Case No. 24-10287

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

IN RE HIGHLAND CAPITAL MANAGEMENT, L.P.

JAMES DONDERO; HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.; the DUGABOY INVESTMENT TRUST; GET GOOD TRUST; and NEXPOINT REAL ESTATE PARTNERS, LLC,

Appellants

v.

JUDGE STACEY G. JERNIGAN,

Appellee

On Appeal from the United States District Court for the Northern District of Texas, Dallas Division
No. 3:23-CV-0726-S
Hon. Karen Gren Scholer, District Judge

BRIEF OF APPELLANTS

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Oral Argument Requested

CERTIFICATE OF INTERESTED PERSONS

Pursuant to the fourth sentence of Fifth Circuit Local Rule 28.2.1, counsel for Appellants certifies that the following persons and entities have an interest in the outcome of this case. Appellants make this certification so that the judges of this Court may evaluate possible disqualification or recusal.

Appellants
James D. Dondero
Get Good Trust
Highland Capital Management Fund Advisors, L.P.
NexPoint Real Estate Partners, LLC
The Dugaboy Investment Trust

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Appellee
The Honorable Stacey G. Jernigan,
United States Bankruptcy Court for the Northern District of Texas

The Debtor
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June 17, 2024 */s/ Michael Lang (with permission)*

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a)(1) and Fifth Circuit Local Rule 28.2.3, Appellants James D. Dondero, Highland Capital Management Fund Advisors, L.P., The Dugaboy Investment Trust, Get Good Trust, and NexPoint Real Estate Partners, LLC (the "Dondero Parties") respectfully request oral argument. Because of the complexity of the record, the multiple entities involved, and the lengthy history of the underlying disputes, the Dondero Parties believe that oral argument will substantially assist the Court.

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STATEMENT REGARDING JURISDICTION

The recusal motion at issue in this appeal is one filed by the Dondero Parties in the Chapter 11 bankruptcy case of Highland Capital Management, L.P. on October 17, 2022. The Bankruptcy Court had jurisdiction pursuant to 28 U.S.C. § 157(b). The Bankruptcy Court issued an order denying the recusal motion on March 6, 2023. The Dondero Parties sought review of the order by Petition for Writ of Mandamus to the United States District Court for the Northern District of Texas on April 5, 2023. The District Court had jurisdiction pursuant to 28 U.S.C. § 158(a). The District Court denied the petition on March 8, 2024. The Dondero Parties timely noticed this appeal on March 28, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

INTRODUCTION

Central to the American justice system and the guarantee of due process is access to fair proceedings before a fair tribunal. For this reason, federal statute mandates that a judge must recuse herself whenever her partiality "might reasonably be questioned." 28 U.S.C. § 455. This appeal presents the question of whether Chief Judge Stacey G. Jernigan—the presiding judge in the Chapter 11 bankruptcy case of Highland Capital Management, L.P. ("Highland")—should have recused herself after making numerous statements and undertaking various actions in the bankruptcy proceedings that convey the appearance of impartiality. By way of example, while presiding over the bankruptcy case, the bankruptcy judge:

- declared, at the first hearing over which she presided, that debtor Highland's then-CEO, Appellant James D. Dondero, had acted in a "bad way," before Mr. Dondero had testified, taken any position, or filed anything in the case;
- *sua sponte* directed counsel for Highland to investigate Mr. Dondero and certain of his affiliates after reading an extrajudicial news article about Paycheck Protection Program loans, and insinuated in open court that Mr. Dondero had obtained the loans fraudulently or improperly;
- wrote and published two novels criticizing Highland's pre-bankruptcy business model, describing the industry in which Mr. Dondero and Highland operated as unscrupulous and "creepy;" and

- repeatedly singled out Mr. Dondero and the Dondero Parties for punitive treatment where none was warranted.

And that is just the tip of the iceberg.

When the bankruptcy judge's bias manifested, the Dondero Parties promptly sought recusal and diligently pursued that relief, both in the Highland bankruptcy case and in a related adversary proceeding. Those efforts began in March 2021, after a series of interactions with the judge led the Dondero Parties to conclude that they could not get fair treatment in her courtroom. Each time, the Bankruptcy Court denied the Dondero Parties' efforts to obtain the judge's recusal while only superficially addressing the factual record, the recusal statute, and the case law interpreting it. As a result, the Dondero Parties have been and continue to be substantially harmed—effectively, the doors of justice have been closed to the Dondero Parties in Judge Jernigan's courtroom.

This appeal arises from a renewed recusal motion filed in the Bankruptcy Court in October 2022. When the Bankruptcy Court denied that motion, the Dondero Parties sought review by mandamus petition to the United States District Court for the Northern District of Texas. Notwithstanding the extensive factual record accompanying the petition—containing thousands of pages of documents reflecting

statements and decisions made by the bankruptcy judge during a more than three-year period—the District Court addressed only one piece of evidence in denying the petition. More importantly, the District Court misapplied the law, imposing a higher bar for recusal than federal law permits.

A fair evaluation of the evidence meriting recusal and applicable federal law reveals that this case presents egregious circumstances that would cause any "reasonable person" to question the impartiality of the presiding bankruptcy judge. The Dondero Parties' rights have been substantially compromised by the failure of the lower courts to properly analyze this weighty issue.

Both the Bankruptcy Court and the District Court erred in refusing to order the recusal of Judge Jernigan, and the Dondero Parties respectfully request that this Court reverse and remand the case to the District Court with instructions to grant the mandamus petition.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the Bankruptcy Court abuse its discretion in denying the Dondero Parties' motion to recuse on the basis that the motion was untimely and despite the record evidence, including the bankruptcy

judge's own novels and statements on the record, which conveyed an animus toward the Dondero Parties from the outset of the bankruptcy?

2. Did the District Court abuse its discretion in denying the Dondero Parties mandamus relief where the record evidence conveys an appearance of bias that would cause any reasonable person to question the bankruptcy judge's impartiality and where federal law mandates recusal under those circumstances?

STATEMENT OF THE CASE

A. Highland Seeks Bankruptcy Protection, and the Case Is Transferred to Judge Jernigan's Court

Prior to bankruptcy, Highland was an SEC-registered multibillion-dollar global investment advisor that provided investment services to an extensive network of investors and managed funds. ROA.14280–282 at ¶¶ 4, 7. The company's portfolio consisted of a unique mix of assets, including among other things collateralized loan obligations ("CLOs"), life settlements, and real estate ventures. *See* ROA.14281–282, ¶ 6. Notwithstanding decades of success, Highland suffered losses resulting from the financial crisis of 2008. One such lawsuit culminated in an adverse arbitration award against Highland in 2019. ROA.14282–284, ¶ 8. As a result, Highland (a Delaware limited partnership) sought

bankruptcy protection in the United States Bankruptcy Court for the District of Delaware on October 16, 2019. *Id.*

Shortly after Highland's bankruptcy filing, the newly-appointed Unsecured Creditors Committee ("Creditors Committee") moved to transfer the bankruptcy case to the United States Bankruptcy Court for the Northern District of Texas. ROA.4379–394. The Creditors Committee sought the transfer to exploit what it perceived as a litigation advantage if the case were to proceed in the Northern District of Texas, where the Chief Judge Jernigan already was presiding over the involuntary chapter 11 bankruptcy of another company, Acis Capital Management, L.P., and its general partner, Acis Capital Management GP, LLC (collectively, "Acis"). *Id.* at ¶ 2.[1] Highland objected to the transfer, arguing that it could not get fair treatment in the Texas bankruptcy court because the chief judge already had formed unfavorable opinions of Highland's management during the Acis bankruptcy. ROA.6880 at 78:3–8 (arguing that the judge had "negative views

[1] Prior to its bankruptcy, Acis served as a portfolio manager for "hundreds of millions of dollars' worth" of CLOs. ROA.2850. Mr. Dondero served as Acis's Chief Executive Officer, and Highland provided services to Acis pursuant to shared services agreements. *Id.* In January 2018, Joshua Terry (an Acis portfolio manager) filed an involuntary petition in bankruptcy against Acis. ROA.2849–850. Terry later served as the representative for Acis on Highland's Creditors Committee. ROA.14307.

regarding certain members of the debtor's management" that the Creditors Committee and Acis "hope[d] w[ould] carry over to this case"); ROA.6881 79:14–18. But the Delaware bankruptcy court granted the Creditor Committee's motion to transfer and, as expected, the case was assigned to Chief Judge Jernigan. ROA.6892 at 90:15–24; ROA.3088.[2]

B. The Bankruptcy Judge Shows Early Signs of Bias, Which Highland Eventually Exploits

Immediately following the transfer, Chief Judge Jernigan foreshadowed her negative opinions of Mr. Dondero and his affiliates. Indeed, at her *very first hearing* in January 2020, the judge expressed her many negative opinions about Mr. Dondero. At that hearing, Highland sought the Court's approval of a settlement between Highland and the Creditors Committee that called for the installation of a three-member independent board to govern Highland during bankruptcy. As part of that settlement, Mr. Dondero agreed to relinquish his control of Highland and its general partner, Strand Advisors, Inc., and he cooperated in

[2] Unbeknownst to the Dondero Parties, by this time, the bankruptcy judge already had authored one novel criticizing the financial industry in which Mr. Dondero and Highland operated and was working on a second novel that would draw from the judge's experiences in the Acis and Highland bankruptcies. *See infra* at pp. 20–23.

