Case No. 24-10880

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

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

Charitable DAF Fund, L.P.; CLO HoldCo, Limited,

Appellants,

v.

Highland Capital Management, L.P.,

Appellee

Appeal from the United States District Court,
Northern District of Texas, Dallas Division
Case No. 3:23-cv-1503-B
Hon. Jane J. Boyle, District Judge

APPELLEE'S BRIEF

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that:

(a) There are no other debtors associated with this bankruptcy case other than Highland Capital Management L.P., and there are no publicly-held corporations that own 10% or more of Highland Capital Management, L.P., which is not a corporation or a parent corporation;

(b) On information and belief, Appellants are all private, non-governmental parties whose owners are also private, non-governmental parties, and no publicly-held corporation owns 10% or more of the equity interests in any of these entities;

(c) The following listed persons and entities, as described in the fourth sentence of 5th Cir. R. 28.2.1, have an interest in the outcome of this case:

(i) Highland Capital Management, L.P., Appellee
Counsel: Pachulski Stang Ziehl & Jones LLP
Hayward PLLC

(ii) The Charitable DAF Fund, L.P., Appellant
CLO Holdco Ltd., Appellant
Counsel: Sbaiti & Company PLLC

/s/ Zachery Z. Annable
Zachery Z. Annable

STATEMENT REGARDING ORAL ARGUMENT

The issues on appeal are straightforward and have been fully briefed. Appellee does not believe oral argument would assist the Court.

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I. ISSUES PRESENTED

1. Whether the Bankruptcy Court abused its discretion when it held Counts 2 (Negligence) and 5 (Tortious Interference) were barred by judicial estoppel where such determination was based on, among other things, its factual finding that Appellants' "inconsistent positions regarding the 'Right of First Refusal' under the Members Agreement would appear, by any plausible measure, to be deliberate, directed, and ***not inadvertent***."

2. Whether all counts of the Complaint were properly dismissed pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(6) for failure to state a claim.

3. Whether the District Court properly concluded that Appellants' arguments regarding their alleged gross negligence are not properly on appeal because they were not raised in the Bankruptcy Court.

4. Whether leave to amend was properly denied as futile under FRCP 15(a) or for failure to demonstrate "compelling circumstances" as required by *CLO Holdco, Ltd. v. Kirschner (In re Highland Capital Management, L.P.)*, 102 F.4th 286 (5th Cir. 2024).

II. STANDARD OF REVIEW

A. Judicial Estoppel

A finding of judicial estoppel is reviewed for "abuse of discretion." *U.S. ex rel. Long v. GSDMIdea City, L.L.C.*, 798 F.3d 265, 271 (5th Cir. 2015); *Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*,

643 B.R. 162, 169 (N.D. Tex. 2022). A court abuses its discretion only if it: "(1) relies on clearly erroneous factual findings; (2) relies on erroneous conclusions of law; or (3) misapplies the law to the facts." *Love v. Tyson Foods, Inc.*, 677 F.3d 258, 262 (5th Cir. 2012) (internal quotations omitted). "Deference … is the hallmark of abuse-of-discretion." *Wal-Mart Stores, Inc. v. Parker (In re Parker)*, 789 F. App'x 462, 464 (5th Cir. 2020) ("We review a refusal to apply the doctrine of judicial estoppel for abuse of discretion …. We will only reverse where 'the district court's factual findings are clearly erroneous or incorrect legal standards were applied.'") (citations omitted). *Love*, 677 F.3d at 262.

B. Dismissal Under FRCP 12(b)(6)

"An appellate court reviews a dismissal under Rule 12(b)(6) de novo." *DAF Fund, L.P.*, 643 B.R. at 169; *see also Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 868 (5th Cir. 2000) (same).

C. Denial of Leave to Amend

A denial of leave to amend as futile under FRCP 15(a) is reviewed *de novo*. *Def. Distributed v. Platkin*, 55 F.4th 486, 494 (5th Cir. 2022).

III. COUNTERSTATEMENT OF THE CASE

A. The Appellants

Appellant Charitable DAF Fund, L.P. ("DAF") is a Cayman Island exempted company formed in 2011 by James Dondero—Appellee Highland Capital Management, L.P.'s ("HCM") ousted founder and former CEO—for tax

purposes. Appellant CLO Holdco, Ltd. ("CLOH") is a Cayman Island company and a wholly owned subsidiary of DAF. ROA.208; *Charitable DAF Fund, L.P. v. Alvarez & Marsal CRF Mgmt., LLC (In re Highland Cap. Mgmt., L.P.)*, 2025 Bankr. LEXIS 59, at *3-4 (Bankr. N.D. Tex. Jan. 13, 2025) ("DAF is not a section 501(c)(3) non-profit entity but, rather, is 'an exempted company' incorporated in the Cayman Islands.").

HCM and DAF entered into the *Second Amended and Restated Investment Advisory Agreement*, effective January 1, 2017 (the "DAF Agreement").[1] ROA.5348-69. Under the DAF Agreement (executed when Dondero controlled both HCM and DAF), HCM provided DAF with investment advice, but all transactions were subject to DAF's approval.[2] The DAF Agreement was terminated in accordance with its terms in early 2021.

HCM never had a contractual relationship with CLOH.

B. Highland CLO Funding, Ltd.

Highland CLO Funding, Ltd. ("HCLOF") is a closed-end investment vehicle that was incorporated under the laws of Guernsey on March 30, 2015. ROA.7903.

[1] In their Complaint, Appellants mistakenly relied on the *Amended and Restated Investment Advisory Agreement*, executed on July 1, 2014. ROA.290. That document was superseded by the DAF Agreement.

[2] *See, e.g.*, ROA.5351 (granting HCM authority "to purchase or otherwise trade in Financial Instruments that have been approved by the General Partner [*i.e.*, DAF]"); ROA.5352 ("ALL ULTIMATE INVESTMENT DECISIONS … SHALL AT ALL TIMES REST SOLELY WITH THE GENERAL PARTNER AND/OR THE OFFICERS/DIRECTORS OF THE APPLICABLE SUBSIDIARY").

Initially, CLOH held approximately 99% of HCLOF's shares. As of 2015, Dondero controlled CLOH, DAF, and HCM.[3]

In November 2017—with Dondero still in control of CLOH, DAF, and HCM—HarbourVest[4] acquired nearly half of CLOH's membership interests in HCLOF for approximately $80 million, resulting in CLOH holding 49.02% of HCLOF's interests, HarbourVest holding 49.98%, and HCM and certain HCM employees (or their entities) holding the remaining 1%.

At all relevant times, HCLOF has been managed by its independent, Guernsey-based board of directors and is governed by, among other documents, the *Members Agreement Relating to the Company*, dated November 15, 2017 (the "Members Agreement"). ROA. 1937-64.

Highland HCF Advisors, Ltd. ("HCFA"), a wholly-owned subsidiary of HCM, was HCLOF's portfolio manager pursuant to the *Portfolio Management Agreement*, effective as of November 17, 2019, by and between HCLOF and HCFA (the "HCFA Agreement," and together with the DAF Agreement, the "Advisory Agreements"). HCFA's current role is limited to assisting in collecting cash owed to HCLOF.

[3] Dondero controls, or exerts significant influence over, DAF and CLOH. ROA.209.

[4] "HarbourVest" means, collectively, HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. HarbourVest is not affiliated with Appellants, Appellee, or Dondero.

Contrary to Appellants' assertions, HCM has never had a contractual or advisory relationship with HCLOF. Instead, HCM provides limited services to HCFA.

C. Highland Files for Bankruptcy and Its Plan Is Later Confirmed

On October 16, 2019 (the "Petition Date"), HCM filed a voluntary petition for relief under chapter 11 of the U.S. Bankruptcy Code (the "Bankruptcy Case"). The Bankruptcy Case is pending in the U.S. Bankruptcy Court for the Northern District of Texas, Dallas Division (the "Bankruptcy Court").

On January 9, 2020, Dondero was removed from all control positions at HCM because of concerns about his ability to function as a fiduciary and to avoid the appointment of a Chapter 11 trustee. Concurrently, the Bankruptcy Court appointed an independent board—consisting of John Dubel, Russell Nelms, and James P. Seery, Jr.—to manage HCM and the Bankruptcy Case. B.D.I.[5] 339. The Bankruptcy Court subsequently appointed Seery as HCM's Chief Restructuring Officer and Chief Executive Officer. B.D.I. 854.

On November 24, 2020, HCM filed its *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [B.D.I. 1472] (the "Proposed Plan"). Among other things, the Proposed Plan exculpated HCM (and others) "for conduct occurring on or after the Petition Date in connection with or

[5] "B.D.I." refers to the docket maintained by the Bankruptcy Court in Case No. 19-34054-sgj11.

arising out of (i) the … administration of the Chapter 11 Case … and (v) any negotiations, transactions, and documentation in connection with the foregoing" unless such conduct constituted "bad faith, gross negligence, criminal misconduct, or willful misconduct." B.D.I. 1472, Art. IX.C.

In January 2021, Dondero and multiple entities under his control, including CLOH, objected to the Proposed Plan. B.D.I. 1661, 1667, 1669, 1670, 1673, 1675, 1676. CLOH, among others, explicitly objected to the Proposed Plan's exculpation provision. B.D.I. 1675 ¶¶ 24-29.

On February 22, 2021, the Bankruptcy Court entered the *Order Confirming (i) the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (ii) Granting Related Relief* (ROA.3793-3883) (the "Confirmation Order"), which confirmed the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* (ROA.3884-3953) (the "Confirmed Plan").

