No. 25-_____

# In the Supreme Court of the United States

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

*v.*

STACEY G. JERNIGAN; HIGHLAND CAPITAL MANAGEMENT, L.P., RESPONDENTS.

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

Petitioner James Dondero was the founder and president of a hedge fund, Highland Capital Management, L.P. In 2019, he entered Highland into a Chapter 11 bankruptcy reorganization. While presiding over Highland's bankruptcy case, the bankruptcy judge wrote and published two novels—*He Watches All My Paths* and *Hedging Death*—that pit a heroic bankruptcy judge against a nefarious hedge-fund manager bearing striking similarities to Mr. Dondero.

Mr. Dondero moved for recusal but the bankruptcy judge denied the motion. He then sought review through mandamus. The Fifth Circuit acknowledged that "a strong argument could be made that she had a duty to recuse" on account of the books. App. 17a. But the Fifth Circuit held that the bankruptcy judge's recusal declination was shielded by two overlapping layers of appellate deference. It could be overturned only if the bankruptcy judge abused her discretion by denying recusal, *and* if Mr. Dondero made a "clear and indisputable" showing of that abuse.

The Fifth Circuit's holding directly conflicts with the Seventh Circuit, which reviews orders denying recusal de novo, even when presented on mandamus. The Fifth Circuit's approach also conflicts with the Third Circuit, which equates the "clear and indisputable" showing requirement with the abuse-of-discretion standard of review when evaluating recusal decisions on mandamus, rather than applying the Fifth Circuit's double dose of deference.

The questions presented are:

1. Should a judge's order declining to recuse be reviewed de novo or for abuse of discretion?

2. When a litigant seeks review of a decision not to recuse through mandamus, should appellate courts require him to apply two layers of deference to that decision and show that it was both an abuse of discretion and that the abuse was "clear and indisputable?"

## PARTIES TO THE PROCEEDING

Petitioners are Mr. James D. Dondero, Highland Capital Management Fund Advisors, L.P., The Dugaboy Investment Trust, NexPoint Real Estate Partners, LLC, and Get Good Trust. Petitioners are parties to the bankruptcy proceedings below and were the appellants in the court of appeals.

Respondents are the Honorable Stacey G. Jernigan, the Chief Judge of the United States Bankruptcy Court for the Northern District of Texas who is presiding over—and Highland Capital Management, L.P., the reorganized Chapter 11 debtor in—the bankruptcy proceedings below.

## RULE 29.6 DISCLOSURE STATEMENT

Petitioners James Dondero, Highland Capital Management Fund Advisors, L.P., The Dugaboy Investment Trust, NexPoint Real Estate Partners, LLC, and Get Good Trust disclose that there are no parent or publicly held companies owning 10% or more of any of the petitioners' stock. *See* Sup. Ct. R. 29.6.

## STATEMENT OF RELATED PROCEEDINGS

Supreme Court of the United States:

- *Highland Capital, L.P.* v. *NexPoint Advisors, L.P.*, No. 25-119 (petition for certiorari filed July 28, 2025)

United States Court of Appeals (5th Cir.):

- *Dondero* v. *Highland Capital Management, L.P.*, No. 21-10219 (dismissed May 18, 2021)
- *NexPoint Advisors, L.P.* v. *Highland Capital Management, L.P.*, No. 21-10449 (judgment entered Aug. 19, 2022)
- *Highland Capital Management Fund Advisors, L.P.* v. *Highland Capital Management, L.P.*, No. 22-10189 (judgment entered Jan. 11, 2023)
- *NexPoint Advisors, L.P.* v. *Pachulski Stang Ziehl & Jones, L.L.P.*, No. 22-10575 (judgment entered July 19, 2023)
- *Dugaboy Investment Trust* v. *Highland Capital Management, L.P.*, No. 22-10831 (judgment entered Feb. 28, 2023)
- *Dondero* v. *Highland Capital Management, L.P.*, No. 22-10889 (judgment entered July 1, 2024)
- *Dugaboy Investment Trust* v. *Highland Capital Management, L.P.*, No. 22-10960 (judgment entered July 31, 2023)
- *Dugaboy Investment Trust* v. *Highland Capital Management, L.P.*, No. 22-10983 (judgment entered July 28, 2023)
- *Charitable DAF Fund, L.P.* v. *Highland Capital Management, L.P.*, No. 22-11036 (judgment entered Apr. 4, 2024)