Highland's efforts to obtain settlement approval. ROA.14286.[3] Yet at the hearing, the bankruptcy judge singled Mr. Dondero out for negative treatment, expressing her view that Mr. Dondero acted in a "bad way" in the Acis case, telling the parties "I can't extract what I learned during the Acis case, it's in my brain." ROA.2891–892, at 78:23–79:16. The judge also pointed to actions that Mr. Dondero purportedly took in the Acis bankruptcy as evidence of a presumed propensity to engage in similar actions in the Highland Bankruptcy. For that reason, the judge insisted, *sua sponte*, on including language in her order approving the settlement expressly allowing the Court to hold Mr. Dondero (but no other party) in contempt of court. ROA.2892–893, at 79:14–80:6. At the time, Mr. Dondero had not filed a single motion or objection to any motion, he was cooperating with Highland and its counsel, and there was nothing in the record justifying the judge's specific rulings and comments about him. ROA.2851.

[3] At the time this deal was struck, Mr. Dondero had not yet hired independent counsel and was acting on the advice of Highland's counsel, Pachulski Stang Ziehl & Jones LLP. Mr. Dondero had no way of knowing when he gave up his substantial rights that Highland and the firm he hired to represent the company would begin to exploit the Bankruptcy Court's opinion of Mr. Dondero to their advantage.

C. The Bankruptcy Judge's Actions Increasingly Raise Reasonable Questions Concerning Her Impartiality

Throughout the early weeks and months of the Highland bankruptcy, the Dondero Parties continued to play only a passive role in the proceedings.[4] Nonetheless, the bankruptcy judge continued to make unsolicited and increasingly negative comments from the bench about Mr. Dondero and his affiliates and to base her rulings on the negative perception she brought to the case rather than the evidence before her. For example:

- Acting *sua sponte*, the judge directed Highland's counsel to investigate Mr. Dondero and certain "Highland affiliates" after she read a news article (that the judge conceded was extrajudicial) suggesting that Mr. Dondero or one or more Highland affiliates received Paycheck Protection Program ("PPP") loans. Notably, neither Mr. Dondero nor the "Highland affiliates" referenced in the article were controlled by Highland, and as Highland's counsel later confirmed, the loans had nothing to do with Highland. ROA.2931–932, at 42:10–43:25; ROA.2940–946, at 53:17–59:3.

- During another hearing, the bankruptcy judge commented on a lawsuit that was not at issue and that she was admittedly unfamiliar with, surmising: "If Mr. Dondero doesn't think

[4] In the first year after the bankruptcy filing, Mr. Dondero filed only four pleadings: a limited response to a motion by Acis for relief from the automatic stay; an objection to Acis's proof of claim and joinder in Highland's similar objection; a response to the Creditor Committee's motion to compel production by Highland; and a response to Highland's motion seeking approval of its settlement with Acis. *In re Highland Capital Mgmt., L.P.*, Case No. 19-cv-34054-sgj11 (Bankr. N.D. Tex.), Dkts. 617, 771, 827, 832 and 1121.

that is so transparently vexatious litigation, yeah, I'm going out there and saying that, I haven't seen it [the complaint she was calling vexatious], but, come on." ROA.2952 at 51:13–16.

- During a hearing on a motion initiated by third-party financial advisors and retail funds (represented by independent, outside counsel) to prevent Highland's liquidation of certain CLO assets, the judge speculated that Mr. Dondero was somehow behind the motion and therefore concluded (without any evidentiary basis) that the motion was brought for an improper purpose. ROA.2975, at 63:14–25. The judge then used the opportunity to condemn Mr. Dondero on the record, notwithstanding that he did not file the motion, did not hire the counsel involved, and was not present at the hearing.

- In response to a motion filed by Highland, the bankruptcy judge conducted a seven-hour evidentiary hearing only to conclude that the issue raised by Highland was moot. Yet the judge inexplicably accused *Mr. Dondero* of driving up legal fees and then went beyond the parties' pleadings and the relief requested by Highland *to issue findings adverse to Mr. Dondero*. *See* ROA.20; *see also* ROA.1934–938.

- One of Highland's independent directors, former bankruptcy judge Russell Nelms, testified under oath that, in the independent board's business judgment, it was in Highland's best interest to hire outside counsel to pursue appeals related to the Acis bankruptcy. ROA.2899, at 62:6–17. Nonetheless, the bankruptcy judge *sua sponte* expressed her belief (untethered to evidence) that Mr. Dondero may have somehow used his "powers of persuasion" to unduly influence the independent board's business judgment. ROA.2905, at 177:2–14.

- A company called CLO Holdco—a non-debtor third party that had used Highland's investment services prior to bankruptcy—filed a motion seeking the release of $2.5 million in funds belonging to CLO Holdco that were being held in the

registry of the Court. While admitting that CLO Holdco's counsel made "perfect arguments" in favor of releasing the funds, the bankruptcy judge nonetheless surmised (without any evidence) that Mr. Dondero was behind the CLO Holdco motion, questioned whether the motion was filed in good faith, and ultimately denied the motion on that basis. ROA.2920, at 82:3–11; ROA.2923, at 85:4–22.

- The bankruptcy judge held a preliminary injunction hearing in which the judge considered whether certain non-debtor financial advisors and retail funds (which were represented by independent, outside counsel) had tortiously interfered with agreements relating to Highland's management of CLOs. It was clear at the hearing that Highland could not make the requisite showing to justify injunctive relief. *See* ROA.24, n.44. However, the judge concluded (without evidence) that Mr. Dondero had caused outside counsel for the retail funds to take the offending actions. She later threatened to shift the "whole bundle of attorney's fees" to Mr. Dondero for his supposed "contempt." ROA.2990–991, at 251:24–252:5.

In short, it became increasingly apparent as the Highland bankruptcy wore on that the presiding bankruptcy judge came into the case predisposed to imagine Mr. Dondero as the villain and stuck to that fiction no matter where the facts led. Regardless of the facts, evidence, or representations of outside counsel, the bankruptcy judge was content to blame every fight initiated in the case on Mr. Dondero. Highland and the Creditors Committee had caught on as well: they both began invoking Mr. Dondero's supposed "control," "vexatiousness," and "bad faith" as a

means of influencing the outcome they desired at the hands of a biased judge.

D. The Dondero Parties Initiate Their Efforts to Recuse the Bankruptcy Judge

It was only after months of unwarranted attacks by the presiding judge that the Dondero Parties made the difficult decision to seek her recusal in March 2021. ROA.80–117. The judge denied the motion one week later. *See* ROA. 3656–666. In doing so, the judge acknowledged that the applicable recusal statute "does not expressly address timeliness," but nonetheless concluded that the motion was untimely. ROA.3660. Moreover, despite recognizing that an objective standard applies to recusal determinations, the judge relied instead on her subjective estimation: "The Presiding Judge does not believe she harbors, or has shown, any personal bias or prejudice against the Movants." ROA. 3665. The judge's order does not address whether any of the evidence cited by the Dondero Parties in their motion conveyed the appearance of impartiality.

Appellants timely appealed to the District Court on June 28, 2021. ROA.3795–764. In February 2022, the District Court dismissed the

appeal for lack of jurisdiction, concluding that the order was interlocutory and therefore not appealable. ROA. 5840–853.

E. The Judge's Conduct Continues to Raise Questions Concerning Her Impartiality

While the Dondero Parties' appeal was pending, the bankruptcy judge continued to: threaten the Dondero Parties, make negative comments about them from the bench, impose hefty sanctions on them and their counsel without proper cause or evidentiary support, and single them out for disparate treatment.

For example, in May 2021, at the end of a hearing on a motion by Mr. Dondero to stay an adversary proceeding against him pending the outcome of a related appeal, the bankruptcy judge *sua sponte* questioned why various, non-debtor entities (most of whom were not present at the hearing) had employed independent outside counsel to represent them and to file separate briefing and objections on issues being raised in the bankruptcy. ROA.11918–920, at 44:7–46:17. After Mr. Dondero's counsel explained that the entities were "separate corporations" with "different duties to various stakeholders" and that they were "controlled by different stakeholders," ROA.11920–921, at 46:18–47:3, the judge expressed her perception that this was all just "Dondero, Dondero,

Dondero" and that she could not just "accept a generalization" (notwithstanding counsel's representation on the record) "that, oh, we have very different stakeholders . . .," ROA.11921–922, at 47:24–48:10. The judge then addressed Mr. Dondero directly, explaining her view that "all roads lead back to you." ROA.11925, at 51:8–11. She also expressly discouraged the various entities she identified (including Appellants NexPoint Advisors, L.P., Highland Capital Management Fund Advisors, L.P., The Dugaboy Investment Trust, Get Good Trust, and HCRE, *see* ROA.11918–19, at 44:7–45:18) from separately participating in bankruptcy proceedings (even if those entities were being separately sued as defendants in adversary proceedings), threatening that the entities must "get it in control, or I might impose something." ROA. 11926, at 52:5–23.

