No. 24-10880

In the United States Court of Appeals for the Fifth Circuit

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 District Court
for the Northern District of Texas, Dallas Division
Case No. 3:23-CV-1503

APPELLANTS' OPENING BRIEF

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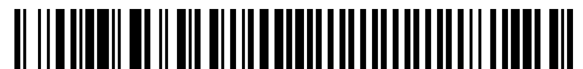
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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Appellants request oral argument as they believe it will significantly aid the decisional process in this case. There are strong grounds for reversing the judgment below, and the questions presented are likely to arise in future cases.

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JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction under 28 U.S.C. § 158(a)(1) because it has jurisdiction to hear appeals from final judgments, orders, and decrees of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under 28 U.S.C. § 157. This Court has subject-matter jurisdiction under 28 U.S.C. § 158(d)(1) because it has jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under 28 U.S.C. § 158(a).

The district court entered final judgment on September 10, 2024. ROA.8086. Appellants timely filed a notice of appeal on September 20, 2024. ROA.8087-8088.

STATEMENT OF THE ISSUES

1. To state a claim for relief, a party must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Appellants' complaint alleges that their fiduciary, registered investment advisor, and attorney-in-fact engaged in a self-dealing transaction, disguised the transaction's profitability with misrepresentations, and failed to disclose material facts within its knowledge. Have Appellants stated a claim?

2. Judicial estoppel prevents a party from "obtaining unfair advantage" by means of "intentional self-contradiction" in a judicial forum. *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 206 (5th Cir. 1999). Here, Appellants withdrew an objection to a settlement under bankruptcy-court review, only to learn afterwards that their investment advisor had misrepresented the value of assets exchanged in the settlement. Are Appellants judicially estopped from bringing claims related to the withdrawn objection?

STATEMENT OF THE CASE

A. The Advisory Relationship

Plaintiff/Appellant The Charitable DAF Fund, L.P. (the "DAF") and its wholly owned subsidiary, Plaintiff/Appellant CLO Holdco, Ltd ("Holdco," and collectively, "Appellants"), hold and manage charitable funds and support various humanitarian organizations in the United States. ROA.282-283. Defendant/Appellee Highland Capital Management, L.P. ("Highland") served as "Registered Investment Advisor[]" to the DAF. ROA.281.

Two agreements evidenced this fiduciary relationship. The first was an auto-renewing contract in effect from July 2014 through mid-February 2021, between the DAF and Highland. *See* ROA.290; *see also* ROA.6023-6044 (advisory agreement between the DAF and Highland). Thereunder, the DAF appointed Highland as its attorney-in-fact for a myriad of purposes, including "purchas[ing] and otherwise trad[ing] in Financial Instruments." ROA.290. The agreement to provide sound investment advice and management functions to the DAF also encompassed a duty to Holdco, the DAF's wholly owned subsidiary through which the DAF conducted business. *Id.*

The second agreement evidencing Highland's fiduciary status was its investment advisory agreement[1] with Highland CLO Funding Ltd. ("HCLOF"), ROA.5084-5085, a Guernsey pass-through investment fund in which Holdco was an investor, ROA.6023-6044. This agreement created an investment advisory relationship between Highland and the investors in HCLOF, including Holdco, because HCLOF is a "pooled investment vehicle" under 17 C.F.R. § 275.206(4)-8 ("Rule 206(4)-8").[2] Thus, Highland owed fiduciary duties directly to Appellants. ROA.289; *see also* ROA.4903 (testimony of Highland CEO James P. Seery admitting fiduciary relationship with investors in funds Highland manages). And this fiduciary relationship was "predicated on trust and confidence." ROA.291.

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[1] Highland performed under the agreement through its wholly owned subsidiary, Highland HCF Advisor, Ltd. ROA.281.

[2] Because HCLOF would have to register under the Investment Company Act of 1940 but for the exceptions identified in Rule 206(4)-8, it is a "pooled investment vehicle." The exceptions identified in Rule 206(4)-8 are for investment companies that do not publicly offer their shares and have fewer than 100 investors. *See Nat'l Ass'n of Priv. Fund Managers v. SEC*, 103 F.4th 1097, 1102 (5th Cir. 2024). HCLOF qualifies for such an exception. *See* ROA.4914-4915 (Recital B and § 2.2 of the HCLOF Members Agreement); ROA.4991-4994, 5003-5004 (Offering Memorandum); *see also, e.g.*, ROA.4982 ("There will be no public offer of the Placing Shares. . . . "[HCLOF] has not been and will not be registered under the Investment Company Act of 1940 . . . ."). HCLOF is therefore a "pooled investment vehicle" under Rule 206(4)-8.

B. The HarbourVest Transaction

In 2017, acting on the advice of Highland, the DAF used Holdco to acquire most of the outstanding shares of HCLOF. ROA.283. Later that year, again acting on Highland's advice, the DAF caused Holdco to sell a 49.98% interest in HCLOF to a group of affiliated entities known as HarbourVest, while retaining 49.02%. *Id.* at 283; *see id.* at 280 (defining HarbourVest). Highland and its affiliates also owned the remaining 1% interest in HCLOF. ROA.285.

During Highland's bankruptcy, HarbourVest filed claims against Highland related to the purchase of the interests in HCLOF from Holdco. ROA.283. In late 2020, Highland agreed to purchase HarbourVest's 49.98% interest in connection with a settlement agreement that required Highland to allow unsecured claims asserted by HarbourVest (the "Settlement Agreement").[3] ROA.285-286. Appellants allege that this was a corrupt, self-dealing transaction. *See* ROA.287-288, 291-293, 296-297.

[3] The settlement agreement provided that (i) Highland would purchase HarbourVest's 49.98% interest in HCLOF and (ii) Highland or its "nominee" would retain the interest. ROA.286.

At the January 14, 2021 hearing approving the settlement, Highland offered sworn testimony explaining that HarbourVest's interest in HCLOF (the "HarbourVest Interests") had a fair market value of $22.5 million:

- "$22-1/2 million . . . is the net asset value of HarbourVest's interest in HCLOF, which, pursuant to the settlement agreement, it will transfer back to the Debtor . . . ." ROA.780.
- "[HarbourVest] net investment . . . now is worth about 22-1/2 million bucks." ROA.796.
- "The twenty-two and a half is the current—actually, the November value of HCL—the HarbourVest interests in HCLOF. And that's based upon Highland's evaluation of those interests. So we do believe that that is a fair value as of that date. It has not gone done. It hasn't gone up explosively, either, but it hasn't gone down." ROA.808.

See also ROA.285-287 ("[Highland's CEO] testified that the fair market value of the Harbourvest HCLOF interests was $22.5 million.").

C. Holdco's Uninformed, Withdrawn Objection

Appellants did not receive notice prior to the execution of Highland's agreement to purchase the HarbourVest Interests. ROA.285. Nor did they have an opportunity to investigate the testimony regarding the value of the HarbourVest Interests before the settlement was approved, since approval came at the same hearing as the testimony. *See* ROA.916.

Nevertheless, Holdco initially objected to the settlement, asserting that it had a contractual right of first refusal to purchase its pro rata share of the HarbourVest Interests. ROA.4405-4414; *id.* at 296 (asserting right of first refusal). This objection was withdrawn at a time when Appellants had no reason to believe the HarbourVest Interests were worth more than the $22.5 million Highland's CEO testified to. *See* ROA.773-774. Thus, it is fair to infer that Appellants were disgruntled by the process of the transaction, but given their fiduciary's sworn representations regarding the relatively equal exchange of value involved, Appellants had little financial motive, at that time, to challenge the transaction's substance.[4]

The bankruptcy court approved the settlement over the objections of other parties at the January 14 hearing. ROA.916 ("I am approving the motion to compromise the HarbourVest claim today . . . .").