- *In re Hunter Mountain Investment Trust*, No. 23-10376 (petition for writ of mandamus denied Apr. 12, 2023)
- *Highland Capital Management, L.P.* v. *NexPoint Asset Management, L.P.*, No. 23-10911 (judgment entered Sept. 16, 2024)
- *Highland Capital Management, L.P.* v. *NexPoint Asset Management, L.P.*, No. 23-10921 (judgment entered Sept. 16, 2024)
- *NexPoint Advisors, L.P.* v. *Highland Capital Management, L.P.*, No. 24-10267 (judgment entered Dec. 5, 2024)
- *NexPoint Asset Management, L.P. v. Highland Capital Management, L.P.*, No. 23-10534 (judgment entered Mar. 18, 2025)
- *Charitable DAF Fund* v. *Highland Capital Management, L.P.*, No. 24-10880 (pending)

United States District Court (N.D. Tex.):

- *Dondero* v. *Highland Capital Management, L.P.*, No. 3:20-cv-03390-X (dismissed Mar. 8, 2022)
- *UBS Securities LLC* v. *Highland Capital Management, L.P.*, No. 3:20-cv-03408-G (dismissed June 14, 2021)
- *Dondero* v. *Highland Capital Management, L.P.*, No. 3:21-cv-00132-E (leave to appeal denied Feb. 11, 2021)
- *Dugaboy Investment Trust* v. *Highland Capital Management, L.P.*, No. 3:21-cv-00261-L (judgment entered Sept. 26, 2022)
- *Highland Capital Management Fund Advisors L.P.* v. *Highland Capital Management, L.P.*, Nos. 3:21cv-00538-N, 3:21-cv-00539-N, 3:21-cv-00546-N, 3:21cv-00550-N (administratively closed July 12, 2022)

- *Charitable DAF Fund, L.P.* v. *Highland Capital Management, L.P.*, No. 3:21-cv-00842-B (administratively closed Oct. 18, 2021)
- *Highland Capital Management, L.P.* v. *Highland Capital Management Fund Advisors, L.P.*, Nos. 3:21-cv-881-X, 3:21-cv-880-X, 3:21-cv-1010-X, 3:21cv-1378-X, 3:21-cv-1379-X, 3:21-cv-03160-X, 3:21-cv3162-X, 3:21-cv-3179-X, 3:21-cv-3207-X, 3:22-cv00789-X (case terminated Dec. 23, 2024)
- *Official Committee of Unsecured Creditors* v. *CLO Holdco Ltd.*, No. 3:21-cv-01112-C (case terminated June 7, 2023)
- *PCMG Trading Partners XXIII, L.P.* v. *Highland Capital Management, L.P.*, No. 3:21-cv-01169 (administratively closed July 6, 2022)
- *Official Committee of Unsecured Creditors* v. *CLO Holdco Ltd.*, No. 3:21-cv-01173-X (dismissed May 6, 2022)
- *Official Committee of Unsecured Creditors* v. *CLO Holdco Ltd.*, No. 3:21-cv-01174-S (case terminated May 23, 2024)
- *Dugaboy Investment Trust* v. *Highland Capital Management, L.P.*, No. 3:21-cv-01295-X (judgment entered Sept. 22, 2022)
- *Charitable DAF Fund, L.P.* v. *Highland Capital Management, L.P.*, No. 3:21-cv-1585 (administratively closed Oct. 6, 2021)
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# In the Supreme Court of the United States

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

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*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

The circuit courts are divided 12-1 on the standard of review that applies when a judge denies a motion to recuse. The Seventh Circuit reviews these recusal decisions de novo,[1] while every other circuit applies an abuse-of-discretion standard. *See infra* at pp. 16–23. This circuit split is entrenched and ripe for this Court's resolution, as every single court of appeals has weighed in on the matter.

