assuming Rule 60(b) applies to the Movants' request, the Court determines that the Movants have not made their motion anywhere close to within a reasonable time, as Rule 60(c) requires, nor do I think the Movants have demonstrated

any exceptional circumstances to declare the order or any of its provisions void. The Movants have put on no evidence that constitutes surprise or constitutes newly-disputed evidence. So why are there no exceptional circumstances here such that the Court might find, you know, a void order or void provisions of an order?

First, this Court concludes that there's no credible argument that the Court overreached its jurisdiction with the gatekeeping provisions in the order. Gatekeeping provisions are not only very common in the bankruptcy world -- in retention orders and in plan confirmation orders, for example -- but they are wholly consistent with the *Barton* case, the U.S. Supreme Court's *Barton's* case, and its progeny that has become known collectively as the *Barton* doctrine. Gatekeeping provisions are wholly consistent with 28 U.S.C. Section 959(a)'s complete language.

The Fifth Circuit has blessed gatekeeping provisions in all sorts of contexts. It has blessed them in the situation of when *Stern* claims are involved in the *Villegas* case. It even blessed Bankruptcy Courts' gatekeeping functions a long time ago, in 1988, in a case that I don't think anyone mentioned in the briefing, but as I've said, my brain sometimes goes down trails, and I'm thinking of the *Louisiana World Exposition* case in 1988, when the Fifth Circuit blessed there a procedure where an unsecured creditors' committee can

bring causes of action against persons, such as officers and directors or other third parties, if they first come to the Bankruptcy Court and show a colorable claim. They have to come to the Bankruptcy Court, show they have a colorable claim and they're the ones that should be able to pursue them. Not exactly on point, but it's just one of many cases that one could cite that certainly approve gatekeeper functions of various sorts of Bankruptcy Courts.

It doesn't matter which court might ultimately adjudicate the claims; the Bankruptcy Court can be the gatekeeper.

And the Court agrees with the many cases cited from outside this circuit, such as the case in Alabama, in the Eleventh Circuit, and there was another circuit-level case, at least one other, that have held that the *Barton* doctrine should be extended to other types of case fiduciaries, such as debtor-in-possession management, among others.

Finally, as I pointed out in my confirmation ruling in this case, gatekeeping provisions are commonplace for all types of courts, not just Bankruptcy Courts, when vexatious litigants are involved. I have commented before that we seem to have vexatious litigation behavior with regard to Mr. Dondero and his many controlled entities.

Now, as far as the Movants' argument that there was not just improper gatekeeping provisions but actually an improper discharge in the Seery retention order of negligence claims or

other claims that don't rise to the level of gross negligence or willful misconduct, again, I reiterate there's nothing exceptional in the bankruptcy world about exculpation provisions like this. They absolutely are a term of employment very often. Just like compensation, they're frequently requested, negotiated, and approved. They are normal in the corporate governance world, generally. They are normal in corporate contracts between sophisticated parties. And most importantly of all, even if this Court overreached with the exculpation provisions in the Seery retention order, even if it did, res judicata bars the attack of these provisions at this late stage, under cases such as *Shoaf, Republic Supply v. Shoaf* from the Fifth Circuit, the *Espinosa* case from the U.S. Supreme Court, and even *Applewood*, since the Court finds the language in this order was clear, specific, and unambiguous with regard to the gatekeeping provisions and the exculpation provisions.

Last, and this is the part where I said I'm going to get to this agreement that has been submitted, the Second Amended and Restated Investment Advisor Agreement or whatever the title is. I am more than a little disturbed that so much of the theme of the Movants' pleadings and arguments, and I think even representations to the District Court, have been they have these sacred jury trial rights, these inviolate jury trial rights, and an Article I Court like this Court should

have no business through a gatekeeping provision impinging on the possible pursuit of an action where there's a jury trial right.