Later the same month, in an emergency hearing on Mr. Dondero's motion to compel the deposition testimony of Highland's corporate representative—at which Mr. Dondero was represented by multiple outside counsel—counsel for Highland randomly questioned whether Mr. Dondero was personally in attendance at the hearing by phone.

ROA.11803, at 16:17–18.[5] Counsel for Mr. Dondero explained that, because the hearing was set on an emergency basis, he did not have time to coordinate with Mr. Dondero to ensure his attendance. ROA.11804, at 17:20–23. Counsel further explained that he had interpreted the Court's prior order requiring Dondero's attendance to apply only to "substantive hearings" in the adversary proceeding in which the order was issued. ROA.11806–807, at 19:18–20:2. Despite counsel's repeated apologies for the confusion and explanation that he was at fault for failing to secure his client's attendance, the judge postulated that Mr. Dondero was to blame: "[I]t screams irony, if nothing else, that at a time when I have under advisement a motion to hold Mr. Dondero in contempt of Court that there would be a trip-up, the second-recent trip-up, by the way, where he didn't appear in a hearing." ROA.11807, at 20:10–16. The judge then ordered Mr. Dondero to appear at every hearing in the main bankruptcy case, whether substantive or not, and whether he was taking a position or not, explaining that, "if he is going to use the offices or, you

[5] The bankruptcy judge immediately reacted to that question, explaining on the record that she had previously ordered Mr. Dondero (in a separate, adversary proceeding) to personally attend all hearings in that case. *See* ROA.11803, at 16:19–22; ROA.11806, at 19:11–14.

know, take up the time of any lawyers, then he needs to be a part of it . . . ." ROA.11807–808, at 20:19–21:14. In other words, the judge transformed a run-of-the-mill discovery hearing into an opportunity to impose punitive requirements on Mr. Dondero for invoking ordinary judicial process. The order remains in place to this day.

In June 2021, the bankruptcy judge conducted several other hearings at which she again targeted the Dondero Parties. First, at a hearing on a motion by Appellants The Dugaboy Investment Trust ("Dugaboy") and Get Good Trust ("Get Good") to enforce Highland's obligation to file periodic reports under Federal Rule of Bankruptcy Procedure 2015.3, the judge refused to order the relief (and continued the hearing for far into the future, ensuring it would likely become moot), while acknowledging the mandatory language of the Rule. In refusing the relief, the judge expressed her "nagging" belief that Dugaboy "want[ed] th[e] information to cobble together a new adversary [proceeding] alleging mismanagement." ROA.11507–508, at 45:13–46:14. In other words, the judge partially refused the relief because of her suspicions (again, untethered to evidence) regarding the movant's motivations. At the end of the hearing, the judge then *sua sponte*

questioned whether Mr. Dondero (a non-movant) was in attendance (he was) and took the opportunity to impose a punitive requirement on Dugaboy as well. ROA.11516–17, at 54:17–55:12. Specifically, the judge ordered that a representative of Dugaboy attend all future hearings in which Dugaboy was taking a position. *Id.* In doing so, the judge explained that the representative was likely to be "the trustee, Nancy Dondero" and acknowledged that Ms. Dondero was probably related to Dondero ("I don't know if that's Mr. Dondero's wife, a sister, who that is. But it will likely be her . . . ."). *Id.*

On the same day, at a separate hearing in a bankruptcy-related adversary proceeding where Appellant NexPoint Real Estate Partners, LLC ("NPRE") was seeking leave to amend its answer to add affirmative defenses (*see* ROA.11526–527, at 64:21–65:4), the bankruptcy judge again took the opportunity to suggest the Dondero Parties had engaged in nefarious behavior. Specifically, after counsel for Highland argued about why leave to amend should be denied, the judge *sua sponte* queried whether the proceeding was going to "morph even further to add fraudulent transfer allegations," encouraged Highland to file a motion to add those allegations, and suggested that the allegations could favorably

impact Highland's efforts to oppose defendants' separately pending motions to withdraw the reference. ROA.11543–545, at 81:5–83:12.

Just over one week later, invoking her inherent jurisdiction under Bankruptcy Code § 105, the bankruptcy judge *sua sponte* issued an order questioning the "party in interest status or standing" of Mr. Dondero and various entities that the judge dubbed the "Non-Debtor Dondero-Related Entities," including each of the Appellants. *See generally* ROA.3921–933. The judge's questioning of these parties' right to appear and be heard in the bankruptcy is difficult to reconcile with the order's express acknowledgement that Mr. Dondero and each of the named entities: (1) filed proofs of claim in the bankruptcy, (2) had direct or indirect equity interests in Highland, and/or (3) had been sued in related adversary proceedings by Highland. *See* ROA.3927–932. Yet the judge's order required each of the "Non-Debtor Dondero-Related Entities" to publicly disclose (1) who owned the entity, (2) whether Mr. Dondero or his family trusts had any direct or indirect ownership in the entity and, if so, what percentage, (3) the names of the officers, directors, managers, and/or trustees of the entity, and (4) whether the entity was a creditor of Highland and, if so, explaining in "reasonable detail" the amount and

substance of its claims. ROA.3932–933. Although dozens of other entities and individuals have filed proofs of claim and appeared in the Highland bankruptcy proceedings, only those the judge perceived to be aligned with Mr. Dondero were ordered to make these disclosures.

Finally, in response to a motion by Highland, in August 2021, the bankruptcy judge held Mr. Dondero in contempt of court in connection with two other entities' filing of a motion for leave to add Highland's acting CEO as a defendant in litigation pending in the Northern District of Texas. ROA.13234–264. The bankruptcy judge acknowledged that "there was no evidence whatsoever that Mr. Dondero was an agent or representative of DAF and CLO Holdco." ROA.13253, at n.71. Nonetheless, consistent with her refrain that "all roads" lead to Mr. Dondero, the judge speculated that Mr. Dondero "sparked the fire," held him jointly and severally liable for $239,655 in attorneys' fees, and tacked on an additional $100,000 sanction to be paid if he chose to appeal the order. ROA.13254, 13263.

This Court recently vacated the sanctions order, concluding that the Bankruptcy Court abused its discretion by ordering a punitive fee-shifting sanction beyond its powers as an Article I court. *In re Highland*

Capital Mgmt., L.P., 98 F.4th 170, 172–75 (5th Cir. 2024). In its opinion, the Court observed that Highland incurred virtually all of its contempt-related expenses ($50,000 of which the judge awarded "based on mere guesswork") because "the bankruptcy court permitted extensive discovery and conducted a marathon evidentiary hearing to unearth Dondero's role in filing the motion." *Id.* at 176. But as the Court pointed out, "Dondero's intentions—and virtually all of the discovery and the bankruptcy court's mini-trial—were irrelevant to *civil* contempt." *Id.* In other words, the bankruptcy judge yet again leveraged an opportunity to investigate and punish Mr. Dondero when he did not file or participate in the proceedings at issue.

As a result of this continued negative and partial treatment, after the District Court dismissed the Dondero Parties' appeal of the bankruptcy judge's initial order denying recusal, the Dondero Parties sought to supplement the record and to have the courts reconsider in light of the new evidence. To that end, the Dondero Parties moved to supplement their earlier recusal motion and requested a final, appealable order. ROA.6221–231. Highland informed the Dondero Parties that it was unopposed to the motion, but the bankruptcy judge nonetheless

denied the relief sought on procedural grounds. ROA. 14719–721. Instead, the judge invited the Dondero Parties to either: (1) file a "simple motion" (without attaching the additional evidence of bias) seeking removal of language from the prior recusal order that might have impeded appellate review, or (2) file a whole new motion to recuse—effectively requiring the Dondero Parties to start the process over from scratch—that appended the additional evidence of bias. *Id.* To ensure a clear and complete record, Appellants chose the second option. *See In re Highland Capital Mgmt., L.P.*, Case No. 19-cv-34054-sgj (Bankr. N.D. Tex.), Dkts. 3541, 3542.[6]

F. After Renewing Their Recusal Motion, the Dondero Parties Learn that Chief Judge Jernigan Had Published Two Novels that Further Warranted Her Recusal

After filing their renewed recusal motion, the Dondero Parties learned that Chief Judge Jernigan had published two novels espousing negative views of the particular industry in which Mr. Dondero operates. Specifically, the Dondero Parties learned that, while presiding over the

[6] The Dondero Parties initially filed their renewed motion to recuse in September 2022 (*see In re Highland Capital Mgmt., L.P.*, Case No. 19-cv-34054-sgj11 (Bankr. N.D. Tex.), Dkts. 3541, 3542), but then amended it in response to objections raised by Highland to certain factual allegations. ROA.2842–870. This brief discusses the amended version, which is the one the Bankruptcy Court and the District Court considered.