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[4] Holdco's counsel did not state at the hearing that Holdco's objection lacked merit, as the bankruptcy court incorrectly concluded. *Compare* ROA.173 (the bankruptcy court's conclusion), *with* ROA.773-774 ("[H]oldco has had an opportunity to review the reply briefing, and after doing so has gone back and scrubbed the HCLOF corporate documents. Based on our analysis of Guernsey law and some of the arguments of counsel in those pleadings and our review of the appropriate documents, I obtained authority from my client . . . to withdraw the [Holdco] objection based on the interpretation of the member agreement."); ROA.4071 ("[I]'m not going to enter into a stipulation on behalf of my client [Holdco] that [Highland] is compliant with all aspects of the contract. We withdrew our objection, and we believe that's sufficient.").

D. The Undisclosed Value

In reality, the HarbourVest Interests were not worth $22.5 million, either at the time of the settlement hearing in January 2021 or the preceding November. They were worth more than $41 million at the time of the settlement. ROA.286. They were worth more than $34.5 million the preceding November. *Id.* They had been worth well more than $22.5 million for some time, and Highland knew this. *See* ROA.286-288, 292-293.

Appellants allege in the alternative that Highland *should* have known the HarbourVest Interests were worth well more than $22.5 million because (1) SEC regulations passed pursuant to the Investment Advisers Act of 1940 (the "IAA"), (2) Highland's internal policies and procedures, and (3) standard industry practices each governs the means and methods for calculating the value of an interest. *See* ROA.286-288. Alternatively, Highland violated the regulations and its own internal policies, changed those policies to be out of compliance with the IAA, or misrepresented and concealed the results of their calculations. *See* ROA.292.

Appellants did not know the value of the HarbourVest Interests in January 2021 or before. Highland failed to advise them that the interests were worth more than $22.5 million. Had they known, they would have

pressed their right of first refusal or, at a minimum, attempted to do so and become a bidder against Highland for the steeply discounted assets. ROA.297. It is therefore fair to infer that the alleged misrepresentations and omissions prevented Appellants from making an informed decision or bidding competitively, as Highland contracted for and closed on the HarbourVest Interests. This is true regardless of whether Holdco's right of first refusal had been triggered.

E. The Truth Emerges

On February 28, 2021, only forty-five days after obtaining approval of its acquisition of the HarbourVest Interests, Highland terminated staff responsible for many of the duties it owed to Appellants as their investment advisor. ROA.294-295. Shortly thereafter, Appellants became aware of facts indicating that Highland had made material misrepresentations and omissions in connection with the acquisition of the HarbourVest Interests. *See* ROA.279-280, 286. It is a fair inference that the new facts came from the recently terminated Highland staff.

F. Procedural History

On January 14, 2021, the bankruptcy court approved the settlement with HarbourVest. ROA.916.

On April 12, 2021, Appellants filed the original complaint, alleging counts of breach of fiduciary duty, breach of contract, negligence, RICO violations, and tortious interference, and requesting all relief to which they are justly entitled. ROA.279-304.

Appellants moved for leave to amend on April 19, 2021, which the district court denied the next day. ROA.315-324. The district court referred this case to the bankruptcy court on September 20. ROA.3209.

Next, the bankruptcy court initiated contempt proceedings against Appellants and their counsel. And it held them in contempt on August 3, 2021, for seeking leave to amend the original complaint. *See Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, 98 F.4th 170, 173–74 (5th Cir. 2024).

The contempt order was ultimately vacated by this Court on April 4, 2024. *Id.* at 177. While the contempt appeal was pending, the Highland bankruptcy plan became effective on August 11, 2021, including the exculpatory provision extinguishing the debtor's liability for simple negligence other than administrative claims. *See* ROA.3866-3867, 3897, 3934-3936.

The bankruptcy court initially dismissed this case on judicial- and collateral-estoppel grounds on March 11, 2022, denying as futile Appellants second request for leave to amend. ROA.3956-3981. The district court affirmed in part and reversed in part on September 2, 2022, remanding the case to the bankruptcy court for further findings on judicial estoppel. ROA.5132-5152. The bankruptcy court dismissed again on June 25, 2023. ROA.16-53. And the district court affirmed on September 10, 2024, concluding that each of Appellants' claims was inadequately pleaded, legally unavailable, or judicially estopped.[5] ROA.8068-8085.

This appeal ensued.

[5] Appellants moved below to withdraw the reference to the bankruptcy court under 28 U.S.C. § 157(d) because the case will require consideration of non-bankruptcy federal law. *See In re Harrah's Entm't*, No. 95-CV-3925, 1996 U.S. Dist. LEXIS 18097, at *7–8, 11 (E.D. La. Nov. 25, 1996) (Clement, J.) (concluding that withdrawal of the reference is mandatory under § 157(d) where the case involves "more than simple application of federal securities laws"); *see also* Pls.' Renewed Mot. to Withdraw the Reference, Dkt. 1-1, No. 3:22-CV-2802 (N.D. Tex. Dec. 15, 2022). The motion was denied as moot following the dismissal of Appellants' complaint, *see* Mem. Op. and Order, Dkt. 17, No. 3:22-CV-2802 (N.D. Tex. July 26, 2023), and is therefore not yet ripe for consideration.

SUMMARY OF THE ARGUMENT

Appellants' complaint states claims for relief, and the bankruptcy court erred both in concluding otherwise and in denying any opportunity to amend. Highland served as investment advisor, attorney-in-fact, and agent, identifying and purchasing collateral loan obligations for the account of Holdco on behalf of its client, the DAF.

In that capacity—and acting under advisory contracts with Texas choice-of-law provisions—Highland recommended and executed the purchase and later sale of HCLOF interests in Holdco's account. But when the opportunity arose to acquire the HCLOF interests held by HarbourVest at a steep discount from their true value, Highland cherry-picked that opportunity for itself, lied about the value of the HarbourVest Interests to conceal what it had done, and violated the IAA and Texas fiduciary law in doing so.

The factual content of the complaint includes details sufficient to establish each element of claims for breach of fiduciary duty, gross negligence, breach of contract, and tortious interference with contractual relations. The bankruptcy court's exculpation order does not preclude Appellants' negligence claim. A gross-negligence claim is also sufficiently

stated in the unique circumstances of this case. And the doctrine of judicial estoppel does not reach Appellants' contract and tortious-interference claims because information critical to those claims had been concealed from Appellants. For these reasons, the bankruptcy court should be reversed.

STANDARD OF REVIEW

In a bankruptcy case, this Court reviews decisions of "the district court by applying the same standards of review to the bankruptcy court's findings of fact and conclusions of law as applied by the district court." *Crowell v. Theodore Bender Acct. (In re Crowell)*, 138 F.3d 1031, 1033 (5th Cir. 1998); *see Lopez v. Viegelahn (In re Lopez)*, 897 F.3d 663, 668 (5th Cir. 2018) ("'Acting as a "second review court,"' [this Court] review[s] a bankruptcy court's legal conclusions *de novo* and its findings of fact for clear error.").

"Rule 12(b)(6) motions are 'viewed with disfavor and rarely granted.'" *Hodge v. Engleman*, 90 F.4th 840, 843 (5th Cir. 2024) (citation omitted). When a 12(b)(6) motion is granted, the dismissal order is reviewed *de novo*. *Amacker v. Renaissance Asset Mgmt. LLC*, 657 F.3d 252, 254 (5th Cir. 2011). "To survive a motion to dismiss, a complaint must contain sufficient

factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

"Well-pleaded facts are taken as true, while 'conclusory allegations, unwarranted factual inferences, and legal conclusions' are not." *Baylor Scott & White Holdings v. Factory Mut. Ins. Co.*, 105 F.4th 816, 819 (5th Cir. 2024) (brackets and citation omitted). Because "Rule 12(b)(6) motion[s] test[] the sufficiency of the pleadings" rather than "the merits of the case," *George v. SI Grp., Inc.*, 36 F.4th 611, 619 (5th Cir. 2022), all well-pleaded facts are accepted "as true and viewed in the light most favorable to the plaintiffs," *Espinal v. City of Houston*, 96 F.4th 741, 745 (5th Cir. 2024). And importantly, "[f]ederal pleading standards do not demand 'any magic words,' but instead only require plaintiffs to give fair notice of all claims brought against the defendant." *Barron v. United States*, 111 F.4th 667, 674 (5th Cir. 2024) (quoting *Boudreaux v. La. State Bar Ass'n*, 3 F.4th 748, 756 (5th Cir. 2021)).