I was surprised initially when I thought about this. I thought, wow, I've seen so many agreements over the months. I can't say every one of them waived the jury trial right, but I just remembered seeing that a lot, and seeing arbitration provisions, and so that's why I asked. It just was lingering in my brain. So I'm going to look at what is submitted. I'm not relying on that as part of my ruling. As you just heard, I had a multi-part ruling, and whether there's a jury trial right or not is irrelevant to how I'm choosing to rule on this motion. But I do want to see the agreement, and then I want Movants within 10 days to respond with a post-hearing trial brief either saying you agree that this is the controlling document or you don't agree and explain the oversight, okay? Because it feels like a gross omission here to have such a strong theme in your argument -- we have a jury trial right, we have a jury trial right, by God, the gatekeeping provisions, among other things, impinge on our sacred pursuit of our jury trial right -- and then maybe it was very conspicuous in the controlling agreement that you'd waived that, the Movants had waived that.

So, anyway, I'm requiring some post-hearing briefing, if you will, on whether omissions, misrepresentations were made

to the Court.

Anyway, so I reserve the right to supplement or amend this ruling with a more fulsome written order. I am asking Mr. Pomerantz to upload a form of order that is consistent with this ruling, and --

MR. POMERANTZ: Your Honor, we will do so. I do have one thing to bring to the Court's attention, unrelated to the motion, before Your Honor leaves the bench.

THE COURT: All right. So just a couple of follow-up things. Have you -- I'm not clear I heard what you said about this agreement. Did you email it to my courtroom deputy or did you file it on the docket?

MR. POMERANTZ: We emailed it to your courtroom deputy. We're happy to file it on the docket. And we also provided a copy to Mr. Sbaiti.

I would note for the Court that it's signed both by The Charitable DAFs by Grant Scott, just for what it's worth.

THE COURT: Okay. All right. Well, I'm trying to think what I want -- I do want you to file it on the docket, and I'm trying to think of what you label it. Just call it Post-Hearing Submission or something and link it to the motion that we adjudicated here today. And then, again, you've got 10 days, Mr. Bridges, to say whatever you want to say about that agreement.

I guess the last thing I wanted to say is we sure devoted

a lot of time to this motion today. We have -- this is a recurring pattern, I guess you can say. We have a lot of things that we devote a lot of time to in this case that I get surprised, but it is what it is. You file a motion. I'm going to give it all the attention Movants and Respondents think it warrants. I'm going to develop a full record, because, you know, there's a recurring pattern of appeals right now, 11 or 12 appeals, I think, not to mention motions to withdraw the reference. If we're going to have higher courts involved in the administration of this case, I'm going to make a very thorough record so nobody is confused about what we did, what I considered, what my reasoning was.

So I kind of think it's unfortunate for us to have to spend case resources and so much time and fees on things like this, but I'm going to make sure a Court of Appeals is not ever confused about what happened and what we did. So that's just the way it's going to be. And I feel like we have no choice, given, again, the pattern of appeals.

All right. So, with that, Mr. Pomerantz, you had one other case matter, you said?

MR. POMERANTZ: Yes. But before I get to that, Your Honor, I assume that, in response to the Movants' submission on the agreement, that we would have right at four or seven days to respond if we deem it's appropriate?

THE COURT: I think that's reasonable. That's

reasonable.

MR. POMERANTZ: Okay. Thank you, Your Honor.

THE COURT: So let me think of how I want to do this. I'll just do a short scheduling order of sorts that just, it says in one or two paragraphs, at the hearing on this motion, the Court raised questions about the jury trial rights and the Debtor has now submitted the controlling agreements, I'm giving the Movants 10 days to respond to whether this is indeed a controlling agreement, and why, if it is, the Movants have heretofore taken the position they have jury trial rights. And then I will give you seven days thereafter to reply, and then the Court will set a further status conference if it determines it's necessary. Okay?

So, Nate, we'll do a short little order to that effect. Okay?

MR. POMERANTZ: Thank you, Your Honor.

I -- again, before I raise the other issue, I want to pick up on a comment Your Honor just made towards the end. I know the Court has been frustrated with the time and effort we've been spending. The Debtor and the creditors have been extremely frustrated, because in addition to the time and effort everyone's spending, we're spending millions of dollars, millions of dollars on litigation that --

THE COURT: It's one of the reasons you needed an exit loan, right?