Acis and Highland bankruptcies, the bankruptcy judge had published two novels, *He Watches All My Paths* and *Hedging Death*, that contain derisive commentary about financial industry executives, the financial industry generally, and the financial instruments specifically at issue in Highland's bankruptcy. ROA.3207–11.

The first novel, *He Watches All My Paths*, was released on January 3, 2019, just weeks before the bankruptcy judge confirmed the bankruptcy plan for Acis, a company for which Mr. Dondero served as CEO and for which Highland provided management services. ROA.3208. The book's protagonist is a Dallas-based bankruptcy judge who describes the financial industry as being dominated by "[h]igh flying hedge fund managers" that "suck up money like an i-robot vacuum" and routinely display "outrageous amounts of hubris" as part of their "bro culture." *Id.*

The second novel, *Hedging Death*, was released in March 2022, less than a year after Highland's plan of reorganization became effective and while the bankruptcy proceedings were ongoing. *Id.* As with the first novel, the protagonist is a Dallas bankruptcy judge. But this story involves an even more striking resemblance to the facts surrounding Highland as it existed under Mr. Dondero's leadership:

- *Hedging Death* involves a Dallas-based investment firm, Ranger Capital, which is described as a "multi-billion-dollar conglomerate, which manage[s] not just hedge funds, but private equity funds, CDOs, CLOs, REITS, life settlement, and all manner of complicated financial products." ROA.3209; *Kirschner v. Dondero, et al.*, Case No. 3:21-03076-sgj (Bankr. N.D. Tex.), Dkt No. 310 at 16–17. By comparison, Highland is a Dallas-based investment firm formerly called Ranger Asset Management that the bankruptcy judge has described as a "multibillion-dollar" enterprise and that manages exactly the same unusual mix of investments. ROA.3209; *Kirschner v. Dondero, et al.*, Case No. 3:21--03076-sgj (Bankr. N.D. Tex.), Dkt No. 310 at 16–17; ROA.14280. Indeed, Highland launched one of the first ever CLOs and was the world's largest CLO manager for years.

- The novel describes "byzantine" international tax structures and off-shore transactions as pretexts for hiding illegal activity and money laundering. *Kirschner v. Dondero, et al.*, Case No. 3:21-03076-sgj (Bankr. N.D. Tex.), Dkt No. 310 at 18 (citing *Hedging Death* at 75, 127–28, 179 ("Graham had kept all this information secret with his byzantine web of offshore companies.")). By comparison, Highland and Mr. Dondero used international tax structures and off-shore transactions (customary in the finance industry), and the bankruptcy judge repeatedly expressed her suspicion of them (calling them "byzantine"). *See, e.g.*, ROA. 2924–925, at 86:16–87:15.

- The novel describes the life settlement industry as "creepy." ROA.32010. When she wrote the novel, the bankruptcy judge was well aware that Highland and Mr. Dondero invested in the life settlement industry.

Three days after Appellants filed their supplemental memorandum of law explaining why the criticisms lodged against the financial industry

in Chief Judge Jernigan's novels further merited recusal, the judge denied the renewed motion. ROA.44–79.

G. The Dondero Parties Seek Mandamus Relief, and the Bankruptcy Judge Continues to Act in a Manner that Appears Partial

The Dondero Parties promptly petitioned for mandamus in the United States District Court for the Northern District of Texas to address the bankruptcy judge's continued refusal to recuse herself. While the petition was pending, the bankruptcy judge continued to hear and rule on critical matters in a manner that has only underscored her partiality.

Perhaps the most egregious recent example of the judge's bias against the Dondero Parties is an order finding that Appellant NPRE (for which Mr. Dondero serves as President) pursued a proof of claim in "bad faith," notwithstanding that NPRE sought to withdraw the claim with prejudice many months before any hearing on Highland's objection to the claim. Dkt. 4041 at p. 1. The bankruptcy judge rejected NPRE's motion to withdraw the claim after a hearing in which counsel for Highland and the Judge insisted NPRE's agreement to withdraw the claim "with prejudice" was insufficient to ensure that NPRE would not pursue the claim in another forum (apparently in light of Mr. Dondero's inherent

untrustworthiness). *Id.* Thereafter, Highland insisted on proceeding to a full evidentiary hearing—a request the judge granted—even though NPRE wished to abandon the claim and curtail further expense. *Id.* at pp. 10–11. After that hearing that NPRE sought to avoid, on Highland's motion, the judge sanctioned NPRE $875,000 for its "bad faith" in filing and pursuing the claim, approximately $375,000 of which was incurred *after* the Bankruptcy Court refused to allow NPRE to withdraw the claim. Dkt. 4039. When NPRE moved for reconsideration of the sanctions order—pointing out that the order erroneously concluded that NPRE had refused to withdraw the proof of claim "with prejudice" (a conclusion that is soundly refuted by the hearing record)—the bankruptcy judge rationalized the ruling by insisting that HCRE refused a concession that it was never asked to make.[7] Dkt. 4069.

On March 8, 2024, the District Court denied the Dondero Parties' request for mandamus relief, affirming the recusal decision of the Bankruptcy Court. Despite the voluminous record supporting recusal, the District Court's order was a mere six pages long and contained little

[7] Along with this brief, Appellants are filing a motion for judicial notice, requesting that the Court take notice of this and other adjudicative facts not subject to reasonable dispute.

legal analysis. According to the District Court, the bankruptcy judge's comments, "when taken in context, provide no basis for reasonably questioning Judge Jernigan's impartiality or finding personal bias or prejudice." ROA.18888. The District Court did not discuss what context led it to that conclusion or even identify any particular comment made by the bankruptcy judge.

The District Court next asserted that the Dondero Parties' recusal motion "contains several misstatements or partial descriptions of events during the case, in several places, that create misimpressions." ROA.18889. But the order gives no examples or explanation.

Finally, the District Court concluded that the Dondero Parties' "allegations do not establish that Judge Jernigan's personal bias or prejudice for or against any party, or any other basis upon which Judge Jernigan's impartiality might reasonably be questioned." *Id.* The District Court did not explain why it found the Dondero Parties' allegations unpersuasive. And the only pieces of evidence the order mentions explicitly—despite the thousands of pages of evidence submitted in support of the mandamus petition—are Chief Judge Jernigan's novels. Even then, the District Court does not analyze the

similarities or language cited by the Dondero Parties in any detail. Instead, the District Court merely announced that "[t]he Court is not persuaded." *Id.*

SUMMARY OF THE ARGUMENT

Recognizing that impartial adjudication is critical to the integrity of the judiciary, Congress imposed a demanding, objective recusal standard: A judge *must* recuse herself whenever her "impartiality might reasonably be questioned." 28 U.S.C. § 455(a); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 850 (1998). Because the bankruptcy judge clearly failed to comply with that mandate and the resulting damage to the integrity of the proceedings demands correction now, the District Court's denial of mandamus relief was an abuse of discretion.

The bankruptcy judge's refusal to recuse herself was an abuse of discretion, and the question is not a close one. First, the judge erred by concluding that the motion to recuse was untimely, where the record demonstrated that the Dondero Parties promptly sought recusal once the judge's bias manifested itself and diligently have pursued recusal ever since that time. Second, the bankruptcy judge applied the wrong test for determining whether recusal was required. Instead of applying the

rigorous, objective standard mandated by Congress, the judge relied on her subjective denial of bias. Moreover, the judge failed to recognize that, even in the absence of actual bias, where, as here, a reasonable observer could question the judge's impartiality, recusal is required. Under the correct test, recusal was mandatory on this record: the bankruptcy judge came to the case with negative views about the Dondero Parties—views so strong that the judge singled Mr. Dondero out for sanctions from the very first hearing before her and consistently acted on those negative views rather than on the record or the parties' (or their counsel's) representations. Predisposed to see Mr. Dondero and his affiliates as villains, the bankruptcy judge has punished the Dondero Parties at every turn.

The District Court also abused its discretion in denying mandamus relief. The Court failed to grapple with the record and, as a result, failed to recognize the Dondero Parties' right to and need for immediate relief. That error infected the rest of the District Court's analysis; the Court gave no reason for denying relief other than its refrain that in its opinion (bereft of analysis) the bankruptcy judge was not biased. It is well established that denial of a request to recuse is amenable to mandamus

review; waiting for an ordinary appeal when a biased judge continues to preside over proceedings would be both inefficient and ineffective. And issuing a writ was warranted under the circumstances here. Allowing a judicial officer whose integrity is compromised to continue presiding over the case undermines the integrity of the judiciary and threatens to waste the parties' and the courts' resources on proceedings that ultimately will need to be revisited by an impartial judge. The time to intervene is now, not after more damage is done.