The Confirmed Plan expressly exculpated HCM from all liability relating to its conduct during the Bankruptcy Case unless such conduct constituted "bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct." ROA.3936-37.

Multiple Dondero entities moved to stay the Confirmation Order pending appeal to this Court, but their motions were denied by the Bankruptcy Court, the

District Court, and this Court. B.D.I. 2084; B.D.I. 2095; Case No. 21-cv-00538-N, D.I. 27 (N.D. Tex. Jun. 23, 2021); Case No. 21-10449, Document # 515906887 (5th Cir. Jun. 21, 2021).

On August 11, 2021, the Confirmed Plan became effective [B.D.I. 2700] (the "Effective Date"). Pursuant to the Confirmed Plan, (a) the deadline for filing administrative expense claims was September 25, 2021 (forty-five (45) days after the Effective Date), (ROA.3891), and (b) claims arising prior to the Effective Date were discharged pursuant to 11 U.S.C. § 1141, (ROA.3936).

On September 7, 2022, this Court affirmed, among other things, the Confirmed Plan's discharge provision and the exculpation clause applicable to HCM. *NexPoint Advisors, L.P.*[6] *v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, 48 F.4th 419, 433-34, 438 (5th Cir. 2022).

D. The HarbourVest Settlement

HarbourVest filed claims in the Bankruptcy Case exceeding $300 million, alleging that HCM—acting through Dondero—fraudulently induced HarbourVest into acquiring an interest in HCLOF and engaged in other wrongful conduct. ROA.1448-1507.

[6] Like Appellants, NexPoint Advisors, L.P., is another entity controlled by Dondero. ROA.3812.

On December 23, 2020, following arm's-length negotiations, HCM moved for Bankruptcy Court approval of a proposed settlement (the "Settlement") of HarbourVest's claims. [B.D.I. 1625] (the "Settlement Motion"). ROA.1509-21.

Contrary to Appellants' assertions, (Br. at 5, 12, 20, 40, 49-50), HarbourVest's interest in HCLOF was not offered for sale during the Bankruptcy Case.[7] Rather, as part of the Settlement, HarbourVest effectively rescinded its investment in HCLOF by agreeing to transfer its interest in HCLOF to an HCM affiliate receiving allowed claims against HCM approximately equal to the net cost of its investment. ROA.228-29. ("HarbourVest did not 'offer' its … interest in HCLOF to [HCM]. Rather, a component of the [Settlement] was for HarbourVest to transfer its membership interest in HCLOF to [HCM's] nominee ….").

The Settlement Motion disclosed all material terms of the proposed Settlement, including (a) the amount and priority of HarbourVest's allowed claims against HCM; (b) the transfer of the HCLOF interests to HCM's affiliate; and (c) valuation (and method of valuation) of the transferred interests. ROA.228-29.

[7] Accordingly, the new premise running throughout Appellants' arguments—that if they had known the "true value" of the HCLOF interests at the time of the Settlement they would have offered to purchase them for more money—is false. HarbourVest was not selling its interests, it was settling HarbourVest's claims, but, even if it had been, Appellants would have had no right to acquire them as the ROFR did not apply to the Settlement—just as CLOH admitted when it withdrew its objection to the Settlement Motion. *See infra* at 9-11.

E. CLOH Objects to the Settlement, Takes Discovery, Conducts Diligence, and Voluntarily Withdraws Its Objection

On January 8, 2021, CLOH objected to the proposed Settlement (ROA.1570-79) (the "Objection"),[8] alleging it violated CLOH's "Right of First Refusal" (the "ROFR") under the Members Agreement.

The proposed Settlement was subject to the Bankruptcy Court's approval, notice of which was provided to all stakeholders.[9] And filing the Objection entitled CLOH to seek discovery, including taking depositions and requesting documents concerning all aspects of the proposed Settlement.[10] In fact, CLOH exercised that right by deposing HarbourVest's principal witness, Michael Pugatch ("Pugatch").[11]

After discovery was complete, HCM filed its reply (ROA.1636-57), showing the Settlement did not trigger the ROFR, (ROA.1649-55). The Bankruptcy Court then held an evidentiary hearing on the proposed Settlement during which CLOH *voluntarily withdrew* its Objection after considering HCM's analysis of the Members Agreement and applicable law:

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[8] Dondero and his family trusts separately objected to the proposed Settlement. B.D.I. 1697; 1706. Their objections were overruled and appeals dismissed. *Dugaboy Inv. Tr. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, 2022 U.S. Dist. LEXIS 185186 (N.D. Tex. Sept. 26, 2022); *Dugaboy Inv. Tr. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, 2023 U.S. App. LEXIS 19671 (5th Cir. Jul. 31, 2023).

[9] Contrary to Appellants' contentions to this Court (Br. at 6-9, 48), CLOH obviously had notice of the Settlement Motion because it filed the Objection. *See also* B.D.I. 1646 (Certificate of Service).

[10] An objection to a motion initiates a "contested matter" in which an objecting party gains discovery rights under Bankruptcy Rule 9014(c).

[11] ROA.1612-18 (Pugatch deposition at 122:4-147:17).

> [CLOH] 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 on those pleadings and our review of the appropriate documents, I obtained authority from my client***, Grant Scott, as trustee for [CLOH], ***to withdraw the [CLOH] objection based on the interpretation of the Members Agreement***.

ROA.774 (emphasis added).

HCM called two witnesses in support of the Settlement Motion—Seery (its court-appointed CEO) and Pugatch (the person CLOH deposed). Dondero and his family trusts cross-examined HCM's witnesses. ROA.829-60, 861-907. CLOH—present at the hearing through counsel—had the opportunity to cross-examine HCM's witnesses and present evidence but chose not to.

Relying on CLOH's withdrawal of its Objection, and the evidence admitted at the hearing, the Court overruled the remaining objections and approved the Settlement [B.D.I. 1788] (the "Settlement Order"). ROA.3631-53; *DAF*, 643 B.R. at 174.

Consistent with the Settlement Agreement, the Settlement Order ***expressly*** authorized the transfer of HarbourVest's interest in HCLOF directly to an HCM affiliate providing, in relevant part, that "[p]ursuant to the express terms of the [Members Agreement] … HarbourVest is authorized to transfer its interest in HCLOF to a wholly-owned and controlled subsidiary of [HCM] … without the need to obtain the consent of any party or to offer such interests first to any other

investor in HCLOF." ROA.3634. The Settlement Order was a final order and is no longer subject to appeal.[12]

F. With a New Trustee and New Counsel, Appellants Attack the HarbourVest Settlement by Filing the Complaint

Shortly after CLOH withdrew its Objection and the Bankruptcy Court approved the Settlement, CLOH's trustee and counsel were replaced.[13] On April 12, 2021, two months after entry of the Confirmation Order, Appellants' new representatives commenced the underlying action by filing the *Original Complaint* (ROA.5945-70) (the "Complaint") in the District Court in which they asserted five causes of action (the "Counts") against HCM for entering into the court-approved Settlement:

- Count 1 alleges HCM violated its "broad" fiduciary duties to Appellants arising under the IAA by: (a) "insider trading with HarbourVest"; (b) "concealing" the value of the HCLOF interests; and (c) "diverting" the purported investment opportunity in HCLOF to HCM without first offering it to Appellants.

[12] UBS and an affiliate were the only parties to appeal the Settlement Order, but they voluntarily withdrew their appeal. *UBS Secs. LLC v. Highland Cap. Mgmt., L.P.*, Case No. 3-20-cv-03408-G, Docket No. 39.

[13] The Complaint and this appeal are being prosecuted by Appellants' *replacement* trustee (a long-time Dondero employee) and *replacement* counsel—none of whom has any personal knowledge concerning Appellants' motivations for withdrawing the Objection. In fact, the only evidence in the record concerning these matters are the voluntary, informed, and unambiguous representations CLOH's then counsel made to the Bankruptcy Court that the Settlement did not implicate the ROFR. Appellants' speculative, unsupported assertions do not establish that CLOH's representations were inadvertent.

- Count 2 alleges breach of the Members Agreement for failing to offer HarbourVest's interest in HCLOF to CLOH pursuant to the ROFR.
- Count 3 alleges HCM negligently breached its duties to Appellants under the IAA by, among other things, miscalculating the value of the HCLOF interests and breaching the ROFR.
- Count 4 alleges HCM violated RICO by failing to disclose the "true" value of the HCLOF interest and transferring HarbourVest's interest to HCM's affiliate.
- Count 5 alleges HCM tortiously interfered with Appellants' ROFR.

ROA.5955-69.

The Complaint contained ***no*** factual or legal allegations with respect to (a) Section 215 of the IAA, (b) state law fiduciary duties or remedies, or (c) gross negligence.

G. Appellants' Complaint Is Dismissed; They Appeal; the Matter Is Remanded for Further Proceedings

In May 2021, HCM filed its (1) *Motion to Dismiss Complaint* (ROA.1437-43) (the "Original MTD") and (2) motion to enforce the District Court's *Miscellaneous Order No. 33* (ROA.408-45), arguing that the Bankruptcy Court—not the District Court—should adjudicate matters relating to the Complaint,

including the Original MTD.[14] The District Court granted the motion to enforce the reference and referred the Complaint and all related proceedings, including the Original MTD, to the Bankruptcy Court.

The Bankruptcy Court dismissed the Complaint, finding Appellants' claims were barred by collateral and judicial estoppel. In light of this holding, the Bankruptcy Court did not address HCM's substantive motion to dismiss for failure to state a claim.