ARGUMENT

I. Appellants State Claims Upon Which Relief Can Be Granted

To state a claim upon which relief can be granted, Appellants are merely required to plead a "short and plain" statement of their claim. FED. R. CIV. P. 8(a)(2). The Supreme Court has repeatedly held this hurdle is not a high one.

In *Johnson v. City of Shelby*, the Supreme Court explained that "[f]ederal pleading rules . . . do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted. . . . Having informed the [defendant] of the factual basis for their complaint, [the plaintiffs] were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim." 574 U.S. 10, 11–12 (2014) (per curiam); *see also id. at* 12 ("The federal rules effectively abolish the restrictive theory of the pleadings doctrine, making it clear that it is unnecessary to set out a legal theory for the plaintiff's claim for relief.").

Similarly, in *Ashcroft v. Iqbal*, the Supreme Court stated, "Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era," and concluded that "[w]hen there are

well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." 556 U.S. at 678–79; *see Runnion v. Girl Scouts of Greater Chi. & Nw. Ind.*, 786 F.3d 510, 517 (7th Cir. 2015) ("Under the modern regime of the Federal Rules, the complaint need contain only factual allegations that give the defendant fair notice of the claim for relief and show the claim has 'substantive plausibility.'").

This Court is equally insistent, having reaffirmed that "even if [a pleading] 'fails to categorize correctly the legal theory giving rise to [a] claim,'" the pleading states a claim "[s]o long as [it] alleges facts upon which relief can be granted." *Homoki v. Conversion Servs., Inc.*, 717 F.3d 388, 402 (5th Cir. 2013) (quoting *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 604 (5th Cir. Nov. 1981)); *see also Agredano v. State Farm Lloyds*, 975 F.3d 504, 506 (5th Cir. 2020) ("[T]he *Twombly*/*Iqbal* 'plausibility' standard does not require magic words or detailed facts in most cases."); *see also Innova Hosp. San Antonio, Ltd. P'ship v. Blue Cross & Blue Shield of Ga., Inc.*, 892 F.3d 719, 726 (5th Cir. 2018) ("The facts alleged must 'be enough to raise a right to relief above the speculative level,' but the complaint may survive

a motion to dismiss even if recovery seems 'very remote and unlikely.'" (quoting *Twombly*, 550 U.S. at 555–56)).

The district court and the bankruptcy court did not apply the requirements of Rule 8(a). Instead, they faulted Appellants' complaint for failing to address formalistic or intricate details of various legal theories, as detailed below. And it denied Appellants leave to amend to address what it found lacking. This was error.

II. Dismissing Appellants' Claims Constitutes Reversible Error

Appellants' complaint asserts claims for breach of fiduciary duty, negligence, breach of contract, and tortious interference.[6] Appellants respectfully submit that, in the unique circumstances of this case, their negligence allegations also provide fair notice and adequate factual support for a gross-negligence claim. None of these claims should have been dismissed.

a. Breach of Fiduciary Duty

There are three elements to a claim for breach of fiduciary duty: (1) a fiduciary relationship between the parties, (2) breach of that duty, and (3)

[6] The complaint also includes a civil RICO claim, *see* ROA.298-302, which is not at issue in this appeal.

resulting injury to the plaintiff or benefit to the defendant. *See D'Onofrio v. Vacation Publ'ns, Inc.*, 888 F.3d 197, 214–15 (5th Cir. 2018) (applying Texas law). Appellants' complaint alleges facts sufficient to establish each element.

As to the first element, the complaint alleges the existence of a fiduciary relationship between Appellants and Highland, evidenced by advisory contracts; Highland's contractual promise to provide sound investment advice and management functions to Appellants to acquire and sell CLO interests; Highland's formal, statutory role as a registered investment advisor; and the appointment of Highland as the DAF's attorney-in-fact. *See* ROA.290; *see also id.* at 291 (detailing these capacities as "predicated on trust and confidence"). These are fiduciary roles under both federal and state law. *See, e.g.*, *Nat'l Ass'n of Priv. Fund Managers*, 103 F.4th at 1103 ("The [IAA] recognizes a fiduciary duty between an investment adviser and his client."); *Sassen v. Tanglegrove Townhouse Condo. Ass'n*, 877 S.W.2d 489, 492 (Tex. App.—Texarkana 1994, writ denied) ("The appointment of an attorney-in-fact creates an agency relationship. An agency creates a fiduciary relationship as a matter of law."); *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962) ("[C]onfidential

relationships may arise not only from the technical fiduciary relationships such as attorney-client, trustee-cestui que trust, partner and partner, etc.—which as a matter of law are relationships of trust and confidence—but may arise informally from 'moral, social, domestic or purely personal' relationships."). And these facts are more than sufficient to establish a fiduciary relationship.

As to the second element, the complaint alleges that Highland breached its fiduciary duties by engaging in a self-dealing transaction and making false representations concerning the value of the HarbourVest Interests that Highland obtained for itself in that transaction. *See* ROA.286-288, 291-293, 296-297. These factual allegations plausibly establish breach. *See, e.g., Douglass v. Beakley*, 900 F. Supp. 2d 736, 751–52 (N.D. Tex. 2012) (finding sufficient breach allegations where investment advisors "failed to make proper disclosures, improperly commingled funds, and charged the [clients] excessive fees"); Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Investment Advisers Act No. 5248, 84 Fed. Reg. 33,669, 33,670–71, 33,676–77 (July 12, 2019) (discussing scope of investment adviser fiduciary duties, including duties against self-dealing and allocating profitable trades to itself at the

expense of an advisee, and duty for full and complete disclosure before transacting); *see also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 16 cmt. c (AM. L. INST. 2020) (identifying "benefit[ting] improperly by engaging in self-dealing, deception, or other disloyal conduct" as conduct "inconsistent with the fiduciary duty").

As to the third element, the complaint alleges how Highland's breach both benefitted Highland and injured Appellants. By withholding information from Appellants as to the true value of the HarbourVest Interests, Highland avoided a competitive-bid negotiation and obtained a considerable windfall from the interests' steeply discounted purchase price. *See* ROA.287-288, 291, 294. Highland's self-dealing injured Appellants by excluding them from an opportunity to participate in the transaction. *See* ROA.288, 291-293, 295. Highland's false representations and omissions had the same result. *Id.* These factual allegations provide notice of a plausible claim for relief, and concluding otherwise was error.[7]

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[7] Notably, the bankruptcy court isolated pleaded assertions from their context and disregarded them as "conclusory." *See, e.g.*, ROA.43. But a statement in the complaint pertinent to a conclusion is not inherently conclusory—it is conclusory when "it relies on inferences without also setting forth the facts that support those inferences." *Favela v. Collier*, 91 F.4th 1210, 1213 (5th Cir. 2024); *see Salazar v. Lubbock Cnty. Hosp. Dist.*, 982 F.3d 386, 392 (5th Cir. 2020) (Ho, J., concurring) ("[A] conclusory statement recites the bottom-line legal standard but fails to present any factual detail or specifics indicating what evidence will actually satisfy the requisite

Despite these factual allegations, the district court and the bankruptcy court concluded that Appellants failed to state a claim for breach of fiduciary duty under the IAA or state law.

i. Breach of Fiduciary Duty Under the IAA

As to the IAA, five rationales were given to justify the conclusion: (1) Appellants did not cite the appropriate section of the IAA, ROA.44-45, 8076-8077; (2) Appellants did not request the appropriate form of relief, ROA.8077; (3) the allegations in the complaint did not provide Highland fair notice of the claim, ROA.8077-8078; (4) the allegations in the complaint were not pleaded with particularity, ROA.43; and (5) Appellants did not plead sufficient facts for the duty and breach elements, ROA.45-46. None of these reasons justify dismissal.