STANDARD OF REVIEW

Mandamus relief is available to obtain appellate review of bankruptcy court orders, including questions of recusal, that are otherwise non-appealable. *In re Lieb*, 915 F.2d 180, 186 (5th Cir. 1990) (citing *In re Barrier*, 776 F.2d 1298 (5th Cir. 1985) (per curiam)); *In re Cameron Int'l Corp.*, 393 Fed. App'x 133, 134–35 (5th Cir. 2010). "Interlocutory review of disqualification issues on petitions for mandamus is both necessary and appropriate to ensure that judges do not adjudicate cases that they have no statutory power to hear." *In re Sisneros*, 283 Fed. App'x 11, 12 (3d Cir. 2008) (citing *In re Sch. Asbestos Litig.*, 977 F.2d 764, 778 (3d Cir. 1992)).

This Court reviews the denial of mandamus for an abuse of discretion. *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380 (2004). Decisions about whether to recuse are also reviewed for an abuse of discretion. *Republic of Panama v. Am. Tobacco Co. Inc.*, 217 F.3d 343, 346 (5th Cir. 2000). A judge abuses her discretion when she denies recusal even though "a reasonable man, cognizant of the relevant circumstances surrounding a judge's failure to recuse, would harbor legitimate doubts about that judge's impartiality." *United States v. Bremers*, 195 F.3d 221, 226 (5th Cir. 1999).

ARGUMENT

A judge *must* recuse herself whenever her "impartiality might reasonably be questioned." 28 U.S.C. § 455(a). The judge's subjective belief of her impartiality is irrelevant, and proof of actual bias is unnecessary. *See Liljeberg*, 486 U.S. at 805; *Burke v. Regolado*, 935 F.3d 960, 1054 (10th Cir. 2019) (citations omitted).

This neutrality requirement helps guarantee that no person will be deprived of his interests without a proceeding in front of an impartial arbiter. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (internal citations omitted). "[F]undamental to the judiciary is the public's

confidence in the impartiality of [its] judges and the proceedings over which they preside," because "justice must satisfy the *appearance* of justice." *Id.* (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). As a result, this Court has held that "**if the question of whether § 455(a) requires disqualification is a close one, the balance tips in favor of recusal.**" *In re Chevron U.S.A., Inc.*, 121 F.3d 163, 165 (5th Cir. 1997) (emphasis added); *accord Lewis v. Curtis*, 671 F.2d 779, 789 (3d Cir. 1982) ("Impartiality and the appearance of impartiality are the sine qua non of the American legal system.").

Moreover, because the Due Process Clause entitles every litigant to a full and fair opportunity to make their case in an impartial forum—regardless of their history with that forum—the source of the judge's bias is not outcome determinative. *Marshall*, 446 U.S. at 242; *see also Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 877 (2009) ("It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process."); *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971) (per curiam) ("Trial before 'an unbiased judge' is essential to due process."); *Miller v. Sam Houston State Univ.*, 986 F.3d 880, 893 (5th Cir. 2021) (same). The Supreme Court has recognized that predispositions developed during

current or prior proceedings will support recusal under section 455(a) "if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 554-55 (1994).

The record evidence in this case was more than sufficient to establish that the bankruptcy judge harbors an actual and enduring bias and animus against the Dondero Parties that is "personal rather than judicial in nature." *Parrish v. Bd. of Comm'rs*, 524 F.2d 98, 100 (5th Cir. 1975). But even absent actual bias, the evidence establishes that any reasonable observer could "harbor doubts concerning [the judge's] impartiality" (*Patterson v. Mobil Oil Corp.*, 335 F.2d 476, 483–84 (5th Cir. 2003) (cleaned up)) and question whether she "'would have difficulty putting [her] previous views and findings aside.'" *U.S. v. Microsoft Corp.*, 56 F.3d 1448, 1465 (D.C. Cir. 1995) (quoting *U.S. v. Torkington*, 874 F.2d 1441, 1447 (11th Cir. 1989)). Allowing the bankruptcy judge to continue to preside over any proceeding involving the Dondero Parties would undermine public confidence in the judiciary. Under these circumstances, recusal is mandatory.

A. The Bankruptcy Judge's Refusal to Recuse Was a Clear Abuse of Discretion

The bankruptcy judge's order denying the renewed motion to recuse is riddled with legal error, necessitating mandamus relief.

1. The Bankruptcy Judge Erred in Denying Petitioners' Renewed Motion Pursuant to 28 U.S.C. § 455 as Untimely

The timeliness of a recusal motion is determined from the point in time that a judge's bias (or her appearance of bias) has manifested in the case (*i.e.*, after the grounds for recusal, beyond speculation, are actually known). *Davies v. C.I.R.*, 68 F.3d 1129, 1130–31 (9th Cir. 1995) (citing *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295 (9th Cir. 1992)). The timeliness of a recusal motion, therefore, depends on when the movant becomes aware of the judge's potential bias. *See I F G Port Holdings, L.L.C. v. Lake Charles Harbor & Terminal Dist.*, 82 F.4th 402, 419 (5th Cir. 2023) (no undue delay where judge and counsel were longstanding friends but movant was unaware of friendship until shortly before moving for recusal); *Hall v. Small Bus. Admin.*, 695 F.2d 175, 179 (5th Cir. 1983) (motion for recusal was not untimely where law clerk's employment offer from plaintiff's counsel was not disclosed until after trial). Motions to recuse are untimely only if the aggrieved party, for

tactical reasons, delayed seeking recusal despite knowing of disqualifying facts or raised the issue only in response to an unfavorable order. *See, e.g.*, *United States v. Sanford*, 157 F.3d 987, 989 (5th Cir. 1998) (denying motion to recuse as untimely because basis for recusal was known, and defendant did not move to recuse the district court and raised issue for the first time on appeal); *Hill v. Schilling*, 495 Fed. App'x 480, 483 (5th Cir. 2012) (denying recusal motion as untimely because movant knew judge's spouse had an economic interest in one of the parties but did not move to recuse until after judge issued adverse judgment at trial); *Davies*, 68 F.3d at 1130–31 (recusal motion untimely where movants knew judge represented the IRS and did not object until after judgment was issued against them); *Delesdernier v. Porterie*, 666 F.2d 116, 123–24 (5th Cir. 1975) (a "motion raised for the first time on appeal, and after two full trials on the merits" was untimely).

Here, the Dondero Parties sought to recuse the bankruptcy judge based on an evolving pattern of conduct by the judge that, when viewed as a whole, revealed both the appearance of bias and actual animus towards them. Importantly, that bias and animus did not clearly manifest itself until late 2020 and early 2021. The Dondero Parties

indisputably filed their original recusal motion within a reasonable time thereafter (*i.e.*, March 18, 2021). As a result, there is no timeliness issue. Neither the 15 months that passed after the Highland bankruptcy was transferred nor the timing of the various recusal motions (or Judge Jernigan's stated suspicions regarding the Appellants' motivation for seeking recusal (ROA. 3599)) are relevant. Judge Jernigan's ruling to the contrary is wrong.

2. The Bankruptcy Judge Erred in Relying on Her Subjective Denials of Actual Bias

While referencing the proper objective standard, Chief Judge Jernigan denied the renewed recusal motion by applying a subjective standard: "[t]he Presiding Judge does not believe she harbors, or has shown, any personal bias or prejudice against the Petitioners. She does not believe she has displayed deep-seated favoritism or antagonism." ROA.60. A judge's subjective belief of her impartiality is no excuse for failing to recuse, *Burke*, 935 F.3d at 1054, and it is not necessary that the judge actually is biased (an appearance of bias is all that is required) or even knows of grounds requiring recusal. *Liljeberg*, 486 U.S. at 805. The bankruptcy judge erred by relying on her own subjective beliefs regarding

her bias to deny the Dondero Parties' motion while giving short shrift to Section 455(a)'s objective standard.

3. The Bankruptcy Judge Abused Her Discretion in Refusing to Recuse Herself Based on the Evidence Presented

On the record presented, the bankruptcy judge also erred in denying the renewed recusal motion where the evidence could and would lead any reasonable observer to question the judge's impartiality. Because the inquiry under Section 455 is "'extremely fact intensive and fact bound," it typically involves "a close recitation of the factual basis for the [party's] recusal motion is necessary." *Republic of Panama*, 217 F.3d at 346. Yet in denying recusal, the judge selectively addressed only a few of the identified bases for recusal (using a flawed or disingenuous analysis) and ignored or misapplied the federal law regarding recusal. And by avoiding most of the grounds for recusal, the bankruptcy judge's order becomes yet another example of her predisposition to rule against the Dondero Parties without due consideration of the evidence before the court and without objective analysis.

a. The Judge's Attempt to Distance Herself from the Opinions She Admittedly Formed During the Acis Bankruptcy Is Not Credible.