On appeal, Appellants argued collateral estoppel did not apply and the Bankruptcy Court abused its discretion because it did not consider "inadvertence" in assessing judicial estoppel. Case No. 22-cv-00695-S, D.I. 9 at 27-28 (N.D. Tex. May 26, 2022). The District Court agreed collateral estoppel did not apply and, with respect to judicial estoppel, remanded solely for a determination as to Appellants' "inadvertence." *DAF*, 643 B.R. at 173-75.

H. Following Remand, HCM Renews Its MTD

Following remand, HCM renewed its motion to dismiss (ROA.4228-65) (the "Renewed MTD"), moving to dismiss (a) Counts 2 and 5 on judicial estoppel grounds, and (b) all counts for failure to state a claim. In response, Appellants argued for the first time that the Complaint pleaded a claim under Section 215 of

[14] The District Court's *Miscellaneous Order No. 33* automatically refers "any or all cases under Title 11 and any or all proceedings arising under Title 11 or arising in or related to a case under Title 11" to the bankruptcy judges in the U.S. District Court for the Northern District of Texas.

the IAA. ROA.4884. On June 25, 2023, the Bankruptcy Court dismissed the Complaint (ROA.16-53) (the "BK Order"), finding Counts 2 and 5 were barred by judicial estoppel because the "inadvertence" element was satisfied and all Counts failed to state a claim under FRCP 12(b)(6).

The Bankruptcy Court made detailed factual findings regarding the "advertence" of Appellants' withdrawal of the Objection (which was premised on the applicability of the ROFR). For example, the Bankruptcy Court found that (a) Appellants "***knew*** of and analyzed the factual and legal issues underpinning Counts 2 and 5 when they unequivocally withdrew the [CLOH] objection … [and Appellants'] acts were intentional based on the unrefuted record," and (b) Appellants' allegations that "they were not informed … that HarbourVest had offered its shares to [HCM] for $22.5 million" was "irrelevant, but … also inaccurate and contradicted by the record" given the public disclosures in the Settlement Motion. The Bankruptcy Court also found Appellants had "motive to take inconsistent positions on Counts 2 and 5." ROA.227-30 (emphasis in original).

Ultimately, the Bankruptcy Court found CLOH's "inconsistent positions regarding the 'Right of First Refusal' under the Members Agreement would appear, by any plausible measure, to be deliberate, directed, and ***not inadvertent***.

There can be no legitimate dispute that [Appellants'] conduct … was 'advertent.'" ROA.230 (emphasis in original).

The Bankruptcy Court concluded that all Counts failed to state a plausible claim under FRCP 12(b)(6):

- Count 1 (Breach of Fiduciary Duty): Appellants' claim under Section 206 of the IAA for breach of fiduciary duty was barred by Supreme Court precedent. ROA.230-35.[15]
- Count 3 (Negligence): Appellants' claim was barred by the Confirmed Plan's exculpation provision and, even if it were not, Appellants' "negligence allegations [were] speculative, conclusory, and fail[ed] to allege proximate cause." ROA.235.[16]
- Count 4 (RICO): Appellants' attempt to withdraw their RICO Count was procedurally improper because it did not comply with FRCP 41(a). Moreover, Appellants failed to state a RICO claim under FRCP 12(b)(6). ROA.236-40.
- Counts 2 (Breach of Contract) and 5 (Tortious Interference): In addition to finding these claims barred by judicial estoppel, the Bankruptcy Court found (a)

[15] The Bankruptcy Court also rejected Appellants' contention that the Complaint somehow alleged claims for breach of fiduciary duty under Texas law, Guernsey law, or Section 215 of the IAA—none of which is even mentioned in the Complaint. A fair reading of the Complaint validates the Bankruptcy Court's conclusion; nothing therein would have given HCM fair notice of such claims.

[16] The Bankruptcy Court did not address Appellants' argument that their negligence claim alleged facts sufficient to demonstrate gross negligence because Appellants raised it for the first time in their appeal to the District Court.

the breach of contract and tortious interference claims failed because the ROFR did not apply to the Settlement; (b) the tortious interference claim failed because a party (such as HCM) cannot interfere with its own contract; and (c) Counts 2 and 5 were duplicative. ROA.240-41.

I. The District Court Affirms the BK Order Dismissing Appellants' Complaint with Prejudice, and Appellants Appeal Again

The District Court affirmed the dismissal of the Complaint with prejudice. ROA.8068-86.

The District Court held the Bankruptcy Court did not abuse its discretion in dismissing Counts 2 and 5 under judicial estoppel because the third element of judicial estoppel—advertence—was satisfied.[17] Appellants had (a) knowledge of their claim *and* (b) motive to conceal it:

> Appellants knew about the potential breach of contract claim and the potential tortious interference with a contract claim arising from the Right of First Refusal provision because [CLOH], one of the plaintiffs in this suit, initially objected to the underlying HarbourVest Settlement on grounds that it would violate the Right of First Refusal provision …. Counts 2 and 5 accuse HCM of the same violations with respect to the same settlement …. Thus, their objection in the underlying bankruptcy proceedings establishes that Appellants had knowledge of these two claims.
>
> The only argument Appellants raise in response to the bankruptcy court's finding is that they did not know the exact value of the HarbourVest interest—the assets that would be purchased by HCM in

[17] The District Court ratified its ruling that the Bankruptcy Court properly determined that the first two elements of judicial estoppel—inconsistent position and acceptance by the court—were satisfied. ROA.8074.

> the HarbourVest Settlement …. The bankruptcy court correctly rejected this argument because Appellants did not learn it could potentially assert a breach of contract claim or tortious interference with a contract claim after the HarbourVest Settlement was approved. Instead, Appellants only learned they could potentially recover *more damages* from asserting these claims after the HarbourVest Settlement was approved. Later learning that a claim could potentially lead to recovering more damages does not establish that they lacked knowledge of their claims as necessary to establish inadvertence ….
>
> Appellants offer no argument in response to the bankruptcy court's conclusion that Appellants would have plenty of motive to take inconsistent positions.

ROA.8074-75. Because the District Court affirmed dismissal under judicial estoppel, it did not address whether Counts 2 and 5 failed to state a claim under FRCP 12(b)(6).

The District Court also affirmed the Bankruptcy Court's dismissal of Court 1 for failure to state a claim. "After reviewing the Complaint, [the District Court] concludes that Appellants have only asserted one breach of fiduciary duty claim under § 206 of the IAA" and that "§ 206 does not confer a private cause of action." ROA.8076.

The District Court rejected Appellants' argument that because "Section 215 of the IAA allows for equitable relief where a contract violates the IAA [and] Appellants asked for disgorgement in their Complaint," they should be deemed to have asserted a claim under Section 215, finding the argument "far too attenuated." ROA.8077. The District Court determined that (a) Appellants failed to plead the

facts necessary to allege a claim under Section 215; (b) Section 215 "was mentioned nowhere in their Complaint;" (c) Appellants also did not allege "that the HarbourVest Settlement was void because it violated the IAA and that, because the Settlement is void, Appellants were entitled to recover the HarbourVest interest under a theory of restitution;" and (d) Appellants did not "allege that the HarbourVest Settlement itself or any other contract entered into by Defendants is void as would be necessary to assert a claim under § 215." ROA.8077-78.

The District Court also rejected Appellants' argument that their Section 215 claim should be allowed because it "featured prominently in Appellants' Response briefing," explaining that "'[i]t is wholly inappropriate to use a response to a motion to dismiss to essentially raise a new claim for the first time.'" ROA.8078 (citations omitted).

Similarly, the District Court found that Appellants failed to plead a breach of fiduciary duty claim under state law: (a) "[t]he breach of fiduciary duties section of the Complaint exclusively discusses federal law and federal regulations … and the Complaint makes no mention of any state law regarding fiduciary duties …"; and (b) "[a]s Appellants have argued throughout this lawsuit … the IAA imposes the duties of loyalty and care upon investment advisors …. Thus, simply alleging

HCM owed these fiduciary duties, while exclusively discussing federal law, is insufficient to have raised a state law claim in their Complaint." ROA.8078-79.[18]

The District Court also affirmed the dismissal of Count 3 (Negligence) because the Confirmed Plan indisputably exculpates HCM from any "negligence claim arising out of HCM's conduct in the bankruptcy proceedings." ROA.8079-81.[19]

The District Court next rejected Appellants' argument—raised for the first time on appeal—that they had implicitly pleaded a claim for gross negligence. "Count 3 … only alleges that HCM was negligent—it does not allege gross negligence, nor can a claim for gross negligence be inferred from the allegations in the Complaint …. To make matters worse, Appellants did not argue before the bankruptcy court that they pled a claim for gross negligence …. Thus, any argument about whether the Complaint asserted a claim for gross negligence was not presented to the bankruptcy court, and this Court will not consider it on appeal." ROA.8081.

The District Court affirmed dismissal of Count 4 (RICO). ROA.8081-82.

[18] Because the District Court held that Appellants failed to assert a state law breach of fiduciary duty claim, it did not address whether the Bankruptcy Court properly dismissed the state law claim under FRCP 12(b)(6) or whether Texas or Guernsey law applied.

[19] Because the District Court held that Appellants' negligence claim was barred by the Confirmed Plan, it did not address whether it was duplicative of Counts 2 and 5 or properly dismissed under FRCP 12(b)(6).