First, the district court and the bankruptcy court deemed the complaint inadequate because it only cites § 206 of the IAA, which does not

legal standard.”). Singling out phrases and sentences may very well give the appearance of conclusory pleadings, but allegations in a complaint are construed as a whole. *Rodríguez-Reyes v. Molina-Rodríguez*, 711 F.3d 49, 55 (1st Cir. 2013) (“There need not be a one-to-one relationship between any single allegation and a necessary element of the cause of action. What counts is the ‘cumulative effect of the complaint’s factual allegations.’” (brackets and citation omitted)). Here, the complaint lays out in particularized detail the bases for the allegations—including the who, what, when, where, why, and how of the misleading statements.

provide a private right of action, rather than § 215 of the IAA, which does.[8] ROA.44-45, 8076-8077; *see Transamerica Mortg. Advisors (TAMA) v. Lewis*, 444 U.S. 11, 19 (1979) ("[W]hen Congress declared in § 215 that certain contracts are void, it intended that the customary legal incidents of voidness would follow, including the availability of a suit for rescission or for an injunction against continued operation of the contract, and for restitution."). But this is no reason to dismiss a claim.

Section 206 does provide the statutory duty, the breach of which gives rise to a claim under § 215. *TAMA*, 444 U.S. at 19, 24. And "under the Federal Rules of Civil Procedure, a complaint need not pin [a] claim for relief to a precise legal theory." *Skinner v. Switzer*, 562 U.S. 521, 530 (2011). This is because "[p]laintiffs need only plead facts, not legal theories, in their complaints." *Reeves v. Jewel Food Stores, Inc.*, 759 F.3d 698, 701 (7th Cir. 2014); *Topchian v. JPMorgan Chase Bank, N.A.*, 760 F.3d 843, 849 (8th Cir. 2014) ("[I]t is the facts alleged in a complaint, and not the legal theories, that state a claim.").

Further, the conclusion that Appellants failed to state a claim under the IAA because "the Complaint never cites § 215," ROA.8077,

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[8] Section 206 refers to 15 U.S.C. § 80b-6, and § 215 refers to 15 U.S.C. § 80b-15.

reintroduces the antiquated practice of code pleading, which the Federal Rules of Civil Procedure replaced almost a century ago. *See Bartholet v. Reishauer A.G.*, 953 F.2d 1073, 1078 (7th Cir. 1992) (describing the adoption of the Federal Rules as a rejection of code pleading in favor of a "latitudinarian" approach: "A complaint under Rule 8 limns the claim; details of both fact and law come later, in other documents." (citations omitted)). *See generally* J. Harvie Wilkinson III, *The Presumption of Civil Innocence*, 104 VA. L. REV. 589, 621–25 (2018).

The complaint discusses § 206 because the provision establishes the standards for registered investment advisors (which are enforceable via § 215), *see* ROA.289, rather than as an authorizing statute for a cause of action available to private litigants under the IAA. Nothing requires Appellants' pleading to specifically reference § 215 to state a claim for relief under § 206—it need only allege a plausible factual basis for the claim, which it does.

Along the same lines, the district court and the bankruptcy court were troubled with whether violations of § 206 and its interpreting rules constituted breaches of fiduciary duties. *See* ROA.44-46, 8076-8078. But, as Appellants have previously urged, *see, e.g.*, ROA.4882, 7790-7794, 7951-

7954, Rule 206(4)-8 clarifies that the duties in § 206(4) of the IAA apply directly between an advisor of a "pooled investment fund" and the investors in the "pooled investment vehicle." It is uncontested that HCLOF is a "pooled investment fund" as defined in Rule 206(4)-8. Because § 215 is actionable for the breach of *any* "provision of [the IAA], or of any rule, regulation or order thereunder," 15 U.S.C. § 80b-15(b), the breach of § 206(4) *or* Rule 206(4)-8 states a claim for relief under § 215 regardless of whether the duty is specifically characterized as "fiduciary," or whether any of the other elements of a fiduciary-duty claim are met.

Second, the district court concluded that Appellants failed to state a claim for breach of fiduciary duty under § 215 because they did not request the appropriate form of relief. ROA.8077. But this conclusion contradicts this Court's precedents and applicable law. Federal Rule of Civil Procedure 8(a)(3) does require pleadings to include "a demand for the relief sought," but this Court has "consistently interpreted this provision to allow a plaintiff *any* relief that the pleaded claim supports." *Laird v. Integrated Res., Inc.*, 897 F.2d 826, 841 (5th Cir. 1990) (emphasis added). Moreover, "demanding an improper remedy is not fatal to a plaintiff's claim so long as there are facts entitling her to some form of relief." *Hager v. Brinker*

Tex., Inc., 102 F.4th 692, 705 (5th Cir. 2024); *see Bontkowski v. Smith*, 305 F.3d 757, 762 (7th Cir. 2002) ("[T]he demand [for relief] is not itself a part of the plaintiff's claim, and so failure to specify relief to which the plaintiff was entitled would not warrant dismissal under Rule 12(b)(6).").

In *Laird*, in fact, this Court addressed *this very issue* under the IAA, holding that a request for the wrong relief for alleged violations of § 206 would *not* merit dismissal. *See* 897 F.2d at 839–40 & n.55. Rather, as long as the plaintiffs "present[ed] sufficient evidence, the district court must award the proper remedy." *Id.* at 842.

Third, the district court deemed the complaint insufficient to provide Highland with fair notice of any claim under § 215 of the IAA. ROA.8077-8078. But § 215 is the only provision of the IAA that creates a private right of action under that statute. And so Appellants' repeated references to breaches of IAA-imposed fiduciary duties do provide notice:

- "Defendants have breached the [IAA]'s fiduciary duties owed to Plaintiff as part of their fiduciary relationship." ROA.292.
- "[O]nce an investment Advisory relationship is formed, the [IAA] does not permit an adviser to exploit that fiduciary relationship by defrauding his client in any investment transaction connected to the Advisory relationship." *Id.*

- "The [IAA] establishes an unwaivable federal fiduciary duty for investment advisers." ROA.289.
- "Under the [IAA], an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients' interests to its own." *Id.*

More to the point, where defendants address the merits of a claim in response to a motion, they cannot be heard to complain that they lacked fair notice. *See, e.g.*, *Quinones v. City of Binghamton*, 997 F.3d 461, 469 (2d Cir. 2021) (declining to dismiss for failure to state a claim where "Defendants' motion to dismiss expressly 'interpreted Plaintiff's complaint to assert a claim under 42 U.S.C. § 1983 to enforce § 1981' and addressed the merits of that claim at length"). Here, Highland identified and briefed Appellants' IAA-based claim under § 215, having devoted several pages of their motion to dismiss to it. *See* ROA.4257, 4259-4261; *see also id.* at 4260 (conceding before the bankruptcy court that "[a] party can seek to void an investment management agreement under Section 215 of the IAA if the agreement's formation or performance would violate the IAA"). Highland cannot plausibly claim that they lacked notice of a claim arising under § 215.