In her second recusal order, the bankruptcy judge initially addressed the Dondero Parties' contention that she formed negative views of Mr. Dondero during the Acis bankruptcy proceedings. The judge's general response was that she did not recall anything specific from the Acis bankruptcy that would have infected her decision-making in the Highland case. ROA.57–60. The record squarely refutes this denial. Indeed, even before Mr. Dondero had testified or taken positions in the Highland bankruptcy, the bankruptcy judge conceded that she formed negative opinions about him in the Acis case that were inextricably planted in her mind ("it's in my brain"). ROA.2891–892, at 78:22–79:13. The judge also openly questioned Mr. Dondero's credibility, sarcastically stating, "[i]f you can trust Mr. Dondero . . . ." ROA.2902–903, at 174:22–175:1. Where did these negative opinions come from if not from the judge's experiences in the Acis bankruptcy? There is no other viable explanation; the Dondero Parties had not yet done anything in the bankruptcy case. Moreover, the judge's recusal order fails to

confront the numerous other negative statements the judge made about Mr. Dondero before he had ever filed anything in the case.

b. The Judge Failed to Address Most of The Allegations of Bias and Judicial Misconduct Stemming from Her Novels.

As the Dondero Parties explained in their recusal motion, Chief Judge Jernigan's two novels—written while she was presiding over the Acis and Highland bankruptcies—create a reasonable perception that she holds negative views about hedge fund managers like Mr. Dondero and the industry in which he operates. In her order denying recusal, the judge acknowledged that she learned about the CLO industry and the CLO products that are featured in her novels during the Acis bankruptcy. ROA.58.

The bankruptcy judge then denied that any characters or entities in her novels were "inspired by or modeled after the [Petitioners];" disclaimed any resemblance her novels have "to actual events, locales, or persons, living or dead, [a]s entirely coincidental;" and focused on aspects of her stories that differ from reality. ROA.77–79. But the judge avoided discussing the important similarities between her novel *Hedging Death* and Highland. For example:

Book	**Source**
Hedging Death involves a Dallas-based hedge fund, Ranger Capital, which is described as a "multi-billion-dollar conglomerate, which manage[s] not just hedge funds, but private equity funds, CDOs, CLOs, REITS, life settlement, and all manner of complicated financial products." *Hedging Death* at 10–11, 73, 99, 244.	Highland: (1) is a Dallas-based investment fund; (2) was formerly named Ranger Asset Management; (3) has been described by the Judge as a "multibillion-dollar global investment adviser;" and (3) manages exactly the same unusual mix of investments. Indeed, Highland launched one of the first ever CLOs and was the world's largest CLO manager for years.[8]
The novel describes "byzantine" international tax structures and off-shore transactions as pretexts for hiding illegal activity and money laundering. *Hedging Death* at 75, 127–28, 179 ("Graham had kept all this information secret with his byzantine web of offshore companies.").	Highland and Mr. Dondero used international tax structures and off-shore transactions (customary in the finance industry), and Judge Jernigan repeatedly expressed her suspicion of them (calling them "byzantine"). *See, e.g.*, ROA.2924–925, at 86:16–87:15; *see also* ROA.14281–282 at ¶6.
The novel describes the life settlement industry as "creepy." *Hedging Death* at 71. *Kirschner v. Dondero, et al.*, Case No. 3:21-03076-sgj (Bankr. N.D. Tex.), Dkt No. 310 at 17; ROA.3209–210.	When she wrote the novel, Judge Jernigan was well aware that Highland and Mr. Dondero invested in the life settlement industry.

[8] The recusal order acknowledges that the bankruptcy judge learned about CLOs from her experience in the Acis bankruptcy. ROA.58.

These are just a few of the parallels between Chief Judge Jernigan's books and Highland, but the only one that the order even attempts to address is the books' use of the name Ranger Capital. To that end, the judge claimed that she had never heard that Highland's original name was Ranger and that the name never appeared in the record before her. ROA.77. The name did appear in a 2018 filing in the Acis bankruptcy. ROA.3410. But more importantly, the judge's recusal order did not deny that Ranger Capital is based upon Highland, offered no alternative "inspiration" for the "Ranger" name, and failed to deny that the unscrupulous depiction of investment fund managers contained in her novels reflects her own views.

At the very least, a reasonable observer could conclude that: (1) certain elements of the judge's second novel, *Hedging Death*, appear patterned, at least in part, after Highland; and (2) the judge holds negative opinions about hedge-fund managers and the investment industry in which Highland and Mr. Dondero historically have operated. At the very least, the parallels between the investment firm in the bankruptcy judge's novels and Highland and the judge's repeated criticisms of the financial services industry at issue could cause observers

to reasonably question the judge's impartiality. These circumstances require recusal. *See, e.g.*, *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 97–98 (3d Cir. 1992) (recusal appropriate "to preserve justice and the appearance of impartiality" where judge criticized tobacco industry).

c. The Judge's Explanations about Why She Sought an Investigation of Possible PPP Loans Taken by Appellants Are Inaccurate and Irrelevant.

Next, the bankruptcy judge defended the inquiries she made during a July 2020 hearing regarding PPP loans that "Mr. Dondero or affiliates" supposedly received as simple curiosity and insisted that her questions did not matter because no action was taken against Mr. Dondero or the Dondero Parties. ROA.70–71. These justifications are inaccurate and irrelevant. First, this was not idle curiosity. After seeing an extrajudicial article that, according to the bankruptcy judge, referenced "Mr. Dondero or Highland affiliates" receiving PPP loans, the judge: (1) insinuated that Mr. Dondero had engaged in improper activity; (2) stated that "you can probably imagine the different things going through my brain;" and (3) *sua sponte* directed Highland's counsel to investigate and report who was behind the alleged loans, even if any such loans were made to a non-debtor entity affiliated with Mr. Dondero and had no impact on the

bankruptcy proceedings. ROA.2932, at 43:13–25. Second, the point is not whether action was taken but that the bankruptcy judge read an article outside the record, assumed from that article (rather than evidence presented in court) that Mr. Dondero had engaged in nefarious conduct, demanded information regarding that conduct, and broadcast her distrust of Mr. Dondero. That appearance of partiality alone should have required recusal, regardless of whether the particular manifestation of bias also caused direct harm.

d. The Record Belies the Judge's Denials of Her Use of Terms "Litigious" or "Vexatious" When Describing Appellants.

In her order, the bankruptcy judge also denied ever "find[ing] or conclud[ing] that Petitioners are 'vexatious litigants'" and claimed that she merely "determined that Mr. Dondero's litigation history supported the inclusion of a gatekeeper provision in the Plan." ROA.75. But this Court has previously concluded that the Bankruptcy Court found the Dondero Parties to be vexatious. Indeed, the Court struck a portion of the gatekeeper provision in Highland's plan of reorganization because the Court found that the provision improperly attempted to enjoin and impose sanctions on the Dondero Parties without following proper

procedures to designate them vexatious litigants. *In re Highland Capital Mgmt., L.P.*, 48 F.4th 419, 438 n. 19 (5th Cir. 2022). Moreover, Judge Jernigan has repeatedly described the Dondero Parties as "litigious" and "vexatious" on the record to justify her orders and actions against those parties. *See, e.g.*, ROA.14282 at ¶ 7 (explaining the court could not "help but wonder" whether Highland's business operations were necessitated by its "culture of litigation"); ROA.14282–283 at ¶ 8, ROA.1077 at 9:17–20 (describing Mr. Dondero as a "serial litigator"); ROA.2952 at 51:13–16 (describing actions by Mr. Dondero as "transparently vexatious").

e. The Judge's Orders Requiring Mr. Dondero's (and His Sister's) Attendance at Bankruptcy Court Hearings.

The bankruptcy judge also took issue with what the recusal order described as the Dondero Parties' "disturbing" allegations that the judge ordered Nancy Dondero to "appear at all hearings 'regardless of whether [her] presence [was] needed.'" ROA.21. The judge denied that was the case. ROA.20. This is untrue. The judge expressly ordered the trustee of Dugaboy to "appear in [1] all future hearings in this Bankruptcy Case, as well as [2] all Adversary proceedings where either the Trusts are a party or take a position, unless otherwise ordered by the court."

ROA.14260. And prior to issuing the order, the judge was well aware that Nancy Dondero was the Dugaboy trustee, having expressly acknowledged that at a prior hearing. *See* ROA.11516–17, at 54:17–55:12 (naming "the trustee, Nancy Dondero" as the likely representative of Dugaboy whose presence would be required at future hearings and acknowledging that Ms. Dondero was probably related to Mr. Dondero).[9] In any event, the point is not whether the bankruptcy judge knew that she was ordering Mr. Dondero's sister to appear at subsequent hearings; the point is that the judge repeatedly and *sua sponte* singled out the Dondero Parties, including Dugaboy, for disparate and punitive treatment, which reasonably calls into question the judge's impartiality.