MR. POMERANTZ: Right. No, exactly. That's frivolous, that we think is made in bad faith.

And Your Honor, and everyone else who's hearing this on behalf of Mr. Dondero, should understand we're looking into what appropriate authority Your Honor would have to shift some of the costs. Your Honor did that in the contempt motion. Your Honor can surely do that in connection with the notes litigation. But all this other stuff that is requiring us to spend hundreds and hundreds of hours and spend millions of dollars, we are clearly looking into whether it would be appropriate and what authority there is. I just wanted to let Your Honor know that.

And in connection with that, the last point, Your Honor, I can't actually even believe I'm saying this, but there was another lawsuit filed -- we just found out in the break -- on Wednesday night by the Sbaiti firm on behalf of Dugaboy in the District Court.

Now, to make matters worse, Your Honor, the litigation relates to alleged improper management by the Debtor of Multi-Strat. If Your Honor will recall, at many times I've told this Court what Dugaboy's claims they filed in this case. Dugaboy has a claim that is filed in this case for mismanagement postpetition of Multi-Strat. Now the Sbaiti firm, in addition to representing CLO Holdco, in addition to representing the DAF, and whatever the Plaintiffs' lawyers are

in that other District Court, PCMG, and in connection with the Acis matter, they've decided they haven't had enough. They've now filed another motion that -- you know, why they filed it in District Court and there's a proof of claim on the same issues, I don't know. But I thought Your Honor should know. I'm not asking Your Honor to do anything about it. But we will act aggressively, strongly, and promptly.

Thank you, Your Honor.

THE COURT: All right. Well, you've reminded me of what came out earlier today about the entity -- I left my notepad in my chambers -- PMC or PMG or something.

Mr. Bridges, we're not going to have a hearing right now on me doing anything, but what are you thinking? What are you doing?

MR. BRIDGES: Your Honor, I'm not trying to duck your question. I literally have no involvement with any other claim, and we would have to ask Mr. Sbaiti to answer your questions.

THE COURT: All right. Is he there?

MR. BRIDGES: He is.

THE COURT: I'll listen.

MR. BRIDGES: I'll switch seats and give him this chair.

MR. SBAITI: Sorry, Your Honor. We had two computers going and weren't able to use the sound on one, so we ended up

turning that off.

Your Honor, I'm not sure what the question is about when you say what are we thinking. We have a client that's asked us to file something, and when we're advised by bankruptcy counsel that it's not prohibited for us to do so, and don't know why we're precluded from doing so, and when the time comes I'm sure we'll be able to explain to Your Honor -- someone will be able to explain to Your Honor why what we're doing, despite Mr. Pomerantz's exacerbation, or excuse me, exasperation, why that wasn't improper. It's our belief that it wasn't improper or a violation of the Court's rule.

THE COURT: Just give me a quick shorthand *Readers' Digest* of why you don't think it's improper.

MR. SBAITI: Sure. My understanding is, Your Honor, there's not a rule that says we can't file it against the Debtor for postpetition actions. So that, that's as -- that's as much as I understand. And I'm going to -- I'm not trying to duck it, either. And if I'm wrong about that and someone wants to correct me on our side offline and if we have to explain to the Court why that's so or what rule has been violated, I'm sure we'll be able to put together something for that. But that's what I've been advised.

THE COURT: Have you done thorough --

MR. POMERANTZ: Your Honor, I think what --

MR. SBAITI: (garbled), Your Honor.

THE COURT: Have you done thorough research yourself? Your Rule 11 signature is on the line, not some bankruptcy counsel you talked to. Have you done the research yourself?

MR. SBAITI: Well, Your Honor, I've relied on the research and advice of people who are experts, and I believe my Rule 11 obligations also allow me to do that, so yes.