Fourth, the bankruptcy court determined that Appellants failed to plead "with particularity that any alleged omissions by [Highland] posed any real significance" to Appellants. ROA.43. This conclusion is both irrelevant and incorrect. Contrary to the bankruptcy court's implication, *see* ROA.42-43, there is no requirement that a claim for breach of fiduciary duty be based on a *material* misstatement or omission.[9]

Even under Rule 9(b), Appellants must merely plead "the type of facts omitted, the place in which the omissions should have appeared, and the way in which the omitted facts made the representations misleading." *Carroll v. Fort James Corp.*, 470 F.3d 1171, 1174 (5th Cir. 2006) (citation omitted). Appellants have done so.[10] Appellants pleaded that Highland

[9] Also, contrary to the bankruptcy court's opinion, Appellants are not bringing a securities-fraud claim under § 10 or Rule 10b-5, and the securities-fraud pleading standard does not apply. *See* ROA.42-43. *See SEC v. Lauer*, No. 03-CV-80612, 2008 U.S. Dist. LEXIS 73026, at *90 (S.D. Fla. Sept. 23, 2008) ("Unlike the antifraud provisions of the Securities Act and the Exchange Act, Section 206 of the Advisers Act does not require that the activity be 'in the offer or sale of any' security or 'in connection with the purchase or sale of any security.'"). Furthermore, it is not clear that Rule 9(b) applies at all—negligence is sufficient to establish a violation of § 206(4) of the IAA. *See SEC v. Cap. Gains Rsch. Bureau, Inc.*, 375 U.S. 180, 195 (1963) ("[C]ongress, in empowering the courts to enjoin any practice which operates 'as a fraud or deceit' upon a client, did not intend to require proof of intent to injure and actual injury to the client."); *ZPR Inv. Mgmt. v. SEC*, 861 F.3d 1239, 1247 (11th Cir. 2017) ("Sections 206(2) and (4) require no showing of scienter, and a showing of negligence is sufficient.").

[10] The specific disclosures and statements made by Highland's CEO under oath were alleged in the complaint—when they were made, who made them, where they were made, and in what context. *See, e.g.*, ROA.285-295. To the extent Appellants pleaded facts "peculiarly within [Highland]'s knowledge," those allegations are properly

failed to offer them the HarbourVest Interests, and then omitted facts regarding the correct value of the HarbourVest Interests as a means of procuring an advantageous investment at Appellants' expense. ROA.280, 286-87, 291. Highland's misrepresentations and omissions appeared, among other places, in the testimony and evidence offered at the January 2021 hearing. *E.g.*, ROA.287, 293, 295. And not only did the information Highland omit mislead Appellants about the true value of the HarbourVest Interests, the omissions precluded Appellants from making an informed decision as to, or bidding competitively for, those interests. ROA.287-88, 292-93, 295.

Fifth, the bankruptcy court determined that Appellants did not plead sufficient facts to allege a fiduciary duty or a breach of the same as relates to HCLOF and the corresponding members agreement. *See* ROA.45-46. Not so. *See supra* pp. 18–20. More importantly, the bankruptcy court conflated two capacities of Highland—being an owner of the HCLOF does not affect or modify the duties Highland owes as an investment advisor under a different agreement. No authority to the contrary has been cited

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"based on information and belief." *Tuchman v. DSC Commc'ns Corp.*, 14 F.3d 1061, 1068 (5th Cir. 1994).

by Highland (or any court in these proceedings). In fact, § 215(a) and § 215(b) would trump any attempt to construe the HCLOF Members Agreement as a waiver of any fiduciary duty owed by Highland as an advisor because such a waiver would be "void" under § 215.

ii. Breach of Fiduciary Duty Under State Law

The district court and the bankruptcy court provided four reasons for dismissing Appellants' state-law claim for breach of fiduciary duty: (1) Appellants did not cite to state law, ROA.8078-8079; (2) Appellants' alleging that Highland owed fiduciary duties "while exclusively discussing federal law" is insufficient to state a state-law claim, ROA.8079; (3) Appellants' allegations of a fiduciary duty and a breach of that duty under state law were insufficient and conclusory, ROA.43-44; and (4) Guernsey law, rather than state law, governs Appellants' claim, ROA.43-44. These conclusions are also incorrect.

First, the district court is incorrect that Appellants' claim for breach of fiduciary duty under state law should be dismissed because the complaint "makes no mention of any state law regarding fiduciary duties." ROA.8079. This is not the case. *See* ROA.289-295. And in any event, as previously explained, "[a] plaintiff need not state the *legal* basis for its

claim so long as it plausibly alleges the *factual* basis for it." *Shippitsa Ltd. v. Slack*, No. 3:18-CV-1036, 2019 U.S. Dist. LEXIS 121994, at *31 (N.D. Tex. July 23, 2019) (Fitzwater, J.) (emphasis in original). Courts are "not limited to granting relief to a party solely on the basis of theories of recovery set forth in the pleadings." *Evans Prods. Co. v. W. Am. Ins. Co.*, 736 F.2d 920, 923 (3d Cir. 1984). Because Appellants alleged a plausible factual basis for a state-law claim for breach of fiduciary duty, it was error to dismiss this claim. *See Homoki v. Conversion Servs., Inc.*, 717 F.3d 388, 402 (5th Cir. 2013).

Second, the district court is incorrect that the state-law claim should be dismissed because "simply alleging [Highland] owed . . . fiduciary duties, while exclusively discussing federal law, is insufficient to . . . raise[] a state law claim." ROA.8079. This reasoning repeats the same error detailed above: dismissing a claim based on a legal theory rather than the factual content of the complaint. *See supra* pp. 21–23. Moreover, it mischaracterizes Appellants' complaint, which is not conclusory. As explained above, the complaint lays out the factual basis establishing the relationship between Appellants and Highland: the advisory contracts; Highland's contractual promise to provide sound investment advice and

management functions to Appellants to acquire and sell CLO interests; Highland's formal, statutory role as a registered investment advisor; the appointment of Highland as DAF's attorney-in-fact, and the relationship's predicates of trust and confidence. *See* ROA.290-291. The district court overlooked the significance of these factual allegations, which form the bases of fiduciary duties.

Third, the bankruptcy court determined that Appellants' allegations were insufficient and conclusory with regard to a fiduciary duty arising under state law. ROA.43-44. On the contrary, the complaint contains ample well-pleaded facts which—along with the proper inferences therefrom—cross the plausibility threshold. *See supra* pp. 18–20.

The bankruptcy court's error stems from at least two misconceptions. To start, as several courts have held, a plaintiff may state a claim for breach of fiduciary duty under state law with § 206 of the IAA supplying the relevant fiduciary duty. *See, e.g.*, *Douglass v. Beakley*, 900 F. Supp. 2d 736, 751–52 n.16 (N.D. Tex. 2012) (denying motion to dismiss state fiduciary-duty claims predicated on breaches of the IAA); *Goldenson v. Steffens*, No. 2:10-CV-440, 2014 U.S. Dist. LEXIS 201258, at *137 (D. Me. Mar. 7, 2014) (same); *Zimmerman v. Matson Money*, No. 1:20-CV-4409,

2021 U.S. Dist. LEXIS 247095, at *12–13 (N.D. Ga. June 9, 2021) (same); *State ex rel. Udall v. Colonial Penn Ins. Co.*, 812 P.2d 777, 785 (N.M. 1991) (same); *see also* TEX. GOV'T CODE § 4001.002(a)(2) (identifying "maximiz[ing] coordination with *federal* and other states' laws and administration" as one of the purposes of the Texas Securities Act (emphasis added)). Under this reasoning, Appellants stated a claim under Texas law.

As well, Texas courts have repeatedly held that advisors owe fiduciary duties to investors without reference to the IAA. *See, e.g.*, *W. Res. Life Assurance Co. v. Graben*, 233 S.W.3d 360, 374 (Tex. App.—Fort Worth 2007, no pet.); *Lampkin v. UBS Painewebber, Inc. (In re Enron Corp. Sec., Derivative & "ERISA" Litig.)*, 238 F. Supp. 3d 799, 852 (S.D. Tex. 2017). Certainly, then, the advisor/investor relationship pleaded here provides a plausible basis for a state-law fiduciary duty. *See Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 512 (1942) (describing such duty as one characterized by "integrity and fidelity."). The advisory agreements make Highland Appellants' attorney-in-fact. ROA.6025-6044. And because "the appointment of an attorney-in-fact creates a fiduciary relationship as a matter of law, Texas law imposes special duties on persons acting in that

capacity." *Pool v. Johnson*, No. 3:01-CV-1168, 2002 U.S. Dist. LEXIS 6613, at *17 (N.D. Tex. Apr. 15, 2002) (citing *Sassen*, 877 S.W.2d at 492). Therefore, Appellants stated a claim for breach of fiduciary duty under state law independent of the IAA's duties.