Moreover, the judge's order relating to Mr. Dondero is even more derogatory and adversarial. At a hearing in a bankruptcy-related adversary proceeding, the judge initially ordered Mr. Dondero to appear at all future hearings (whether or not he was involved in the issue to be heard or taking a position), suggesting his presence was necessary

[9] If there were any doubt in the bankruptcy judge's mind about the relationship between Nancy Dondero and Mr. Dondero (or that Ms. Dondero was the trustee of Dugaboy), that mystery was resolved minutes later. Highland's counsel read extensive testimony from Ms. Dondero into the record and expressly identified her as Mr. Dondero's sister and "the trustee of Dugaboy"). ROA.11536–539.

because he could not be "trust[ed]" to "keep[s] his word." *See* ROA.2902–903, at 174:11–175:13. When Mr. Dondero later failed to personally appear at a routine discovery hearing in the main bankruptcy case where he was represented by multiple outside counsel, the judge expanded the scope of her order to require his presence at *all* bankruptcy hearings (again, regardless of whether his presence was necessary). His counsel represented on the record that Mr. Dondero's non-attendance was counsel's error, both because counsel failed to coordinate with Mr. Dondero in advance of the hearing and because counsel did not realize that his presence was required at hearings outside of the adversary proceeding in which the bankruptcy judge previously ordered his attendance. *See* ROA.11804, at 17:20–23; *see also* ROA.11806–807, at 19:18–20:2. Nonetheless, the judge found a way to blame Mr. Dondero for the issue and promptly broadened the scope of her prior order. ROA.11807–808, at 20:19–21:14.

B. The District Court Abused its Discretion in Denying the Dondero Parties' Mandamus Petition

As the Supreme Court of the United States has held, the three-part test for determining whether a writ of mandamus is appropriate is demanding but "not insuperable." *Cheney*, 542 U.S. at 380–81. "First,

the party seeking issuance of the writ must have no other adequate means to attain the relief he desires." *Id.* (internal quotations omitted). "Second, the petitioner must satisfy the burden of showing that his right to issuance of the writ is clear and undisputable." *Id.* at 381 (internal quotations omitted). Third, "the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Id.*

The Dondero Parties met all three elements. The District Court reached its contrary conclusion by failing to properly analyze the record and misapplying the law as to both mandamus relief and the underlying § 455 question. In doing so, the Court committed reversible error.

1. The Dondero Parties Have No Other Adequate Means for Relief

The first requirement of the test for mandamus relief asks a reviewing court to analyze whether the lower court's error is "irremediable on ordinary appeal." *In re A&D Ints., Inc.*, 33 F.4th 254, 256 (5th Cir. 2022). This requirement is satisfied when "[t]he usual appeals process does not provide an effective way to review" the lower court's decision. *In re Lloyd's Reg. N. Am., Inc.*, 780 F.3d 283, 288 (5th Cir. 2015).

Therefore, "a petition for writ of mandamus is an appropriate legal vehicle for challenging the denial of a disqualification motion." *In re Chevron*, 121 F.3d at 165; *see also In re Faulkner*, 856 F.2d 716, 721 (5th Cir. 1988) (granting petition for writ of mandamus directing trial court judge to recuse himself); *In re Kensington Int'l Ltd.*, 353 F.3d 211, 219 (3d Cir. 2003) (mandamus was proper means to review "judge's refusal to recuse from a case"); *Bell v. Chandler*, 569 F.2d 556, 559 (10th Cir. 1978) ("There is no question but that a mandamus petition may be used to force the disqualification of a district court judge.").

The settled practice of reviewing the refusal to recuse through the mandamus power makes sense because "ordinary appellate review following a final judgment is insufficient to cure the existence of actual or apparent bias." *In re Mohammad*, 866 F.3d 473, 475 (D.C. Cir. 2017); *see also In re Faulkner*, 856 F.2d at 721 (granting mandamus petition directing trial judge to recuse); *Bell*, 569 F.2d at 559. Though appellate "review after final judgment can (at a cost) cure the harm to a litigant, it cannot cure the additional, separable harm to public confidence that section 455 is designed to prevent." *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 163 (3d Cir. 1993). Indeed, "[t]here are obvious

difficulties . . . with the remedy of appeal after final judgment." CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3553 (3d ed.). Appellate review is an inadequate remedy because "[i]t comes after the trial and if prejudice exists it has worked its evil and a judgment of it in a reviewing tribunal is precarious." *Id.* (quoting *Berger v. U.S.*, 255 U.S. 22, 36 (1921)).

In its order denying the mandamus petition, the District Court did not address the well-settled law finding that mandamus relief is warranted in the recusal context, nor did it address the Dondero Parties' argument about why an ordinary appeal will not suffice. Instead, the Court merely concluded that mandamus is not an available vehicle here because it thought the Dondero Parties should lose on the merits—which goes to the second prong, not the first. ROA.18888. That is irreconcilable with this Court's precedent holding that mandamus is the appropriate vehicle for addressing a judge's refusal to recuse. *In re Chevron*, 121 F.3d at 165.

2. The District Court Failed to Properly Analyze or Apply the Federal Recusal Statute and Therefore Failed to Recognize the Dondero Parties' Clear Right to Mandamus Relief

The District Court's order recognizes the federal statute governing recusal, but the Court gets the relevant inquiry wrong, leading the Court to err in concluding that recusal was not merited. Under 28 U.S.C. § 455, recusal is *mandatory* whenever: (1) a judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;" *or* (2) the judge's "impartiality might reasonably be questioned." 28 U.S.C. § 455 (emphasis added); *Liljeberg*, 486 U.S. at 850. Recusal is likewise warranted when a judge violates the Code of Conduct for United States Judges. *Hall*, 695 F.2d at 178 (explaining the Code of Conduct "was converted into mandate" upon enactment of 28 U.S.C. § 455).[10]

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[10] It is well-accepted that "[a] judge may not write about or discuss a pending or impending case, or disclose nonpublic information, even in a work of fiction." *See* American Bar Ass'n Model Code of Judicial Conduct, Rules 2.10, 3.5. Indeed, the Code of Conduct for United States Judges requires judges to abide by various canons in the execution of their judicial duties. Code of Conduct for United States Judges, available at: https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf. Of particular relevance here, Canon 2 requires a judge to avoid impropriety and the appearance of impropriety in all activities. *Id.* (explaining that Canon 2A "applies to both professional and personal conduct"). Canon 4 prescribes that a judge may engage in extrajudicial activities only if those

First, the District Court incorrectly interpreted § 455 as *requiring* an extrajudicial source of bias. ROA.18888–889. In doing so, the Court relied on this Court's opinion in *Andrade v. Chojnacki*, 338 F.3d 448, 455 (5th Cir. 2003). *See* ROA.18888. But *Andrade* does not hold that bias *must* come from an extrajudicial source, only that the source of bias is relevant to the recusal inquiry. *Andrade*, 338 F.3d at 455–56. Further, in discussing the importance of an extrajudicial source, this Court in *Andrade* relied on language from the Supreme Court's opinion in *Liteky*. *See id.* at 455. The language of *Liteky* likewise makes plain that an extrajudicial source of bias is not a prerequisite to a finding of judicial bias: "The fact that an opinion held by a judge derives from a source outside judicial proceedings is not a *necessary* condition for 'bias or prejudice' recusal." *Liteky*, 510 U.S. at 554 (emphasis in original). Indeed, as this Court has previously recognized, *Liteky* expressly "held that the extrajudicial nature of a judge's opinion is a factor to consider in

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activities are consistent with the obligations of judicial office. *Id.* In this regard, a judge should (1) avoid using information regarding the judicial office in advertising materials, (2) avoid conducting a book signing or discussion directed to attorneys or other members of the legal community, and (3) refrain from engaging in promotional activities relating to any private publication. *See, e.g.*, Guide to Judiciary Policy, Vol. 2, Part B, § 220, Nos. 55, 112, 114, available at https://www.uscourts.gov/sites/default/files/vol02b-ch02.pdf.

analyzing whether recusal is necessary; however, it is not determinative." *United States v. Mizell*, 88 F.3d 288, 299 (5th Cir. 1996) (finding no bias where asserted grounds for recusal "consist[ed] of judicial rulings which the district judge was *required* to make"). Moreover, a judge's predispositions developed during the course of current or prior proceedings will support recusal under section 455(a) "if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Liteky*, 510 U.S. at 554–55; *see also Marshall*, 446 U.S. at 242. In other words, a judge's bias does not have to come solely from an "extrajudicial source."