Finally, the District Court, after a *de novo* review, affirmed the denial of leave to amend as futile: (a) Count 1 (Breach of Fiduciary Duty) "was brought solely under a statutory provision that does not confer a private cause of action"; (b) "Counts 2 and 5 … are barred by judicial estoppel—thus any amended complaint would likewise fail to state a claim"; (c) "[the] Plan's exculpation provision expressly prohibits" Count 3 (Negligence); and (d) "Appellants did not propose … any new set of facts that would have shown … a viable claim under the RICO statute." ROA.8082-84.

Appellants then appealed to this Court.

IV. SUMMARY OF ARGUMENT

Dismissal of the Complaint with prejudice should be affirmed.

A. The Bankruptcy Court made detailed factual findings and correctly determined the last element for judicial estoppel—inadvertence—was satisfied, and Count 2 (Breach of Contract) and Count 5 (Tortious Interference) were therefore barred by judicial estoppel. Appellants are estopped from arguing the District Court applied the wrong standard in assessing "inadvertence." In their first appeal, Appellants urged the District Court to apply the *Coastal Plains* test for "inadvertence," and the District Court did so. Now, unhappy with the result, Appellants disingenuously contend the District Court erred in adopting the *Coastal Plains* standard.

B. As Appellants concede, no private right of action exists under Section 206 of the IAA for breach of fiduciary duty. Moreover, Appellants failed to plead a claim under Section 215 of the IAA or for breach of fiduciary duty under state law.

C. The Confirmed Plan's exculpation provision bars Count 3 (Negligence). Appellants' argument that the Complaint is an "administrative expense claim" and therefore not discharged misses the point. The Confirmed Plan exculpated, *i.e.*, "absolved," HCM from claims arising from alleged negligence. Appellants cannot prosecute a claim that is barred under the clear terms of the Confirmed Plan.

D. Appellants' argument that they asserted a claim for gross negligence was not presented to the Bankruptcy Court and cannot be considered on appeal. Even if it could, Appellants failed to plead facts necessary to allege a claim for gross negligence and have no excuse for failing to do so.

E. Appellants' request to amend under FRCP 15(a) is procedurally improper. Appellants concede they are asserting an "administrative expense claim"—*i.e.*, a bankruptcy claim. Post-confirmation amendment of a bankruptcy claim requires proof of "compelling circumstances," but Appellants have never offered such proof. *CLO Holdco, Ltd.*, 102 F.4th at 291. Even if FRCP 15(a) did apply, the District Court correctly found amendment would be futile.

V. ARGUMENT

For the reasons set forth below, the Court should affirm dismissal of the Complaint.

A. Judicial Estoppel Bars Counts 2 and 5

1. Legal Standard

Judicial estoppel is "a common law doctrine by which a party who has assumed one position in [its] pleadings may be estopped from assuming an inconsistent position." *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir. 1988). The purpose of the doctrine is "to protect the integrity of the judicial process" by "prevent[ing] parties from playing fast and loose with the courts to suit the exigencies of self-interest." *Id*. (internal quotations omitted); *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993). Generally, judicial estoppel applies where: (1) "the position of the party to be estopped is clearly inconsistent with its previous one; and (2) that party … convinced the court to accept that previous position." *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 206 (5th Cir. 1999).

At Appellants' urging, however, the District Court in Appellants' first appeal concluded a third element—inadvertence—was required for judicial estoppel. *DAF*, 643 B.R. at 173. Under the case law on "inadvertence" urged by Appellants, "the debtor's failure to satisfy its statutory disclosure duty is 'inadvertent' only when, in general, the debtor either lacks knowledge of the

undisclosed claims or has no motive for their concealment." Br. at 46 (citing *Coastal Plains*, 179 F.3d at 210); *see also Superior Crewboats, Inc. v. Primary P & I Underwriters (In re Superior Crewboats, Inc.)*, 374 F.3d 330, 335 (5th Cir. 2004) (same); *Jethroe v. Omnova Sols., Inc.*, 412 F.3d 598, 600-01 (5th Cir. 2005) (same). Whether a party acted inadvertently "presents a question of fact." *Love*, 677 F.3d at 262.

2. The Bankruptcy Court Correctly Concluded Counts 2 and 5 Were Barred by Judicial Estoppel

The Bankruptcy Court properly exercised its discretion in finding that Count 2 (Breach of Contract) and Count 5 (Tortious Interference) were barred by judicial estoppel because Appellants had acted "advertently."

In their Objection, Appellants argued the proposed transfer of HarbourVest's interests in HCLOF pursuant to the Settlement would breach the ROFR. But after briefing and discovery were completed, Appellants intentionally, voluntarily, and unequivocally withdrew their Objection, expressly conceding the proposed Settlement and integrated transfer did not implicate the ROFR. *See supra* at 9-11. As the Bankruptcy Court found and the District Court affirmed in the first appeal, Counts 2 and 5 are premised entirely on HCM's alleged violation of the ROFR—the very theory Appellants expressly disavowed when withdrawing their Objection. *DAF*, 643 B.R. at 174 ("[CLOH] made clear in the withdrawal of its objection that it no longer disputed the other parties' interpretation of the [ROFR]

which now forms the basis of [DAF's] second and fifth causes of action."). The unrefuted record establishes that Appellants knew all the facts and legal issues underlying Counts 2 and 5 when they voluntarily withdrew their Objection.

As the Bankruptcy Court explained, it also "seems implausible" that Appellants had "no motivation to take inconsistent positions" on the ROFR, because the only risk in asserting their position now is "litigation risk," while "they have borne none of the speculative risk of what would happen to the value of the HCLOF membership interests, had they had the opportunity to acquire it." ROA.229-30. Appellants did not dispute the factual findings regarding their "motive" in the District Court.

Appellants' inconsistent positions regarding the ROFR were thus deliberate, direct, and advertent. Appellants' attempt to play "fast and loose with the court" is precisely the type of conduct the judicial estoppel doctrine is intended to prevent. *Superior Crewboats*, 374 F.3d at 335-36 (non-disclosure of a viable claim was not "inadvertent" where debtors "were aware of the facts underlying the claim"); *GSDMIdea City*, 798 F.3d at 272 (failure to disclose claims was not "inadvertent" where party "was aware of the facts underlying his claims as early as 2010 and [] filed this lawsuit in 2011," noting inadvertence through lack of knowledge cannot be shown "as long as the debtor has enough information to suggest that he may have a potential claim").

3. Appellants Raise No Valid Arguments Against Judicial Estoppel

Notwithstanding the indisputable facts in the record, Appellants now contend (a) the lower courts erred by applying the test for "inadvertence," (b) the District Court erred by not assessing Appellants' motive to conceal, and (c) Appellants acted inadvertently in withdrawing the Objection because they supposedly lacked accurate information concerning the value of HarbourVest's HCLOF interest. Br. at 44-48.

a. Appellants Are Estopped from Arguing the District Court Applied the Wrong Test for "Inadvertence"

In their first appeal, Appellants urged the District Court to apply this Court's decision in *Coastal Plains*, which held a failure to disclose was "inadvertent" when a debtor failed to satisfy its statutory duty to disclose and lacked knowledge of the undisclosed claims or a motive for their concealment. Now, Appellants take the opposite position, claiming the District Court erred by doing exactly what they requested.[20] Having persuaded the District Court to apply the *Coastal Plains* test

[20] *Cf.* Case No. 22-cv-00695-S, D.I. 9 at 27 (N.D. Tex. May 26, 2022) ("It is established law in the Fifth Circuit that if a party did not have knowledge of the facts giving rise to the claim at the time of the prior decision, or have no pecuniary reason to not bring their claims at the time, then any inconsistency is "inadvertent," and judicial estoppel does not apply. *See [Coastal Plains]*, 179 F.3d at 210 ('Our review of the jurisprudence convinces us that, in considering judicial estoppel for bankruptcy cases, the debtor's failure to satisfy its statutory disclosure duty is 'inadvertent' only when, in general, the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment.')") *with* Brief at 46 ("In fact, the case cited by the district court for this proposition, *In re Coastal Plains …* 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.").

for "inadvertence," Appellants are estopped from arguing application of the *Coastal Plains* test was error. *Coastal Plains*, 179 F.3d at 206.

Regardless, the Bankruptcy Court[21] made detailed factual findings regarding the "advertence" of Appellants' actions. Appellants' replacement representatives do not challenge those factual findings nor do they identify which standard should apply to "inadvertence," for an obvious reason: The Bankruptcy Court's factual findings would satisfy any standard because they conclusively prove that Appellants' actions were knowing, intentional, and advertent. *See, e.g.*, *id.* at 206-07 ("[T]he party to be estopped must have acted intentionally, not inadvertently …. 'If incompatible positions are based not on chicanery, but only on inadvertence or mistake, judicial estoppel does not apply.' … '[T]he rule looks toward cold manipulation and not an unthinking or confused blunder.'").

b. Appellants Waived Their Arguments Regarding Motive

Appellants' argument that the District Court erred in not reviewing the Bankruptcy Court's findings on "motive" also fails. Appellants did not challenge the Bankruptcy Court's findings on "motive" in the District Court and therefore abandoned their right to challenge them on appeal. *See, e.g.*, *Innova Hosp. San*

[21] The Bankruptcy Court noted that, "in the Fifth Circuit, the element of 'inadvertence' is generally applied in a bankruptcy context where a ***debtor***, post-discharge, seeks to assert a claim that had or could have been addressed within the bankruptcy. Therefore, one might be unclear whether the element of 'inadvertence' applies in this case, which relates to ***a non-debtor plaintiff's change of position in an adversary proceeding***." ROA.227 (citations omitted) (emphasis in original).