What the bankruptcy court appears to be concerned with are instances in the complaint in which Appellants allege in the alternative that Highland knew the true value of the HarbourVest Interests and did not tell Appellants, did not know but should have, or knew as an entity but perhaps the individual speaker did not. *See* ROA.43-44. But it is not Appellant's "responsibility" to plead "discoverable information" presently "in the control and possession of" Highland. *Innova Hosp. San Antonio, Ltd. P'ship v. Blue Cross & Blue Shield of Ga., Inc.*, 892 F.3d 719, 730 (5th Cir. 2018). The federal rules permit Appellants to plead in the alternative or "on information and belief" where, as here, "factual information necessary to initially state and ultimately prove a claim for relief is in the possession and control of" their litigation opponent. 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE – CIVIL § 12.34[1][a] (3d ed. Dec. 2024

Update). The bankruptcy court erred in holding Appellants to a higher standard.[11]

Fourth, the bankruptcy court determined that Appellants failed to state a fiduciary-duty claim under state law because Guernsey law, rather than Texas law, controls, given that "HCLOF is a Guernsey entity[] and the HCLOF Members Agreement is governed by Guernsey law." ROA.43. But the direct advisory relationship between the DAF and Highland in no way involves Guernsey. And further, this is a misapplication of the internal affairs doctrine, which applies to "matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders." *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982). Contrary to the bankruptcy court's conclusion, the claims at issue do not concern such matters because Highland is not being sued for breach of fiduciary duty as

[11] Similarly, while it is not clear which allegations the bankruptcy court found "vague," it appears from context that the bankruptcy court expects proof of Highland breaching fiduciary duties owed to Appellants in the complaint itself. *See* ROA.44. Appellants fully intend to advance such proof following discovery. But since this stage of the proceedings "focuses on the allegations in the pleadings" rather than "whether a plaintiff actually has sufficient evidence to succeed on the merits," *Ferrer v. Chevron Corp.*, 484 F.3d 776, 782 (5th Cir. 2007), now is not the time or place for such a showing. *See Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir. 1999) (per curiam) ("The issue is not whether the plaintiff will ultimately prevail, but whether he is entitled to offer evidence to support his claim."); *see also Schuchardt v. President of the U.S.*, 839 F.3d 336, 347 (3d Cir. 2016) ("[C]ourts cannot inject evidentiary issues into the plausibility determination.").

an officer, director, or member of HCLOF, nor is it being sued for violations of duties imposed by Guernsey law on officers or directors of Guernsey entities.

Rather, this case concerns the fiduciary duties Highland owes as a result of its role as an investment advisor—*i.e.*, as a result of the relationship between (i) the DAF and Highland as advisor/investor, attorney-in-fact/client, and principal/agent; and (ii) Holdco and Highland as advisor/investor. The duties are collateral to and arise independently from relations peculiar to HCLOF, and they therefore concern external—not internal—affairs. *See First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 621, 633–34 (1983) (declining to apply internal affairs doctrine on "equitable principles to avoid the injustice that would result from permitting a foreign state to reap the benefits of our courts while avoiding the obligations of international law"); *id.* at 621–23 (noting that "the need for certainty and predictability of result while generally protecting the justified expectations of parties with interests in the corporation" is informed by "articulated congressional policies"); *id.* at 630 ("[T]he Court has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies.").

Nor does the internal affairs doctrine permit Highland to skirt federal securities laws. In *Edgar*, the Supreme Court held that the internal affairs doctrine (i) was irrelevant where the issue was the violation of the securities laws, and (ii) could not be used to circumvent federal securities laws. *See* 457 U.S. at 645; *cf. Anderson* v. *Abbott*, 321 U.S. 349, 365 (1944) (declining to apply the law of the state of incorporation when determining whether a banking corporation complied with federal banking laws because "no State may endow its corporate creatures with the power to place themselves above the Congress of the United States and defeat the federal policy concerning national banks which Congress has announced"). Here, Highland's fiduciary duties arise out of its role as a registered investment advisor. *See* 15 U.S.C. §§ 80b-6, 80b-15(a). Those duties are subject to their advisory agreements, which expressly select Texas law. *See* ROA.5085 (Offering Memorandum); ROA.5129 (Advisory Agreement). Moreover, the Offering Memorandum, (which is incorporated via § 2.2 of the HCLOF Members Agreement, *see* ROA.4917), states that Highland is "subject to the provisions of the Investment Advisers Act." ROA.5003; *see* ROA.5061-5062 ("[H]ighland will allocate investment opportunities across

the entities for which opportunities are appropriate consistent with . . . the requirements of the [IAA].").

Guernsey law is therefore irrelevant to the fiduciary-duty claims.

b. Negligence and Gross Negligence

Appellants' claims for negligence and gross negligence were dismissed. *See* ROA.46, 8079-8081. This was also error.

iii. Negligence

The elements of a claim for negligence are (1) the existence of a legal duty, (2) a breach of that duty by the defendant, and (3) damages to the plaintiff proximately caused by the breach. *See Kristensen v. United States*, 993 F.3d 363, 368 (5th Cir. 2021) (applying Texas law).

As to the first element, duty, Appellants have alleged that Highland owed broad fiduciary duties as a registered investment advisor, ROA.290, including a "duty of utmost care," ROA.291.

Moreover, by pledging to acquire the HarbourVest Interests as part of the settlement hearing, Highland owed an affirmative duty to (i) not cherry pick opportunities from the DAF to itself, and (ii) truthfully disclose the value of such opportunities. *See SEC v. World Tree Fin., L.L.C.*, 43 F.4th 448, 460 (5th Cir. 2022) (defining cherry-picking as "involv[ing]

allocating more profitable trades to certain accounts" and stating that the practice "implicates a conflict of interest" when an advisor—a fiduciary—"is 'stealing from one customer to enrich himself'" (citation omitted)); *Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998) (stating that a duty to disclose arises in a "fiduciary relationship"). And by affirmatively disclosing the value of the HarbourVest Interests, Highland was obligated to (i) speak truthfully and completely, and (ii) correct any prior misstatements. *See, e.g.*, *State Nat'l Bank v. Farah Mfg. Co.,* 678 S.W.2d 661, 681 (Tex. App.—El Paso 1984, writ dism'd by agr.); *Ralston Purina Co. v. McKendrick,* 850 S.W.2d 629, 636 (Tex. App.—San Antonio 1993, writ denied). The district court agreed that a duty of care runs between investment advisors and their clients. *See* ROA.8079 ("As Appellants have argued throughout this lawsuit, the IAA imposes the duties of loyalty and care upon investment advisors." (citation omitted)). And Highland owed Appellants contractual duties too, including the obligation to provide sound investment advice and management functions. ROA.290.

As to the second element, breach, Appellants have alleged in the alternative that Highland should have known it was providing inaccurate information regarding the value of the HarbourVest Interests. ROA.286-

288. IAA regulations, Highland's own internal policies and procedures, and general industry practice set forth specific standards for valuing such assets, and had those processes been utilized and consulted, Highland would have known the actual value of the assets. *Id.* Thus, if Highland did not know the true value of the HarbourVest Interests, its ignorance resulted from failing to act as a reasonably prudent investment advisor would under the same or similar circumstances—*i.e.*, Highland should have verified the value of the HarbourVest Interests when the representations were made. *See* ROA.291-293, 297; *see also, e.g.*, *Hill Country Pres., LLC v. Philip G. King & Synchropile, Inc.*, No. 08-23-00205-CV, 2024 Tex. App. LEXIS 2998, at *27 (Tex. App.—El Paso Apr. 30, 2024, pet. filed) (mem. op.) ("By agreeing to perform certain professional engineering services for [the plaintiff], [the defendant] took on the duty to exercise the degree of care, skill, and competence that reasonably competent engineers would exercise under similar circumstances. While [the defendant] limited his role in the project, a breach of the professional duties he did assume would support a negligence claim." (citation omitted)).