MR. POMERANTZ: Your Honor, I think we're entitled to know if it's Mr. Draper's firm who has been representing Dugaboy. He's the bankruptcy counsel. I don't think it's an attorney-client privilege issue. If Mr. Sbaiti is going to be here and sort of say, hey, bankruptcy counsel said it was okay, I think we would like to know and I'm sure Your Honor would like to know who is that bankruptcy counsel.

THE COURT: Yes. Fair enough. Mr. Sbaiti?

MR. SBAITI: Your Honor, in consultation with Mr. Draper and with consultation with other counsel that we've spoken to, that has been our understanding.

THE COURT: Who's the other counsel?

MR. SBAITI: Well, we've talked to Mr. Rukavina about some of these things for the PCMG and the Acis case. We've talked to the people who, when they tell us you can't do this because they're bankruptcy counsel for our client, then we don't do something. So, and I'm not trying to throw anybody under the bus, but my understanding of what goes on in Bankruptcy Court is incredibly limited, so, you know, and if

it's a mistake then I'll own it, if I have a mistaken understanding, but I also wasn't anticipating having to make a presentation about this right here right now, so --

THE COURT: Well, you're filing lawsuits that involve this bankruptcy case during the hearing, so --

MR. SBAITI: Oh, we didn't file it during the hearing, Your Honor. It was filed last night, I believe.

THE COURT: Okay. Well, I assume that you're going to go back and hit the books, hit the computer, and be prepared to defend your actions, because your bankruptcy experts, they may think they know a lot, but the judge is not very happy about what she's hearing.

MR. POMERANTZ: Your Honor, if I may ask when Your Honor intends to issue the contempt ruling in connection with the June 8th hearing? I strongly believe -- and, obviously, this has nothing to do with the contempt hearing; this happened after -- but I strongly believe that sending a message that Your Honor is inclined to hold counsel in contempt, which obviously is one of the violators we said should be held in contempt, it may be important to do that sooner rather than later so that people know that Your Honor is serious.

THE COURT: All right. Well, I understand and respect that request. And let me tell you all, I had a seven-day -- okay. You all were here on that motion June 8th. I

had a seven-day, all-day, every-day, 9:00 to 5:00, 45-minute lunch break, in-person hearing with a dozen or so live witnesses that I just finished Tuesday at 5:00 o'clock. So you all were here on the 8th, and then -- what day was that -- what was -- Tuesday, I finished. Tuesday was the 22nd. So I started on the 14th, okay? So you all were here on the 8th and I had a live jury trial -- I mean, not jury trial, a live bench trial -- live human beings in the courtroom, beginning June 14th. So you're here the 8th. June 14th through 22nd, I did my trial. And here we are on the 25th. And guess what, I have another live human-being bench trial next week, Monday through Friday.

So we've been working in other things like this in between those two. So I'm telling you that not to whine, I'm just telling you that, that's the only reason I didn't get out a quick ruling on this, okay?

MR. POMERANTZ: And Your Honor, I was not at all making that comment to imply anything about the Court.

THE COURT: Well, --

MR. POMERANTZ: The time and effort that you have given to this case is extraordinary, --

THE COURT: Okay.

MR. POMERANTZ: -- so please don't misunderstand my comment.

THE COURT: Okay. And I didn't mean to express

annoyance or anything like that. I guess what I'm trying to do is I don't want anyone to mistake the delay in ruling on the contempt motion to mean I'm just not that -- you know, I'm not prioritizing it, other things are more serious to me or important to me, or I'm going to take two months to get to it. It's literally been I've been in trial almost all day long every day since you were here. But trust me, I'm about as upset as upset can be about what I heard on June 8th, and I'm going to get to that ruling, and I know what I'm going to do. And, well, like I said, it's just a matter of figuring out dollars and whom, okay? There's going to be contempt. I just haven't put it on paper because I've been in court all day and I haven't come up with a dollar figure. Okay?

So I hope -- I don't know if that matters very much, but it should.

All right. We stand adjourned.

(Proceedings concluded at 3:35 p.m.)

--oOo--

CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Kathy Rehling **06/29/2021**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

INDEX
Excerpt
11:33 a.m. to 3:35 p.m.