Either way, the bankruptcy judge's conduct in the Highland bankruptcy meets the standards of § 455(a). The judge admitted on the record to forming negative views about Mr. Dondero prior to the very first hearing before her, and those views manifested as the case proceeded through a pattern of comments, punitive treatment, and rulings that can only be described as targeting the Dondero Parties. *See supra*, at pp.6–7. The judge's "high degree of antagonism" toward the Dondero Parties has made fair process impossible. Moreover, the judge has relied on an extrajudicial source of information—namely, a news article describing

Mr. Dondero's potential use of PPP loans—as a basis to question the conduct of Mr. Dondero and his affiliates outside of the courtroom and to demand an investigation of that conduct. *See supra*, at p. 8. That alone merits recusal.

Next, the District Court concluded that the Dondero Parties failed to "place the contested rulings and statements in the appropriate context." ROA.18889. That conclusion is mystifying. In reaching the conclusion, the District Court appears to have relied on the bankruptcy judge's unsupported statement that the Dondero Parties' recusal motion "contains several misstatements or partial descriptions of events during the case, in several places, that create misimpressions." ROA.61. But neither the bankruptcy judge's recusal order nor the District Court's order denying mandamus relief explains this statement or provides examples of "misstatements" or "partial descriptions." And as set forth above, it is the bankruptcy judge's recusal order that contains misstatements of record or fails to address the various grounds raised in the Dondero Parties' recusal motion supporting the relief sought. *See supra*, at pp. 23–24. Further, even a cursory review of the Dondero Parties' repeated recusal briefing reveals that they have gone out of their

way to put the circumstances of the judge's comments and decisions into context. Admittedly, it is difficult to marshal all the evidence of bias in a record the size of the one in the Highland bankruptcy. But the Dondero Parties have done their level best by providing—and contextualizing—examples that demonstrate a consistent pattern and practice of unwarranted negative treatment by the judge that should cause any reasonable observer to question the judge's impartiality. Nothing more is required.

Finally, although the District Court concluded that the Dondero Parties failed to demonstrate "any action or statement revealing a sufficient degree of antagonism" meriting recusal, the recusal record (when analyzed in light of the law that the District Court should have applied) belies that conclusion.

Federal courts have held that numerous circumstances applicable in this case support recusal, including where:

(1) There was "immediate, continuing, and ever-increasing tension" between the judge and one party's counsel, the judge questioned in open court "the conduct of the lawyers" for one party, and the judge questioned one party's "good faith. *Johnson v. Sawyer*, 120 F.3d 1307, 1334–37 (5th Cir. 1997).

(2) The judge made antagonistic statements to plaintiffs and manifested an "apparent distrust" of plaintiffs "early in the

litigation." *Sentis Group, Inc. v. Shell Oil Co.*, 559 F.3d 888, 904–05 (8th Cir. 2009).

(3) The judge "suggested that th[e] case was an embarrassment to the justice system and an inefficient allocation of taxpayer resources." *In re U.S.*, 572 F.3d 301, 311–12 (7th Cir. 2009).

(4) The judge openly questioned the integrity of one party's counsel, suggested he was proceeding in "bad faith," and called certain decisions made by him "suspicious." *U.S. v. Kennedy*, 682 F.3d 244, 258–60 (3d Cir. 2012).

(5) The judge's comments "evidenced his distrust of [one party's] lawyers and his generally poor view of [one party's] practices." *Microsoft Corp.*, 56 F.3d at 1465.

The bankruptcy judge has engaged in all of these behaviors in this case. Specifically, the judge made antagonistic statements about Mr. Dondero right out of the gate, manifesting an apparent distrust of him early in the litigation. *See, e.g.*, ROA.2891–892, at 78:23–79:16; *see also* ROA.2902–903, at 174:11–175:13. In addition, the judge has repeatedly questioned the Dondero Parties' motivations for pursuing various courses of action and made comments that were critical of the parties' positions. ROA. 2891–892, at 78:23–79:16; *see also* ROA.2902–903, at 174:11–175:13, and ROA.14291–292 (suggesting the order was necessary because Mr. Dondero could not be "trusted" to "keep his word"). The judge likewise has repeatedly questioned the Dondero Parties' use of the judicial system, suggested that they were deliberately bogging down

proceedings, and ordered them to prove that they had a right to take positions in the case. ROA.3921–933. The judge has also repeatedly suggested that they or their counsel were proceeding in "bad faith," called their actions "frivolous," and even sanctioned (or threatened to sanction) counsel unnecessarily. ROA.21, 27, 79, 2975 at 63:14–25, 2920 at 82:3–11, 2923 at 85:4–22, 2981–2984 119:6–122:25, 2990–991 at 251:24–252:5, and 14291–292. Indeed, the bankruptcy judge's comments and tone have consistently "evidenced h[er] distrust of [one party's] lawyers and [her] generally poor view of [one party's] practices." *Microsoft Corp.*, 56 F.3d at 1465. Finally, Chief Judge Jernigan wrote and published two novels espousing highly negative views of the specific industry in which Mr. Dondero and Highland operate, admittedly learned about some of the financial products mentioned in her books from the Highland proceedings, called products offered by Highland "creepy" and "immoral," and generally appears to have drawn inspiration for the books from the Acis and Highland cases before her. In summary, on this record, recusal is not even a close question. A reasonable observer could and should question the bankruptcy judge's impartiality, which mandated recusal and should have prompted immediate mandamus relief.

3. The District Court Erroneously Concluded that a Writ of Mandamus Is Not Appropriate in the Circumstances of this Case

The District Court also erred in applying the third prong of the mandamus test—"whether the writ is appropriate under the circumstances." *Cheney*, 542 U.S. at 381. In analyzing this third element, the federal courts look to whether "the issues implicated have importance beyond the immediate case." *In re A&D Ints., Inc.*, 33 F.4th at 256 (internal quotations omitted). Though recusal requires a fact-specific inquiry, *I F G Port Holdings, L.L.C.*, 82 F.4th at 418–19, it necessarily involves the integrity of the judicial system and the public's perception of judges, which has importance beyond any one case. *See In re Faulkner*, 856 F.2d at 721. As this Court held in *In re Faulkner*, judges must "avoid[] even the appearance of impropriety whenever possible" because "[p]eople who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges." 856 F.2d at 721 (quoting *Liljeberg*, 486 U.S. at 865); *see also Matter of Cont'l Airlines*, 981 F.2d 1450, 1463 (5th Cir. 1993) ("[W]e are concerned with . . . maintaining the public's confidence and trust that should a violation of § 455(a) occur, the welfare of the parties will take

priority over convenience or ease of disposing of the parties' claims."); *Liljeberg*, 486 U.S. at 865.[11]

Rather than analyze this law or the broader issues implicated by the bankruptcy judge's refusal to recuse, the District Court said only that mandamus relief is not appropriate because the Court concluded at the second, merits prong that the bankruptcy judge was not biased. Had the Court appropriately considered the third prong of the Supreme Court's test for mandamus relief as well as this Court's precedent regarding recusal, it should easily have concluded that the circumstances of this case warrant recusal. Chief Judge Jernigan published two novels criticizing the financial services industry and financial services executives at a time when she was presiding over the bankruptcies of Acis and Highland—two financial services firms whose executives have played major roles in the bankruptcy process. It is not a stretch to assume that these novels—and the treatment of the Dondero Parties in her courtroom—could signal to the public that the bankruptcy judge

[11] The third prong of the test is particularly relevant in light of recent allegations of impropriety by other sitting bankruptcy judges in Texas, causing investigations and re-opening of cases dating back years. *See* Sujeet Indap, "The downfall of the judge who dominated bankruptcy in America," FINANCIAL TIMES (Nov. 21, 2023), https://www.ft.com/content/574f0940-d82e-4e4a-98bd-271058cce434. This is not a time to allow the appearance of judicial bias to continue unchecked.

cannot impartially preside over bankruptcies involving at least the Dondero Parties, and perhaps also these types of financial institutions. Accordingly, assuming that the first two prongs are satisfied, so is the third—there is no reason to decline to issue the writ here, and the District Court did not give one. The District Court's conclusion to the contrary was error.

* * *

The Dondero Parties have been seeking the bankruptcy judge's recusal for more than three years. In that time, the judge has repeatedly criticized the Dondero Parties and their lawyers, questioned their integrity, made false accusations against them, issued *sua sponte* rulings designed to punish and harm them, sanctioned them inappropriately, and refused them even reasonable relief when the circumstances and evidence warranted it. If due process and the sanctity of the judiciary is to be respected, then the bankruptcy judge needs to be recused immediately.

CONCLUSION

The Court should reverse the denial of mandamus relief and remand with instructions to issue the writ.

Respectfully Submitted,

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Dated June 17, 2024

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CERTIFICATE OF SERVICE

This is to certify that this brief was served this day on all parties who receive notification through the Court's electronic filing systems.

Dated June 17, 2024

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