Antonio, L.P. v. Blue Cross & Blue Shield of Ga., Inc., 892 F.3d 719, 732 (5th Cir. 2018) ("An appellant abandons all issues not raised and argued in [his] initial brief on appeal.") (quotations omitted). "Failing to identify errors in the district court's analysis 'is the same as if [appellant] had not appealed th[e] judgment' at all." *U.S. v. Hooper*, 783 F. App'x 433, 435 (5th Cir. 2019) (citations omitted). Appellants cannot argue the District Court erred by not assessing a factual finding they elected not to appeal.

Appellants also mischaracterize the Bankruptcy Court's factual findings concerning their motive. The Bankruptcy Court made factual determinations regarding Appellants' state of mind based on their flip-flopping positions on the ROFR and found that they had motive to conceal their alleged claims. ROA.229-30. Appellants do not challenge these findings; they just generically contend the findings are insufficient to show motive. Br. at 47-48. That is not enough to overturn the Bankruptcy Court's factual findings as clearly erroneous or its application of judicial estoppel as an abuse of discretion.

Finally, because the "inadvertence" test is in the disjunctive and requires *either* a finding that Appellants had (a) knowledge of their claims *or* (b) motive to conceal them, the Bankruptcy Court's factual findings on "motive" are dispositive on whether judicial estoppel bars Counts 2 and 5.

c. The ROFR Is Not Contingent on the Value of the HCLOF Interests

Appellants argue the allegedly false valuation of HarbourVest's interest in HCLOF is relevant to the judicial estoppel analysis. That is wrong. As the Bankruptcy Court correctly found, even assuming the ROFR applied to the Settlement, the ROFR "would not be dependent on the value of the HCLOF shares/membership interests" because the ROFR either does or does not apply. Here, Appellants' prior representatives admitted the ROFR did not apply—an admission based on their comprehensive review of the governing documents and applicable law, not on value. ROA.228-29; *see also* ROA.8075 ("Later learning that a claim could potentially lead to recovering more damages does not establish that [Appellants] lacked knowledge of their claims as necessary to establish inadvertence."). The notion that Appellants' prior representatives would have come to a different conclusion had the value of HarbourVest's interest been $45 million rather than the disclosed $22.5 million is baseless.

The Bankruptcy Court's factual finding that Appellants' contradictory positions were not "inadvertent" is not clearly erroneous, and its finding that Counts 2 and 5 are barred by judicial estoppel should be affirmed as a proper exercise of its discretion.

B. The Complaint Fails to State Claims Under FRCP 12(b)(6)

1. Legal Standard

To survive a motion to dismiss under FRCP 12(b)(6), a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the appellant pleads 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). "A properly pleaded complaint must give 'fair notice of what the claim is and the grounds upon which it rests.'" *Sims v. City of Madisonville*, 894 F.3d 632, 643 (5th Cir. 2018) (quoting *Ashcroft*, 556 U.S. at 698–99). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Ashcroft*, 556 U.S. 662, 663 (2009) (citations omitted).

Claims identified for the first time in a responsive brief should not be considered when assessing a motion to dismiss. *Charles v. K-Pats., Inc.*, 2020 U.S. Dist. LEXIS 55115, at *39-40 (E.D. Tex. Mar. 19, 2020), *aff'd* 898 F. App'x 448 (5th Cir. 2021) ("[T]he court need not consider the issue because Plaintiffs' Amended Complaint fails to provide fair notice of the claim and, therefore, Plaintiffs are foreclosed from raising the issue for the first time in response to K-Patents's motion for summary judgment."); *Ross Neely Sys., Inc. v. Navistar, Inc.*,

2015 U.S. Dist. LEXIS 69350, at *2-3 (N.D. Tex. May 28, 2015) (quoting *Aschroft*, 556 U.S. at 698-99) ("[I]f claims or theories are nowhere to be found in the complaint, it would be unfair to require a defendant to defend against such claims or theories that it learns of, for the first time, during summary judgment.").

A court may take judicial notice of matters of public record when considering a motion to dismiss for failure to state a claim. *See, e.g.*, *T.L. Dallas (Special Risks), Ltd. v. Elton Porter Marine Ins.*, 2008 U.S. Dist. LEXIS 112613, at *5 (S.D. Tex. May 22, 2008).

2. Appellants Fail to Plead a Breach of Fiduciary Duty in Count 1

a. Appellants Failed to Satisfy the Heightened Pleading Standard in FRCP 9(b)

Appellants' fiduciary duty claim is premised on HCM's alleged: (a) insider trading; (b) concealment of the value of the HCLOF interests; and (c) diversion of an investment opportunity—in each case in violation of the anti-fraud provisions in Rule 10b-5 of the Securities and Exchange Act of 1934 and Section 206 of the IAA (codified at 15 U.S.C. § 80b-6). *See, e.g.*, ROA.279, 291.

Where, as here, a plaintiff's breach of fiduciary duty claim is premised on securities fraud, FRCP 9(b)'s heightened pleading standard applies. *See Tigue Inv. Co. v. Chase Bank of Tex., N.A.*, 2004 U.S. Dist. LEXIS 27582, at *4 (N.D. Tex. Nov. 15, 2004). To state a securities-fraud claim under section 10(b) and Rule 10b–5, plaintiffs must plead: "(1) a misstatement or omission; (2) of a material

fact; (3) made with scienter; (4) on which the plaintiffs relied; and (5) that proximately caused the plaintiffs' injuries." *Southland Secs. Corp. v. INSpire Ins. Sols., Inc.*, 365 F.3d 353, 368 (5th Cir. 2004). "A fact is material if there is 'a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder.'" *Id.* (quoting *Grigsby v. CMI Corp.*, 765 F.2d 1369, 1373 (9th Cir. 1985)).

As found by the Bankruptcy Court, Appellants' allegations underlying their breach of fiduciary duty claim are conclusory and pleaded without factual support or particularity. *See, e.g.*, ROA.292-93 (speculating about Appellants' "lost opportunity cost," and vaguely asserting that "Defendants' malfeasance" has "exposed HCLOF to a massive liability from HarbourVest"). Appellants' allegations also fail to give rise to a "strong inference of scienter" sufficient to state a claim under Rule 10(b). *See Newby v. Lay (In re Enron Corp. Secs., Derivative & ERISA Litig.)*, 258 F. Supp. 2d 576, 635 (S.D. Tex. 2003); *Southland*, 365 F.3d at 368 (plaintiff must plead "more than allegations of motive and opportunity to withstand dismissal" for claim of securities fraud). Appellants' allegations regarding proximate cause are equally deficient. ROA.295 (vaguely alleging that because of HCM's actions, "[Appellants] have lost over $25 million").

Because Appellants failed to properly plead securities fraud, any fiduciary duty claim premised on such allegations fails. *See Town N. Bank, N.A. v. Shay Fin. Servs.*, 2014 U.S. Dist. LEXIS 137551, at *74 (N.D. Tex. Sep. 30, 2014).

b. Appellants Failed to Plead a Plausible Claim for Breach of Fiduciary Duty Under the IAA

Appellants allege HCM breached its "unwaivable" fiduciary duty under the IAA. Br. at 18-19, 21-22. This Count is purportedly premised on the IAA because (a) HCM was an investment advisor to DAF under the DAF Agreement and (b) HCM was supposedly HCLOF's investment advisor under the HCFA Agreement—notwithstanding that HCM is not a party to the HCFA Agreement.

i. No Private Right of Action Exists Under Section 206 of the IAA

Appellants alleged HCM breached its fiduciary duties under Section 206 of the IAA. ROA.289-95. But, as Appellants have finally conceded (Br. at 21-22), Section 206 does not provide a private right of action. *See, e.g.*, *Transamerica Mtg. Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11 (1979) (finding no private right of action under Section 206 of the IAA); *Corwin v. Marney, Orton Invs.*, 788 F.2d 1063, 1066 (5th Cir. 1986) (affirming dismissal of IAA claim "because the investors had no private causes of action"). Accordingly, Appellants' breach of fiduciary duty claim under Section 206 fails as a matter of law.

ii. Appellants Have Not Pleaded a Cause of Action Under Section 215 of the IAA

Confronted with the failure of their Section 206 claim, Appellants—in their response to the Renewed MTD—argued that the Complaint implicitly included a breach of fiduciary duty claim under Section 215 of the IAA, a provision never mentioned in the Complaint—because (a) Section 206 "provides the statutory duty" and (b) the breach of that duty somehow creates a claim under Section 215. Br. at 22-23. But, as found by the District Court, "'[i]t is wholly inappropriate to use a response to a motion to dismiss to essentially raise a new claim for the first time.'" ROA.8078 (citing *United States ex rel. Grynberg Prod. Corp. v. Kinder Morgan CO2 Co., L.P.*, 491 F. Supp. 3d 220, 233 (N.D. Tex. 2020)). The Court should not consider Appellants' alleged Section 215 claim. *Grynberg Prod.*, 491 F. Supp. 3d at 233 ("The court will not consider this [claim] as it is asserted for the first time in the response.").

Regardless, Appellants did not plead *facts* in the Complaint sufficient to allege a Section 215 claim. Moreover, even if Appellants had alleged sufficient facts and could prove such a claim, (a) they would never be entitled to compensatory damages and (b) recission of the Advisory Agreements—the only remedy available under Section 215—was not sought and has already effectively been provided since the DAF Agreement was terminated in 2021.

