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415.263.7000Lyle W. Cayce, Clerk
United States Court of Appeals
for the Fifth CircuitRe: ***In re Highland Capital Management Fund Advisors,
L.P., et al v. Highland Capital Management, L.P. (In
re Highland Capital Management, L.P.), Case 23-
10534.***

Dear Mr. Cayce:

Under FRAP 28(j), we bring to the Court's attention the Supreme Court's denial of certiorari in *In re Highland Capital Management*, 48 F.4th 419 (5th Cir. 2022) (Confirmation Appeal). Both Highland (No. 22-631) and NexPoint (No. 22-669) sought certiorari. The Supreme Court invited the Solicitor General to express the views of the United States. The Solicitor General filed a brief¹ and advised the Court to "hold the petitions for writs of certiorari in this case pending disposition of *Harrington v. Purdue Pharma L.P.*, ... (No. 23-124), and then dispose of the petitions as appropriate in light of the Court's disposition in that case."

The Supreme Court decided *Purdue* on June 27.² Both parties filed supplemental briefs in the Supreme Court. Today, the Court denied both petitions.

This Court's judgment in the Confirmation Appeal is now final, *res judicata*, and law of the case.

Here, the sole issue properly before the Court is the *interpretation* of this Court's opinion in the Confirmation Appeal insofar as it bears on the gatekeeper—not the exculpation—provision. Appellants nevertheless have tried to get this Court to revisit, not just

¹ https://www.supremecourt.gov/DocketPDF/22/22-631/285584/20231019172359327_22-631%20and%2022-669%20U.S.%20Br.pdf

² https://www.supremecourt.gov/opinions/23pdf/23-124new_nkp1.pdf.





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interpret, that opinion. *See, e.g.*, Docket No. 32 at 13-14, 27-31; Docket No. 40 at 1-4. Today's denial of certiorari makes that suggestion especially inappropriate.

If this Court—notwithstanding the cert. denial—considers the effect of *Purdue* on this appeal, two points are fundamental. *First*, the rationale of *Purdue* does not extend beyond third-party releases of the sort at issue in that case. That case involved a release from tort liability for pre-petition conduct. Its core rationale, stated at the beginning of the opinion, is that the released parties must enter bankruptcy themselves to get a discharge available only in bankruptcy. *Highland*, by contrast, is about post-petition conduct by persons appointed by the bankruptcy court as estate fiduciaries to facilitate the reorganization. *Second*, and as has been briefed extensively, gatekeeper provisions protecting post-petition fiduciaries whose conduct materially contributed to the resolution of the bankruptcy are justified under the *Barton* doctrine and other sources of law. *Purdue* has no bearing on gatekeeper provisions.

Sincerely,

/s/ Jeffrey N. Pomerantz

Jeffrey N. Pomerantz

cc: All Parties (via ECF)