EXHIBIT C

2022 WL 4093167
Only the Westlaw citation is currently available.
United States Court of Appeals, Fifth Circuit.

In the MATTER OF: HIGHLAND CAPITAL MANAGEMENT, L.P., Debtor,
NexPoint Advisors, L.P.; Highland Capital Management Fund Advisors, L.P.; Highland Income Fund; NexPoint Strategic Opportunities Fund; Highland Global Allocation Fund; NexPoint Capital, Incorporated; James Dondero; The Dugaboy Investment Trust; Get Good Trust, Appellants,
v.
Highland Capital Management, L.P., Appellee.

No. 21-10449
|
FILED September 7, 2022

Synopsis

Background: Co-founder of Chapter 11 debtor, an investment firm that had managed billion-dollar, publicly-traded investment portfolios for nearly three decades, together with several other creditors and the United States Trustee (UST), objected to confirmation of debtor's proposed reorganization plan. The United States Bankruptcy Court for the Northern District of Texas, Stacey G. C. Jernigan, Chief Judge, overruled the objections and subsequently granted motion of co-founder and creditors to directly appeal confirmation order to Court of Appeals. Following consolidation of direct appeals, debtor moved to dismiss appeal as equitably moot.

Holdings: The Court of Appeals, Duncan, Circuit Judge, held that:

[1] equitable mootness did not bar review of creditors' claims, even though, because no stay of the plan pending appeal was granted, the plan had been substantially consummated;

[2] the plan was properly classified as a reorganization plan, allowing for automatic discharge of its debts, notwithstanding debtor's "wind down" of its portfolio management;

[3] the plan satisfied the absolute-priority rule;

[4] failure of "Independent Directors" to file periodic financial reports as required by bankruptcy rule did not bar the plan's confirmation;

[5] the Bankruptcy Court did not clearly err in finding that, despite their purported independence, debtor's publicly traded investment funds were entities "owned and/or controlled by" debtor's co-founder;

[6] the plan's non-debtor exculpation provision violated the Bankruptcy Code to the extent it extended beyond debtor, unsecured creditors committee, and "Independent Directors" selected by committee to act as "quasitrustee" for debtor; and

[7] the plan's injunction provision was not unlawfully overbroad or vague.

Motion to dismiss appeal denied; judgment affirmed in part, reversed in part, and remanded.

Previous opinion, 2022 WL 3571094, withdrawn.

Procedural Posture(s): On Appeal; Objection to Confirmation of Plan; Motion to Dismiss.

West Headnotes (34)

[1] **Bankruptcy** Unsecured creditors and equity holders, protection of

Bankruptcy court must proceed by nonconsensual confirmation, or "cramdown," when class of unsecured creditors rejects Chapter 11 reorganization plan, but at least one impaired class accepts it. 11 U.S.C.A. § 1129(b).

[2] **Bankruptcy** Preservation of priority
Bankruptcy Fairness and Equity; "Cram Down."

"Cramdown" requires that Chapter 11 plan be fair and equitable to dissenting classes and satisfy absolute priority rule, that is, dissenting classes are paid in full before any junior class can retain any property. 11 U.S.C.A. §§ 1129(b), 1129(b)(2)(B).

[3] **Bankruptcy** Finality

Bankruptcy court's confirmation order is appealable final order, over which Court of Appeals has jurisdiction. 28 U.S.C.A. §§ 158(d), 1291.

[4] **Bankruptcy** Conclusions of law; de novo review

Bankruptcy Clear error

Court of Appeals reviews bankruptcy court's factual findings for clear error and legal conclusions de novo.

[5] **Bankruptcy** Moot questions

Judge-made doctrine of "equitable mootness" allows appellate courts to abstain from reviewing bankruptcy orders confirming complex plans whose implementation has substantial secondary effects.

[6] **Bankruptcy** Moot questions

Doctrine of equitable mootness seeks to balance equitable considerations of finality and good faith reliance on judgment and right of party to seek review of bankruptcy order adversely affecting him.