Section 215 provides a limited private right of action if the formation of an advisory agreement or performance of an advisory agreement in accordance with its terms violates the IAA. *See* 15 U.S.C. § 80b-15 (Validity of Contracts) ("Every contract made in violation of any provision of this subchapter and every contract … the performance of which involves the violation of, or the continuance of any relationship or practice in violation of any provision of this subchapter, or any rule, regulation, or order thereunder, shall be void …."); *see also TAMA*, 444 U.S. at 18; *NexPoint Diversified Real Est. Tr.*[22] *v. Acis Cap. Mgmt., L.P.*, 2023 U.S. App. LEXIS 23756, at *8 (2d Cir. Apr. 25, 2023) (same).

Accordingly, a Section 215 claim requires an allegation that the terms of the advisory agreement itself violated the IAA. *NexPoint*, 2023 U.S. App. LEXIS 23756, at *10-14 (citing *TAMA*, 444 U.S. at 17) (emphasis in original). Allegations that an investment advisor breached an advisory agreement or its duties to investors arising from such agreement—under Section 206 or otherwise—do not give rise to a plausible claim under Section 215. *NexPoint*, 2023 U.S. App. LEXIS 23756, at *12-13 ("§215 … is a statute centered on contracts, not the conduct of parties to contracts …. As such, permitting claims under §215(b) based solely on conduct not required by the contract would create … 'a backdoor to the private

[22] Like Appellants, NexPoint Diversified Real Estate Trust (f/k/a NexPoint Strategic Opportunities Fund) is another entity controlled by Dondero. ROA.3812. NexPoint's counsel is the same counsel now representing Appellants.

right of action that the Supreme Court refused to find under §206.'") (emphasis in original); *see also Kahn v. Kohlberg, Kravis, Roberts, & Co.*, 970 F.2d 1030 (2d Cir. 1992); *Omega Overseas Partners, Ltd. v. Griffith*, 2014 U.S. Dist. LEXIS 109781, at *2 (S.D.N.Y. Aug. 7, 2014)). Section 215 thus does not apply to claims arising from conduct; it only applies if an advisory agreement's formation or performance requires a violation of the IAA. Appellants have never made such an allegation and therefore could not be deemed to have asserted a plausible claim under Section 215.

Further, the only remedy available for a violation of Section 215 is to void—*i.e.*, rescind—the advisory agreement, *TAMA*, 444 U.S. at 15-24, and the only damages available under Section 215 are "restitution of the consideration given under the [advisory] contract, less any value conferred by the other party," *id.* at 24 n.14. "Restitution [under §215] would not … include compensation for any diminution in value of the … investment alleged to have resulted from the adviser's action or inaction. Such relief could provide by indirection the equivalent of a private damages remedy [under §206] that we have concluded Congress did not confer." *Id.*

As the District Count found, the Complaint contains no allegations that would support a claim under Section 215 (nor does it even mention Section 215). Although the Complaint addresses HCM's alleged conduct, it does not allege that

the Settlement or the Advisory Agreements are void or seek restitution resulting from the recission of those contracts. None of the elements necessary to assert a plausible claim under Section 215 were alleged in the Complaint.

To avoid this, Appellants contend *Laird* "addresses this very issue under the IAA" and saves Appellants' Section 215 claim. Br. at 25 (citing *Laird v. Integrated Res., Inc.*, 897 F.2d 826 (5th Cir. 1990).[23] In *Laird*, an appellant alleged a Section 215 claim but erred by requesting "more relief than is available instead of the incorrect relief." *Laird*, 897 F.2d at 841. This Court found that seeking an unavailable remedy does not doom an otherwise properly pleaded claim. *Id.* However, unlike the plaintiffs in *Laird*, Appellants have not simply requested the wrong remedy; they failed to allege the facts necessary to plead a Section 215 claim.

Appellants also argue that their failure to allege a Section 215 claim should be excused because HCM "identified and briefed Appellants' IAA-based claim under § 215" and "devoted several pages of their motion to dismiss to it" and therefore had notice of the Section 215 claim. Br. at 26. Appellants are mistaken.

[23] Appellants cite a number of cases for the proposition that a complaint does not need to state a "precise legal theory" if it alleges sufficient "facts" to state a claim. Br. at 24-25. While Appellants' legal position may be accurate, it is irrelevant. Appellants failed to plead the facts to support a plausible Section 215 claim. Appellants' cases are also factually inapposite.

Unlike in the *Quinones* case cited by Appellants, neither the Original MTD nor the Renewed MTD briefed Appellants' newly alleged Section 215 claim.[24] *Quinones v. City of Binghamton*, 997 F.3d 461, 469 (2d Cir. 2021). Instead, in their response to the Renewed MTD, Appellants alleged ***for the first time*** that the Complaint somehow included a hidden Section 215 claim, forcing HCM to respond in the Bankruptcy Court and District Court. Appellants cannot identify a new claim in a responsive brief and then charge HCM with notice because HCM was forced to defend against the newly alleged claim in subsequent briefing.

iii. Appellants Failed to Plead Breach of Fiduciary Duty Under the IAA Generally

Moreover, even if a viable claim existed under the IAA (and it does not), Appellants' allegations of breach of fiduciary duty would still be deficient because Appellants failed to plead "duty" or "breach." As Appellants admitted when withdrawing their Objection, HCM owed no duty to offer the HCLOF interests to Appellants. The Settlement, including the transfer of the HCLOF interests, was effectuated in compliance with the Members Agreement and the Bankruptcy Court's Settlement Order. And the DAF Agreement transparently disclosed that

[24] The Original MTD did not reference Section 215. Appellants' response did not allege a Section 215 claim was included in the Complaint. ROA.2070. HCM's reply made no mention of Section 215. Section 215 was not mentioned in the appeal of the Original MTD. The Renewed MTD, in a footnote, stated: "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.… ***Plaintiffs have not pled such claim nor could they***.") ROA.4260 (citations omitted) (emphasis added). The Renewed MTD did not otherwise mention Section 215.

HCM could compete with DAF for investments with no obligation to offer those investments to DAF.[25] *SEC v. Cap. Gains Rsch. Bureau, Inc.*, 375 U.S. 180, 181-82 (1963) (noting "the evident purpose of the [IAA was] to substitute a philosophy of disclosure for the philosophy of caveat emptor" and finding disclosure of an adviser's "practice of purchasing shares … for his own account" satisfied the IAA fiduciary duties); *Dugaboy Inv. Tr. v. Highland Cap. Mgmt., L.P.*, 2022 U.S. Dist. LEXIS 172351, at *10-11 (N.D. Tex. Sept. 22, 2022), *aff'd* 2023 U.S. App. LEXIS 19553 (5th Cir. Jul. 28, 2023) (addressing argument that fiduciary duties under the IAA cannot be waived and finding investor consented to potential conflict when clear disclosure was made).

HCM also owed no duty to CLOH as an investor in HCLOF under the HCFA Agreement (HCM was not a party to the HCFA Agreement) or otherwise; there is no fiduciary relationship between an adviser to a fund and the fund's individual investors.[26] *Goldstein v. SEC*, 451 F.3d 873, 881 (D.C. Cir. 2006) ("The adviser owes fiduciary duties only to the fund [*i.e.*, the client], not to the fund's

[25] *See, e.g.*, ROA.5363 ("The Fund will be subject to a number of actual and potential conflicts of interest … including … that … [HCM] … may actively engage in transactions in the same securities sought by the Fund and, therefore, may compete with the Fund for investment opportunities….").

[26] If Guernsey law applies, it is the same. *CLO Holdco Ltd. v. Highland CLO Funding Ltd.*, [2023] GRC061 (Roy. Court of Guernsey Dec. 1, 2023) ("It is no part of a company director's general duties to consider or take account of the personal interests or circumstances of particular shareholders …. [A]ny such proposition would be entirely unworkable in practice … [and] would almost inevitably lead to a failure to do the same as regards the interests of another shareholder …. It would also … put directors in an impossible position of conflict of interest.").

investors … If the investors are owed a duty and the entity is also owed a fiduciary duty, then the adviser will inevitably face conflicts of interest."); *see also Nat'l Assoc. of Priv. Fund Managers v. SEC*, 103 F.4th 1097, 1103 (5th Cir. 2024) (citing *Goldstein*, 451 F.3d 873) ("The [IAA] recognizes a fiduciary duty between an investment adviser and his client. 15 U.S.C. § 80b-6. In the private fund context, that client is the fund itself—not the fund's investors.").[27]

Finally, as explained by the Bankruptcy Court, there was no corporate opportunity to divert. HarbourVest asserted bankruptcy claims against HCM seeking, among other things, the effective rescission of its investment in HCLOF. The Settlement effectuated that remedy. Because HarbourVest had no claims against Appellants, there was no taking of a corporate opportunity. HCM was resolving a bankruptcy claim against HCM, not purchasing a security, and could not transfer its liability to HarbourVest to Appellants.

iv. Appellants Fail to Allege a Breach of Fiduciary Duty Claim Under State Law

Appellants also fail to allege any breach of fiduciary claims premised on state law. First, the Complaint references no state (or Guernsey) law fiduciary

[27] Appellants argue Seery is bound by a statement, made in an unrelated matter, that he owes fiduciary duties to investors in a fund. Br. at 4; n.27. Judicial admissions apply to statements of fact, not conclusions of law. *See, e.g.*, *Blankship v. Buenger*, 653 F. App'x 330, 334 (5th Cir. 2016) ("Judicial admissions are defined as 'factual assertions in pleadings ….' A judicial admission 'has the effect of withdrawing a fact from contention.'").

duties; the only allegation is that HCM violated its alleged federal duties to Appellants under the IAA and is liable to Appellants under the IAA.