As to the third element, damages, Appellants have alleged that Highland's breach proximately caused damages suffered by Appellants. It was reasonably foreseeable that Highland's negligence in not offering the HarbourVest Interests to the Appellants for $22.5 million and "failing to disclose the current value of the [HarbourVest Interests] would impact [Appellants] negatively in a variety of ways," ROA.297, including depriving Appellants of a highly valuable asset. ROA.298.

In fact, because Holdco held interests in HCLOF identical in kind to those being acquired by Highland, the inaccurate information regarding those interests constitutes improper advice from Appellants' investment advisor concerning the very assets it had advised them, alternately, to acquire, sell, and hold. ROA.283, 285. This advice harmed Appellants and, at a minimum, prevented them from being an informed, competitive bidder for the HarbourVest Interests. *See* ROA.292-293, 297-298.

The district court affirmed the dismissal of Appellants' negligence claim not on the merits, but because "the bankruptcy Plan's exculpation provision bars" it. *See* ROA.8080-8081. Appellants' claim for negligence arose out of Highland's administration of the bankruptcy estate as debtor-in-possession, however, which makes it an administrative expense claim

under the Bankruptcy Code. *See Texas v. Lowe (In re H.L.S. Energy Co.)*, 151 F.3d 434, 437 (5th Cir. 1998); 11 U.S.C. § 503; *see also* ROA.7886 ("[A]ppellants, if they have a claim, have an 'administrative claim' against [Highland]."). Per the confirmed bankruptcy plan, administrative expense claims are not discharged, and Highland is not exculpated from liability for them. *See* ROA.3936, 3941; *see also* ROA.7886-7888 (Highland conceding that administrative expense claims are not discharged by the final plan). It was therefore error to dismiss Appellants' negligence claim on these grounds.

iv. Gross Negligence

"Gross negligence is a heightened form of negligence," so in addition to the elements of ordinary negligence, gross negligence requires "'an extreme degree of risk' and a 'conscious indifference' by the negligent actor." *Lane v. Halliburton*, 529 F.3d 548, 565 (5th Cir. 2008) (quoting *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 921 (Tex. 1998)); *see* TEX. CIV. PRAC. & REM. CODE § 41.001(11) (defining gross negligence).

Appellants would have stated a gross-negligence count more explicitly in the first instance had the bankruptcy court, at that time, already exculpated Highland from liability for mere negligence. But the

exculpation order came *after the complaint was filed*, and Appellants were not given an opportunity to amend. Nevertheless, Appellants submit that the factual content of the complaint is sufficient to state this claim, and it therefore should not have been dismissed. *See Rodgers v. Lancaster Police & Fire Dep't*, 819 F.3d 205, 207 n.2 (5th Cir. 2016) ("A complaint need not . . . articulate a perfect 'statement of the legal theory supporting the claim asserted.'" (citation omitted)).

Appellants' complaint alleges facts demonstrating that Highland's actions were very likely to cause Appellants serious injury and that Highland did not care. Highland gave Appellants bad information after ignoring the available information, knowing that (i) Appellants would not know better, and (ii) the absence of accurate information would create a very high likelihood that Appellants would act on the improper information. *See* ROA.280, 287-288. Further, by opining on the value of HCLOF under oath, Highland had a duty to investigate the truth. Instead, it provided inaccurate public testimony denigrating the value of Holdco's interests in HCLOF. *See* ROA.287-289, 291-293. That Highland did this—when accurately and appropriately valuing assets was among its core business functions as a registered investment advisor—raises an inference

of recklessness, which is sufficient to meet the gross-negligence standard. *See Baylor Scott & White Holdings v. Factory Mut. Ins. Co.*, 105 F.4th 816, 819 (5th Cir. 2024) ("A complaint ultimately withstands 12(b)(6) scrutiny 'if it "contains factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."'" (brackets omitted) (quoting *McLin v. Twenty-First Jud. Dist.*, 79 F.4th 411, 415 (5th Cir. 2023))).

The district court provided two reasons for dismissing the gross-negligence claim: (1) the complaint does not allege such a claim, and (2) Appellants' argument was not presented to the bankruptcy court. ROA.8081. Neither reason warrants dismissal.

First, there is no requirement that Appellants plead the *name* of a cause of action in order to state a claim. Such a requirement transgresses federal pleading standards. *See Skinner*, 562 U.S. at 530; *see also see Barron*, 111 F.4th 667 (5th Cir. 2024) ("[A] party need not include the proper label for a claim in their complaint so long as they plead each element of the claim that they are trying to bring."). And as noted, Appellants *would have* explicitly labeled this count had the exculpatory provisions of Highland's bankruptcy plan been in place at the time.

Second, Appellants cannot be defaulted on a Rule 12(b)(6) motion. It is incumbent on courts to "assess[] the legal sufficiency of the complaint" even when the nonmovant does not make a particular argument because "[R]ule 12 does not by its terms require an opposition." *Servicios Azucareros de Venez., C.A. v. John Deere Thibodeaux, Inc.*, 702 F.3d 794, 806 (5th Cir. 2012); *see* 2 MOORE ET AL., *supra*, § 12.34[1][a] ("A court may not grant a motion to dismiss on a 'default' basis merely because the opposing party has failed to submit a memorandum in opposition to the motion. Rather, once the movant raises the issue, the opposing party may stand on the pleadings, and the court must examine the complaint and determine whether it states a claim as a matter of law."). Appellants' claim cannot be dismissed "as a penalty for [a] perceived failure to properly brief [their] opposition to [Highland]'s motion" to dismiss; it is therefore improper to disregard their arguments here regarding the claim. *See Servicios*, 702 F.3d at 806.

c. Judicial Estoppel

The district court affirmed the dismissal of Appellants' claims for breach of contract and tortious interference on the basis of judicial estoppel. *See* ROA.8073-8076. On this issue only, the district court

reviewed the bankruptcy court's decision for abuse of discretion. ROA.8074. Nonetheless, by applying an incorrect legal standard and misapplying the law to the facts, the district court erred and the bankruptcy court abused its discretion. *See In re Chamber of Com. of U.S.*, 105 F.4th 297, 311 (5th Cir. 2024).

"[J]udicial estoppel[] 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'" *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000)). For the doctrine to apply, the party against whom judicial estoppel is sought must *not* have acted inadvertently. *Reed v. City of Arlington*, 650 F.3d 571, 574 (5th Cir. 2011) (en banc); *see Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 206 (5th Cir. 1999) ("[Judicial estoppel] is generally applied where 'intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice.'" (citation omitted)).

The district court analyzed "inadvertence" under the following rubric: "A party's failure to disclose a claim arising out of a bankruptcy case is only inadvertent if the party either (1) lacked knowledge of the claim or (2) the

party has no motive to conceal the claims." ROA.8074 (citing *In re Coastal Plains*, 179 F.3d at 210). This Court has never applied that standard. In fact, the case cited by the district court for this proposition, *In re Coastal Plains*, 179 F.3d at 210, concerns a debtor's "statutory disclosure duty" to disclose assets of the estate during a pending bankruptcy, rendering it plainly inapposite here because there is no duty to object to a settlement. *See also* ROA.5143-5144 (explaining why issues raised in a Rule 9019 hearing are not "actually litigated").

Making matters worse, the bankruptcy court interpreted the term "motive" to mean *any* sort of motivation or incentive it might imagine Appellants could have, rather than the actual motivation for the allegedly contradictory statements—doing so led the bankruptcy court to a discussion of hypotheticals and conjecture, not evidence, characterized by phrases like "might have had a motive," "would have had to," and "may have continued." ROA.40-41. That is not analysis, and those are not facts.