[7] **Bankruptcy** Moot questions

Court of Appeals uses equitable mootness, a judge-made doctrine allowing appellate courts to abstain from reviewing certain bankruptcy confirmation orders, as a scalpel rather than an axe, applying it claim-by-claim, instead of appeal-by-appeal.

[8] **Bankruptcy** Moot questions

In determining whether to apply equitable mootness, a judge-made doctrine allowing appellate courts to abstain from reviewing certain bankruptcy confirmation orders, Court of Appeals analyzes three factors for each claim: (1) whether a stay has been obtained, (2) whether the plan has been substantially consummated, and (3) whether the relief requested would affect either the rights of parties not before the court or the success of the plan; no one factor is dispositive.

[9] **Bankruptcy** Moot questions

Equitable mootness did not bar Court of Appeals' review of creditors' claims on appeal from Bankruptcy Court's confirmation of reorganization plan of Chapter 11 debtor-investment firm, even though, because no stay pending appeal had been granted, the plan had been substantially consummated; Court of Appeals could, by granting only partial relief, fashion the remedy it saw fit without upsetting the reorganization, such that entire appeal was not equitably moot, and, analyzing appeal on claim-by-claim basis, legality of plan's non-consensual non-debtor release was consequential to the Chapter 11 process and so should not escape appellate review in the name of equity, and equitable mootness did not bar appellate review of absolute-priority-rule challenge to plan's cramdown and treatment of "class 8" creditors, as relief requested in that respect would not affect third parties or success of plan.

[10] **Bankruptcy** Modification or revocation

Bankruptcy Code does not prohibit modifications to confirmed Chapter 11 plans after substantial consummation. 11 U.S.C.A. § 1127.

[11] **Bankruptcy** Modification or revocation

Bankruptcy Decisions Reviewable

Although the Bankruptcy Code restricts post-confirmation modifications of Chapter 11 plans, it does not expressly limit appellate review of plan confirmation orders. 11 U.S.C.A. § 1127.

[12] **Bankruptcy** Determination and Disposition; Additional Findings

On appeal of a Chapter 11 plan's confirmation order, the Court of Appeals may fashion fractional relief to minimize an appellate disturbance's effect on the rights of third parties.

[13] **Bankruptcy** Moot questions

Equitable mootness may apply to an appeal concerning a Chapter 11 liquidation plan, as well as to appeals concerning reorganization plans.

[14] **Bankruptcy** Moot questions

For purposes of determining whether equitable mootness bars appellate review, equity strongly supports review of issues consequential to integrity and transparency of Chapter 11 process; goal of finality sought in equitable mootness analysis does not outweigh court's duty to protect integrity of process.

[15] **Bankruptcy** Sale or liquidation

Bankruptcy Effect as discharge

Plan of Chapter 11 debtor-investment firm was properly classified as a reorganization plan, allowing for automatic discharge of its debts, notwithstanding debtor's "wind down" of its portfolio management; by plain terms of plan, debtor had and would continue its business as a reorganized debtor for several years, continuing to manage the assets of others. 11 U.S.C.A. § 1141(d)(1), (3).

[16] **Bankruptcy** Sale or liquidation

Bankruptcy Effect as discharge

Whether a corporate Chapter 11 debtor "engages in business," such that its plan is properly classified as a reorganization plan, allowing for automatic discharge of its debts, is "relatively straightforward"; a business entity will not engage in business post-bankruptcy when its assets are liquidated and the entity is dissolved. 11 U.S.C.A. § 1141(d)(1), (3).

[17] **Bankruptcy** Sale or liquidation

Bankruptcy Effect as discharge

Even a temporary continuation of business after a plan's confirmation is sufficient to discharge a Chapter 11 debtor's debt. 11 U.S.C.A. § 1141(d)(1), (3).

[18] **Bankruptcy** Preservation of priority

Bankruptcy Unsecured creditors and equity holders, protection of

When assessing whether Chapter 11 plan is fair and equitable in cramdown scenario, courts must invoke absolute-priority rule, pursuant to which, 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 any property under the plan. 11 U.S.C.A. §§ 1129(b)(1), 1129(b)(2)(B).