Even if Appellants had alleged a state law fiduciary duty claim, it would be subject to dismissal. Texas law provides "[t]he elements of a breach of fiduciary duty claim are: (1) a fiduciary relationship between the plaintiff and defendant; (2) the defendant must have breached his fiduciary duty to the plaintiff; and (3) the defendant's breach must result in injury to the plaintiff or benefit to the defendant." *In re ATP Oil & Gas Corp.*, 711 F. App'x 216, 221 (5th Cir. 2017) (internal quotations omitted). "The plaintiff must plead some facts as to the nature of the relationship to state a plausible claim that that a fiduciary duty has been breached." *In re Life Partners Holdings, Inc.*, 926 F.3d 103, 125 (5th Cir. 2019).

The Complaint fails to sufficiently allege facts regarding the nature of the relationship between Appellants and HCM. ROA.290 (alleging only that (a) HCM "owed a fiduciary duty to [Appellants]" under federal law pursuant to which HCM "agreed to provide sound investment advice," and (b) this federal fiduciary relationship is "broad and applies to the entire advisors-client relationship"). The Complaint fails to allege that *any* state law (or Guernsey) fiduciary duty existed, let alone was breached, for the same reasons. *Life Partners*, 926 F.3d at 125 (no allegation of "the nature of the fiduciary duty owed" to plaintiff). The allegations of HCM's alleged breach of its "internal policies and procedures" or the diversion

of "corporate opportunities" are vague and conclusory and also arise under federal, not state, law. ROA.294-98; *In re Soporex, Inc.*, 463 B.R. 344, 417 (Bankr. N.D. Tex. 2011).

Appellants cite a series of cases they allege provide that allegations of breach of federal fiduciary duties under Section 206 of the IAA are sufficient to allege a breach of state law fiduciary duties. Br. at 31-32. But, in *Goldenson*, *Zimmerman*, and *Udall*, the plaintiffs properly pleaded the existence of a state law fiduciary obligation. *Goldenson v. Steffens*, 2014 U.S. Dist. LEXIS 201258, at *140 n.439 (D. Me. Mar. 7, 2014) (finding that "the IAA does not create the fiduciary relationship; this arises under Maine common law"); *NexPoint Diversified Real Est. Tr. v. Acis Cap. Mgmt., L.P.*, 620 F. Supp. 3d 36, 43 n.3 (S.D.N.Y. 2022) ("*Goldenson* … does not change the analysis here. There, the plaintiff had argued that the defendant breached a fiduciary duty under Maine common law, not the IAA."); *Zimmerman v. Matson Money*, 2021 U.S. Dist. LEXIS 247095, at *12-13 (N.D. Ga. Jun. 9, 2021) (finding plaintiff pleaded breach of fiduciary duties when it alleged defendant was "registered as an investment adviser in the State of Georgia …."); *State ex rel. Udall v. Colonial Penn Ins. Co.*, 812 P.2d 777, 785 (N.M. 1991) (finding adviser breached its duties by selling illegal securities to the State of New Mexico under state law).

Douglass allowed a state law breach of fiduciary duty claim premised on Section 206 of the IAA to proceed. *Douglass v. Beakley*, 900 F. Supp. 2d 736, 751-52 (N.D. Tex. 2012). *Douglass* is not binding on this Court, and its logic has been criticized.[28] Even assuming *Douglass* applies, *Douglass* pleaded all elements of a fiduciary duty claim. Unlike the plaintiffs in *Douglass*, Appellants failed to plead (a) breach of fiduciary duty and (b) injury from such breach and thus failed to state a claim.

3. Appellants Fail to Plead a Breach of Contract Claim in Count 2

In addition to finding Count 2 was barred by judicial estoppel, the Bankruptcy Court correctly found that it failed to state a plausible claim. As found by the Bankruptcy Court, the Settlement and integrated transfer of the interests to an HCM affiliate "was permitted under the plain and unambiguous terms of the HCLOF Members Agreement" and the ROFR did not apply. ROA.240-41. Section 6.1 of the Members Agreement grants members the unconditional right to transfer interests to an "Affiliate of an initial Member." ROA.4762-63. Section 6.2 sets

[28] *See also Laird*, 897 F.2d at 837 ("The Supreme Court has recognized the investment advisers' fiduciary status. Courts may refer to these cases instead of state analogies in deciding whether this status prohibits particular conduct. And, because state law is not considered, uniformity is promoted."); *Steadman v. SEC*, 603 F.2d 1126, 1142 (5th Cir. 1979) ("[T]he purpose of the IAA … was to regulate the 'delicate fiduciary nature of an investment advisory relationship.' … We do not think this overall purpose is a warrant to read section 206 … of the IAA … as the vehicle to reach all breaches of fiduciary trust."); *see also Belmont v. MB Inv. Partners*, 708 F.3d 470, 502 (3d Cir. 2013) ("With the exception of a private remedy [under Section 215], 'the [IAA] confers no other private causes of action, legal or equitable.' That reality ought to call into serious question whether a limitation in federal law can be circumvented simply by hanging the label 'state law' on an otherwise forbidden federal claim.").

forth the ROFR and has two exceptions to its application: (a) transfers to "affiliates of an initial Member" from Members *other than* CLOH and the "Highland Principals," and (b) transfers from CLOH or a Highland Principal to (1) HCM, (2) HCM's "Affiliates," or (3) another Highland Principal. ROA.4763. "Affiliate" is defined as, "with respect to a person, (i) any other person who, directly or indirectly, is in control of, or controlled by, or is under common control with, such person …." ROA.4737. A "Member" is a "holder of shares in the Company." ROA.4758. The "initial Member[s]" are the initial Members listed on the first page of the Members Agreement and include HCM, HarbourVest, and CLOH. ROA.4756. Because HarbourVest transferred its interests as required by the Settlement and Settlement Order directly to HCM's affiliate—an Affiliate of an initial Member—the transfer was permitted, without restriction, under section 6.1 and satisfied the exception to the ROFR in section 6.2. ROA.240-41.

Appellants' arguments as to why the ROFR applies are constantly evolving. In the Complaint and briefing to the lower courts, Appellants argued the Settlement Agreement was an "offer and sale" to HCM of HarbourVest's interests in HCLOF that violated Section 6.2 of the Members Agreement. To this Court, Appellants argue that, although HCM's nominee acquired legal title to the HarbourVest interests, HCM still somehow acquired equitable title, which was in some way sufficient to trigger the ROFR. Br. at 49-50. Either way, Appellants misread the

Settlement Agreement and the Members Agreement and fabricate transfers and obligations that never existed.

As found by the Bankruptcy Court, HarbourVest directly transferred its interests to HCM's affiliate. Further, there was neither an offer nor a sale. The transfer of the interests was but one component of a complete Settlement effectuating HarbourVest's desire for recission and HCM's need to resolve bankruptcy claims.

Appellants' Complaint is also defective because it failed to plead actual damages, simply contending that "had plaintiff been allowed to do so, it would have obtained the interests." *See, e.g.*, ROA.296. Such conclusory allegations ignore that CLOH *never* offered to purchase the HCLOF interests and, in any event, are insufficient to state a claim. *See Snowden v. Wells Fargo Bank, N.A.*, 2019 WL 587304, at *6 (N.D. Tex. Jan. 18, 2019), *adopted by* 2019 U.S. Dist. LEXIS 22982 (N.D. Tex. Feb. 12, 2019) (actual damages inadequately plead); *Little v. KPMG LLP*, 2008 U.S. Dist. LEXIS 26281, at *15 (W.D. Tex. Jan. 22, 2008) (lost profits claim "speculative and conjectural").

4. Count 3 (Negligence) Is Barred by the Confirmed Plan

In Count 3, Appellants allege HCM negligently breached its duty to Appellants under the IAA. As the Bankruptcy Court and the District Court found, the Confirmed Plan—confirmed in February 2021—bars Count 3.

The Confirmed Plan exculpated HCM for, *inter alia*, all "Causes of Action" arising from the administration of the Bankruptcy Case unless such conduct constituted "bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct." ROA.3936-37. As defined in the Confirmed Plan, "Causes of Action" include "any claim for breach of contract or breach of duties imposed by law or equity." ROA.3893. Count 3 asserts a "Cause of Action," *i.e.*, a claim for breach of contract or duty, and the Settlement was indisputably part of the "administration of the Chapter 11 Case." HCM has therefore been expressly exculpated from Appellants' claim for negligence.

Appellants argue, without citation or authority, that the Confirmed Plan cannot exculpate HCM from Count 3 because (a) the Complaint asserts administrative expense claims, (b) "administrative expense claims are not discharged," and (c) because Count 3 was not discharged, the Confirmed Plan does not bar it. Br. at 40-41. Appellants are wrong. Article II.A of the Confirmed Plan allows properly filed administrative expense claims to be prosecuted after the Confirmed Plan's Effective Date. Because the Complaint was filed before the applicable bar date, Appellants may prosecute the Complaint—*but they must do so pursuant to the Confirmed Plan*. As this Court found, on the Effective Date, the Confirmed Plan "absolve[d]" HCM "from any negligent conduct that occurred during the course of the bankruptcy." *NexPoint*, 48 F.4th at 437 (citing *Bank of NY*

Tr. Co., NA v. Official Unsecured Creditors' Comm. (In re Pac. Lumber Co.), 584 F.3d 229, 252-53 (5th Cir. 2009)). HCM, by operation of the Confirmed Plan and Confirmation Order, has been exculpated—*i.e.*, "absolved"—from *all* liability arising from its negligence during the Bankruptcy Case, including the liability related to the alleged negligent conduct in Count 3. Count 3 must be dismissed.