Further, applying this new standard would necessarily entail a review of the bankruptcy court's findings regarding Appellants' knowledge and motive to conceal. But the district court conducted no such review, instead stating only that "Appellants offer no argument in response to the

bankruptcy court's conclusion that Appellants would have plenty of motive to take inconsistent positions." ROA.8075. This is also incorrect. Appellants argue in response. *See, e.g.*, ROA.7968.

Without more, the district court abused its discretion. *See FDIC v. Calhoun*, 34 F.3d 1291, 1297 (5th Cir. 1994) ("In order to guard against the application of hindsight by district courts who have sat through long, complicated, and often contentious proceedings, we must not be put in the position of having to guess what unwarranted factual or legal errors were the basis of the sanctions. At very least, such guidelines allow a fair and full appellate review of the decision."); *see also Occidental Petro. Corp. v. Wells Fargo Bank, N.A.*, 117 F.4th 628, 648 (5th Cir. 2024) (Ramirez, J., concurring in part and dissenting in part) ("Absent record evidence demonstrating that Wells Fargo's inconsistent statements were made with the requisite manipulative intent, judicial estoppel is not warranted.").

Instead of making guesses about motive based on speculation untethered to record evidence, Highland (or the courts) needed to identify competent evidence from Appellants, through testimony or otherwise. None was identified. Given the existing record at the time Holdco withdrew it objection, Appellants:

- Did not know Highland's representation that the HarbourVest Interests were worth $22.5 million was false,
- Did not know Highland had failed to utilize the valuation processes required by regulations and internal policies (or utilized them and concealed the results), and
- Did not know the actual value of the HarbourVest Interests was actually north of $41 million.

ROA.286-288, 292-293. Indeed, it was not until shortly after Highland terminated numerous staff members responsible for many of its duties to investors that Appellants learned these things from them. ROA.279-280, 286, 294-295.

These facts concerning the timing of Appellants' knowledge wholly refute the notion that the withdrawal of the objection on January 14, 2021, and the complaint filed three months later on April 12, 2021, were intentionally self-contradictory or made with the requisite manipulative intent. Judicial estoppel therefore does not apply.

Because the bankruptcy court applied an incorrect legal standard and engaged in speculation divorced from record evidence, it abused its discretion in dismissing Appellants' claims for breach of contract and tortious interference with contract. And the district court erred by affirming.

d. Contract-Related Claims

The bankruptcy court, in the alternative, reached the merits of and dismissed Appellants' claims for breach of contract and tortious interference with contractual relations. *See* ROA.51-52. This was also error.

The HCLOF Members Agreement permits transfers of interests in HCLOF by members to "affiliates" of initial members, but not to members themselves, without certain conditions precedent. *See* ROA.4921. One such condition is that the other members of HCLOF must be afforded a right of first refusal, *i.e.*, the right to purchase their pro rata portion of the available interest. *Id.*; *see* ROA.296–97. Here, after the Settlement Agreement was already signed, Highland purported to transfer the HarbourVest Interests to its "nominee," HCMLP Investments, LLC, and because that nominee is allegedly an "affiliate," Highland claims it was unnecessary to offer the right of first refusal to Holdco. *See, e.g.*, ROA.7880.

The overarching theory of the claim for breach of contract is the following: the transfer of the HarbourVest Interests did not go directly from HarbourVest to HCMLP Investments, LLC—rather, given the actual parties to the Settlement Agreement and the language therein, title passed

to Highland before its nominee ever took title since Highland had authority under the Settlement Agreement to select its nominee. As such, the HarbourVest Interests were transferred under the HCLOF Members Agreement to Highland—a member rather than the affiliate of a member—meaning Highland breached the governing agreement by not offering other members their right of first refusal. And in the alternative, to the extent at least some title transferred to HCMLP Investments, LLC when the bankruptcy court approved the Settlement Agreement, Highland still committed a breach of contract because HCMLP Investments, LLC, as Highland's nominee, took *legal* title while *equitable* title transferred to Highland—this would also trigger the HCLOF members' right of first refusal. *See Oxford Cap. Corp. v. United States*, 211 F.3d 280, 284 (5th Cir. 2000) (stating that a nominee holds only legal title to property that belongs to another, who actually controls and possesses beneficial ownership of the property).

As for tortious interference, the elements for such a claim are "(1) an existing contract subject to interference, (2) a willful and intentional act of interference with the contract, (3) that proximately caused the plaintiff's injury, and (4) caused actual damages or loss." *Prudential Ins. Co. of Am.*

v. Fin. Rev. Servs., Inc., 29 S.W.3d 74, 77 (Tex. 2000). Because the premise for dismissing Holdco's tortious-interference claim was predicated on the non-existence of an enforceable contract as well as judicial estoppel, the claim likewise survives. But this claim survives for an additional reason: the self-dealing and misleading statements by Highland as to the value of HarbourVest, which amount to willful interference with Holdco's rights under the HCLOF Members Agreement vis-à-vis HarbourVest. *See* ROA.302-303.

The bankruptcy court erred in holding that Highland, as a member of HCLOF, could not tortiously interfere. A party to a contract cannot be liable for interference by inducing its own breach of an agreement, but where, as here, there are multiple parties to an agreement and Party A causes Party B to breach the agreement as to Party C, Party C has a claim for tortious interference against Party A. Considering the multiple parties to the HCLOF Members Agreement, Highland caused HarbourVest to breach the agreement as to, among others, Holdco. Accordingly, Holdco has a tortious-interference claim against Highland.

III. Refusing Appellants an Opportunity to Amend Their Complaint Constitutes Reversible Error

Appellants respectfully submit that the circumstances of this case compel an opportunity to amend. They requested leave to amend twice, first in a formal motion to the district court at the outset of the case, and again in their response to the motion to dismiss. Both were denied. ROA.315-324, 4863-4864.

But Federal Rule of Civil Procedure 15 instructs that leave to amend should be freely given. Thus, a court's discretion to deny leave is severely limited by this bias in favor of amendments. See *Dussouy v. Gulf Coast Invest. Corp.*, 660 F.2d 594, 598 (5th Cir. Nov. 1981). And leave to amend "should not be denied 'unless there is a substantial reason to do so.'" *Jacobsen v. Osborne*, 133 F.3d 315, 318 (5th Cir. 1998) (emphasis added) (quoting *Leffall v. Dall. Indep. Sch. Dist.*, 28 F.3d 521, 524 (5th Cir. 1994)).

Appellants submit that any shortcomings in their complaint can be cured in an amendment. In particular, as noted previously, Appellants would have explicitly alleged a gross-negligence count in the complaint in the first instance had the bankruptcy court already exculpated Highland from liability for mere negligence.

Further, an opportunity to amend would allow Appellants to provide citations to the legal provisions that the bankruptcy court faulted them for omitting. They can request the specific relief that is available under § 215 of the IAA (rescission), which, according to the district court, their general request for relief did not include. Appellants can explicitly label their gross-negligence claim as such and allege, specifically, that their negligence claim is an administrative expense claim under the Bankruptcy Code and therefore not subject to the bankruptcy plan's exculpatory provisions. They can provide additional notice, additional citations, and additional particulars.

Appellants do not believe these amendments would prove futile and respectfully submit that Rule 15 mandates they be given an opportunity to replead.

CONCLUSION

It is a bedrock principle of securities law that investment advisors who "purchase and otherwise trade" in financial instruments on behalf of others as Highland does, ROA.290, have duties to the investors they advise. And they must face consequences when they breach those duties. The integrity of financial markets depends on the enforceability of such

principles. Nothing in the Bankruptcy Code authorizes circumventing such laws—or the Federal Rules of Civil Procedure either—to obtain a different set of standards when investment advisors are also debtors in bankruptcy court. Here, Appellants have stated claims for relief against such a debtor. They respectfully submit that their claims should be decided on the merits.

For these reasons, the Court should reverse the judgment and remand to the district court for further proceedings, including, but not limited to, renewed consideration of Appellants' motion to withdraw the reference.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the United Court of Appeals for the Fifth Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 12,558 words excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

Date: December 20, 2024

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