[19] **Bankruptcy** Preservation of priority

Reorganization plan of Chapter 11 debtor-investment firm satisfied the absolute-priority rule; although objectors argued that plan violated rule by giving class-10 and class-11 claimants a "Contingent Claimant Trust Interest" without fully satisfying class-8 claimants, the pro rata share of "Contingent Claimant Trust Interests" received by classes 10 and 11 vested only when claimant trustee certified that all class-8 claimants had been paid indefeasibly in full and all disputed claims in class 8 had been resolved, such that no interest junior to class 8 would receive any property unless and until class-8 claimants were paid. 11 U.S.C.A. § 1129(b)(2)(B).

[20] **Bankruptcy** Requisites of Confirmable Plan

Failure, by "Independent Directors" selected by unsecured creditors committee to act together as "quasitrustee" for Chapter 11 debtor-investment firm, to file periodic financial reports about entities in which debtor's estate held a substantial or controlling interest, as required by bankruptcy rule, did not bar confirmation of reorganization plan; rule in question was not an "applicable provision" of title 11 because the bankruptcy rules are not provisions of the Bankruptcy Code, nor was rule tethered to bankruptcy trustee's general duties. 11 U.S.C.A. § 1129(a)(2); 28 U.S.C.A. § 2075; Fed. R. Bankr. P. 2015.3.

[21] **Bankruptcy** Confirmation; Objections

In confirming reorganization plan of Chapter 11 debtor-investment firm, the Bankruptcy Court's finding that, despite their purported independence, debtor's publicly traded investment funds were entities "owned and/or controlled by" debtor's co-founder was supported by testimony to that effect by the executive vice president of two funds that were debtor's clients, notwithstanding the testimony of the funds' chief compliance officer that they were run by independent board members; the Bankruptcy Court found officer to be not credible because he "abruptly resigned" from debtor at the same time as co-founder and was currently employed by co-founder.

[22] **Bankruptcy** Clear error

"Clear error" is formidable standard: Court of Appeals disturbs factual findings of bankruptcy court only if left with firm and definite conviction that bankruptcy court made mistake.

[23] **Bankruptcy** Findings of Fact

Court of Appeals defers to bankruptcy court's credibility determinations.

[24] **Bankruptcy** Settlement, adjustment, or enforcement of claims

Non-debtor exculpation provision of reorganization plan of Chapter 11 debtor-investment firm violated the Bankruptcy Code's bar on non-debtor discharge by reaching beyond debtor, unsecured creditors committee, and "Independent Directors" selected by committee to act together as "quasitrustee" for debtor, to exculpate other third parties from postpetition liability for breach-of-contract and negligence claims; Independent Directors were entitled to all rights and powers of a trustee, including limited qualified immunity for any actions short of gross negligence, the Code categorically barred third-party exculpations absent express authority elsewhere in the Code, and neither section of the Code authorizing court to issue any order necessary or appropriate to carry out provisions of title 11 nor section of the Code allowing a Chapter 11 plan to include any appropriate provision not inconsistent with applicable provisions of title 11 provided statutory basis for non-debtor exculpation. 11 U.S.C.A. §§ 105(a), 524(e), 1107(a), 1123(b)(6).

[25] **Courts** Number of judges concurring in opinion, and opinion by divided court

Panel of the Fifth Circuit is bound to apply its own circuit precedent.

[26] **Bankruptcy** Settlement, adjustment, or enforcement of claims

Bankruptcy court's underlying factual findings do not alter whether it has statutory authority to exculpate a non-debtor through a Chapter 11 plan. 11 U.S.C.A. § 524(e).

[27] **Bankruptcy** Debtor in possession, in general

Like a debtor-in-possession, "Independent Directors" selected by unsecured creditors committee to act together as "quasitrustee" for Chapter 11 debtor under the unique governance

structure of the case were entitled to all rights and powers of trustee. 11 U.S.C.A. § 1107(a).