Even absent exculpation, Appellants fail to state a claim. "The elements of a negligence claim under Texas law are: '(1) a legal duty on the part of the defendant; (2) breach of that duty; and (3) damages proximately resulting from that breach.'" *Sivertsen v. Citibank, N.A. as Tr. for Registered Holders of WAMU Asset-Back Certificates WAMU Series No. 2007-HE2 Tr.*, 390 F. Supp. 3d 769, 789 (E.D. Tex. 2019). The negligence allegations (ROA.121-22) are speculative, conclusory, and fail to allege proximate cause. *Rodgers v. City of Lancaster Police*, 2017 U.S. Dist. LEXIS 14588, at *37 (N.D. Tex. Jan. 6, 2017).

To the extent Count 3 is premised on a breach of the Members Agreement, the DAF Agreement, or the IAA, it is duplicative of the other Counts and fails for the reasons set forth above.

5. <u>Appellants Have Abandoned Count 4 (RICO)</u>

Appellants do not press Count 4 (RICO) in this Court and have abandoned it. *Hooper*, 783 F. App'x at 435.

6. Appellants Fail to Plead Tortious Interference in Count 5

The Bankruptcy Court properly found Count 5 (Tortious Interference), which was premised on the alleged violation of the Members Agreement and alleged concealment of the value of HCLOF, was duplicative of Count 2 (Breach of Contract). ROA.241. The Bankruptcy Court also properly found that because the ROFR did not apply to the Settlement (and thus there was no breach of contract), there was no tortious interference. *Id.* ("Tortious interference with contract claims cannot exist in the absence of a contract right with which a defendant can interfere") (citing *WickFire, L.L.C. v. Woodruff*, 989 F.3d 343, 354 (5th Cir. 2021) ("[T]o prevail on an interference claim, the plaintiff must 'present evidence that some obligatory provision of a contract [was] breached'")).[29] Appellants have no response to this finding other than to allege HCM's supposed "self-dealing and misleading statements" as to the value of the interests were themselves somehow a violation of the ROFR. But, as discussed above, allegations about hiding "value" have nothing to do with whether the ROFR applied to the Settlement.

[29] Appellants also failed to allege proximate causation or any actual damage sustained as a result of the alleged interference. *Specialties of Mex. Inc. v. Masterfoods USA*, 2010 U.S. Dist. LEXIS 58782, at *15 (S.D. Tex. June 14, 2010) (The elements of tortious interference with contract are: "(1) the existence of a contract subject to interference, (2) willful and intentional interference, (3) that proximately causes damage, and (4) actual damage or loss.").

The Bankruptcy Court also correctly found that Appellants failed to "explain how [HCM], a party to the HCLOF Members Agreement, could have interfered with it; only third parties can interfere with a contract." ROA.241 (citing *1st & Trinity Super Majority, LLC v. Milligan*, 657 S.W.3d 349, 372 (Tex. App. 2022)); *see also Ancor Holdings, L.P. v. Landon Cap. Partners, LLC*, 114 F.4th 382, 401 (5th Cir. 2024) ("Texas law requires that 'a person must be a stranger to a contract to tortiously interfere with it ….'") (citation omitted); *Holloway v. Skinner*, 898 S.W.2d 793, 794-95 (Tex. 1995) ("Texas jurisprudence has long recognized that a party to a contract has a cause of action for tortious interference against any third person (a stranger to the contract) who wrongly induces another contracting party to breach the contract.").

Appellants did not address this finding in the District Court. In this Court, Appellants allege—without citation—that in a multiparty contract, one contract party can interfere with another's rights. Br. at 51. But, as set forth above, that is not the law. *See also Bill FitzGibbons, LLC v. Rev Birmingham, Inc.*, 2014 U.S. Dist. LEXIS 65102, at *19 (N.D. Ala. May 12, 2014) ("In Alabama, a 'party to a particular contract cannot, as a matter of law, be liable for tortious interference with that contract.' Likewise, a party to '[interdependent] contractual relations' with different 'rights and duties between different sets of parties to a multiparty contract' cannot be liable for interference.'").

C. Appellants Have Not Properly Asserted or Pleaded Gross Negligence

Appellants did not argue to the Bankruptcy Court that the Complaint contained a claim for gross negligence. They raised it, for the first time, in the District Court. Arguments not raised in the Bankruptcy Court are not properly before this Court on appeal and cannot be considered. *In re Gilchrist*, 891 F.2d 555, 561 (5th Cir. 1990) ("It is well established that we do not consider arguments or claims not presented to the bankruptcy court."); *Moody v. Empire Life Ins. Co. (In re Moody)*, 849 F.2d 902, 905 (5th Cir. 1988), *cert. denied*, 488 U.S. 967 (1988) (same).

To the extent the District Court considered the issue, it correctly found "Appellants did not assert a claim for gross negligence in their Complaint." ROA.8078. Under Texas law, gross negligence is an "act or omission" that

> when viewed objectively … involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and … [o]f which defendant had actual subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others. … '[w]hat separates ordinary negligence from gross negligence is the defendant's state of mind; in other words, the plaintiff must show that the defendant knew about the peril, but his acts or omissions demonstrate that he did not care.

FLNG Liquefication, LLC v. CB&I Inc. (In re Zachry Holdings, Inc.), 2025 Bankr. LEXIS 29, at *10-11 (Bankr. S.D. Tex. Jan. 7, 2025). Neither the words "gross

negligence" nor any of the required factual and legal elements are in the Complaint.

Appellants claim they would have "stated a gross-negligence count more explicitly in the first instance had the bankruptcy court, at that time, already exculpated [HCM] from liability for mere negligence. But the exculpation order *came after the complaint was filed* …." Br. at 41-42 (emphasis in original). That statement is demonstrably false. The Proposed Plan was filed in November 2020. CLOH objected to exculpation in January 2021. The Confirmation Order was entered in February 2021 and was not stayed. Appellants filed the Complaint in April 2021—*after* entry of the Confirmation Order. Appellants, with notice of the Confirmation Order and Plan, chose not to plead gross negligence.

D. Appellants Cannot Amend the Complaint

Appellants argue they were improperly denied leave to amend the Complaint under FRCP 15(a). But, as they concede, the Complaint asserts administrative expense claims—*i.e.*, bankruptcy claims. Br. at 40-41.[30] Amendment of bankruptcy claims is governed by the Bankruptcy Code, not FRCP 15(a).

[30] Administrative expense claims include claims arising from a debtor's postpetition negligence, tortfeasance, and malfeasance. *See Reading Co. v. Brown*, 391 U.S. 471, 478-79 (1968) (holding that if a debtor commits a tort or harms a non-debtor the injured party's claim is an "administrative claim"); *In re Al Copeland Enters., Inc.*, 991 F.2d 233, 239 (5th Cir. 1993) ("[T]hose injured during … administration of an estate are entitled to an administrative priority [claim] regardless of whether their injury was caused by a tort or other wrongdoing").

This Court recently addressed the standard applied to requests for post-confirmation amendment of bankruptcy claims and found that:

> more is required. … [B]y 'more' we mean 'compelling circumstances.' Post-confirmation amendments warrant a heightened showing because a confirmed plan of reorganization is equivalent to a final judgment in civil litigation. This potential res judicata effect justifies ratcheting up the legal standard because post confirmation amendments may 'mak[e] the plan infeasible,' 'disrupt the orderly process of adjudication,' and 'alter the distribution[s] to other creditors.'

C*LO Holdco, Ltd.*, 102 F.4th at 291. Appellants do not argue "compelling circumstances." Instead, they argue leave should be granted so they can assert wholly new claims notwithstanding that the Confirmation Order was entered four years ago and all such claims were discharged. ROA.2432; *NexPoint*, 48 F.4th at 433 (affirming discharge over Dondero objections). What Appellants want is exactly what the "compelling circumstance" test prohibits.

But even if FRCP 15(a) applied, amendment would be futile. As found by the District Court: Count 1 alleges only a claim under Section 206 of the IAA, and that claim is barred by clear Supreme Court precedent. Counts 2 and 5 are barred by judicial estoppel. Count 3 is barred by the Confirmed Plan. Appellants have abandoned Count 4. None of the Counts will ever survive FRCP 12(b)(6). New claims are barred by the Confirmed Plan and the Confirmation Order. *Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.),* 2022 Bankr. LEXIS 2780, at *35-37 (Bankr. N.D. Tex. Sept. 30, 2022) (denying

leave to amend as futile when amended claim would be time barred by the Confirmed Plan). Amending the Complaint would not prevent dismissal under FRCP 12(b)(6) and would be futile.

VI. CONCLUSION

The Complaint was properly dismissed based on judicial estoppel and failure to state a claim and leave to amend was properly denied. This Court should deny the appeal and affirm dismissal of the Complaint with prejudice.

Dated: January 22, 2025

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CERTIFICATE OF SERVICE

I certify that, on January 22, 2025, the foregoing Appellee's Brief was electronically filed using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

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CERTIFICATE OF COMPLIANCE WITH FRAP 32

1. This document complies with the word limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because, including footnotes and excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 12,400 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced serif (Times New Roman) typeface at 14-point type (12-point for footnotes).

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