[28] **Bankruptcy** Settlement, adjustment, or enforcement of claims

Any exculpation in a Chapter 11 reorganization plan must be limited to the debtor, the creditors committee and its members for conduct within the scope of their duties, and the trustees within the scope of their duties. 11 U.S.C.A. §§ 524(e), 1103(c), 1107(a).

[29] **Bankruptcy** Court of Appeals

Court of Appeals lacks jurisdiction to consider collateral attacks on final bankruptcy orders even when such attack concerns whether the court properly exercised jurisdiction or authority at the time.

[30] **Bankruptcy** Scope of review in general

Permanency alone is no reason to alter a bankruptcy court's otherwise-lawful injunction on appeal.

[31] **Bankruptcy** Construction, execution, and performance

Chapter 11 reorganization plan's injunctive provision, which enjoined bankruptcy participants "from taking any actions to interfere with the implementation or consummation of" the plan, was not overbroad or vague; plan defined what constituted "interference" to include filing a lawsuit, enforcing judgments, enforcing security interests, asserting setoff rights, and acting "in any manner" not conforming with the plan.

[32] **Bankruptcy** Construction, execution, and performance

Determination of whether gatekeeper provision of Chapter 11 debtor's reorganization plan impermissibly extended to unrelated claims over which the Bankruptcy Court lacked subject-matter jurisdiction would be left to the Bankruptcy Court in the first instance.

[33] **Bankruptcy** Leave to sue

Under the *Barton* doctrine, 104 U.S. 126, 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.

[34] **Bankruptcy** Settlement, adjustment, or enforcement of claims

Non-debtor exculpation within reorganization plan is not lawful means to impose vexatious litigant injunctions and sanctions.

Appeal from the United States Bankruptcy Court for the Northern District of Texas, USDC No. 19-34054, USDC No. 3:21-CV-538, Stacey G. C. Jernigan, Chief Judge

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Before Wiener, Graves, and Duncan, Circuit Judges.

ON PETITION FOR REHEARING

Stuart Kyle Duncan, Circuit Judge:

***1** 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 non-debtors in violation of 11 U.S.C. § 524(e), strike those few parties from the plan's exculpation, and affirm on all remaining grounds.

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 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.

***2** 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 quasitrustee 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.

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.

***3** 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]

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. §§ 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.

***4** 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."

[1] **[2]** 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 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

[3] **[4]** A confirmation order is an appealable final order, over which we have jurisdiction. *Bullard v. Blue Hills Bank*, 575 U.S. 496, 502, 135 S.Ct. 1686, 191 L.Ed.2d 621 (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

***5** 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.

[5] **[6]** 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.2d 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]

[7] **[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 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.

[9] 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 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.

***6** 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.*

[10] 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.

[11] **[12]** "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.

[13] 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.

***7** **[14]** 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 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

[15] 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.

***8** **[16]** **[17]** 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 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

[18] 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]

[19] 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.

***9** 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, 108 S.Ct. 963, 99 L.Ed.2d 169 (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

[20] 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

[21] 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.

[22] **[23]** "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 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

***10** 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*

[24] 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 at 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*, —— U.S. ——, 141 S. Ct. 1394, 209 L.Ed.2d 132 (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.

***11** 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 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).

[25] 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.

***12** **[26]** 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.*

[27] 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.

[28] **[29]** 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]

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*

***13** 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.

[30] 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).

[31] 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.

[32] 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.

[33] 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, 26 L.Ed. 672 (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]

* * *

***14** **[34]** 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.

All Citations

--- F.4th ----, 2022 WL 4093167

Footnotes

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 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.

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.

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.

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, 119 S.Ct. 1411, 143 L.Ed.2d 607 (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).

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).

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.

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).

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.

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)).

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)).

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, 129 S.Ct. 2195, 174 L.Ed.2d 99 (2009); *In re Linn Energy, L.L.C.*, 927 F.3d 862, 866–67 (5th Cir. 2019) (quoting *Bailey*, 557 U.S. at 152, 129 S.Ct. 2195). 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.

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

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").

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.

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