1. *See United States v. Balistrieri*, 779 F.2d 1191, 1202–03 (7th Cir. 1985) ("[W]e . . . review decisions against disqualification under § 455(b)(1) *de novo.*").

And the issue affects the public's perception of the courts' integrity—a matter of grave importance that has led this Court to grant certiorari on appearance-of-bias claims even without a circuit split. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

There is also a 3-1-1 circuit split on the standard of review that applies when a litigant challenges a recusal decision on mandamus. The Seventh Circuit reviews these decisions de novo—even in mandamus proceedings. But the courts of appeals that apply the abuse-of-discretion standard are divided over how that standard applies in the mandamus context. The Third Circuit has held that a litigant who makes a "clear and indisputable" showing of an entitlement to recusal will, by definition, establish an abuse of discretion, essentially collapsing the abuse-of-discretion standard and the "clear and indisputable" showing requirement into a single inquiry. *See infra* at p. 25. The Fourth, Fifth, and Ninth Circuits, by contrast, apply two separate and distinct layers of deference to a judge's decision not to recuse when presented on mandamus. They require litigants to establish *both* an abuse of discretion *and* that the abuse is "clear and indisputable."

The Court should grant certiorari to resolve these fractures among the circuit courts. The extent to which a judge's recusal decision is promptly and freshly reviewed by judges whose impartiality is not questioned is at the core of ensuring public confidence that federal courts serve as fair and neutral arbiters of the Nation's most important issues.

This petition is also particularly timely, given the recent surge in requests by the Executive Branch for

federal judges to recuse. Providing for a clear system of reliable and unassailably impartial review of such requests is more important than ever in this Court's solemn efforts to protect the integrity and reputation of the Judicial Branch.

Correcting the decision below also serves that mission. A federal judge is writing books about her job and about characters difficult to distinguish from a party before her, while deriding the type of business at issue in the case. And that judge continues to comment in the media on the recusal issue and to exploit the case for commercial gain in connection with an upcoming book. *See infra*, at pp. 11–12 & nn. 22–25.

## OPINIONS BELOW

The opinion of the court of appeals is unreported and reproduced at App. 1a–18a. The order of the district court denying mandamus is unreported and reproduced at App. 39a–45a. The order of the bankruptcy court denying the motion to recuse is unreported and reproduced at App. 46a–91a.

## JURISDICTION

The court of appeals entered judgment on April 16, 2025, and denied rehearing on May 23, 2025. App. 1a, 19a–20a. On August 12, 2025, Justice Alito extended the deadline for seeking certiorari to September 22, 2025. *Dondero v. Jernigan*, No. 25A176 (U.S. Aug. 12, 2025). This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 455 provides, in relevant part:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. . . .

## STATEMENT

In 2019, the Highland Capital Management, L.P. hedge fund led by James Dondero was facing a money judgment. Highland had more than enough assets to pay this judgment but needed time to liquidate them. So it filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the District of Delaware to restructure that particular debt. App. 2a.

The Creditors Committee moved to transfer the case to the United States Bankruptcy Court for the Northern District of Texas. The Creditors Committee argued that Chief Judge of that Court—Stacey G. Jernigan—was already familiar with Highland's principals and organizational structure because she had previously presided over a bankruptcy of a former affiliate of Highland, Acis Capi-

tal Management, L.P. ("Acis"). App. 2a–3a. That motion was granted. App. 3a.

At the first hearing in the Northern District of Texas, the bankruptcy judge disclosed that she had a detailed and negative impression of Mr. Dondero from the prior case: "I can't extract what I learned [about Mr. Dondero] during the *Acis* case, it's in my brain."[2] In the hearing. the bankruptcy judge immediately supported Mr. Dondero's removal from leading the fund during the bankruptcy.[3]

The bankruptcy judge approved an agreement requiring Mr. Dondero to step down from running Highland and appointed an "Independent Board" to control the hedge fund. App. 3a. New bankruptcy-court-appointed management retained, with the bankruptcy court's approval, law firms, accountants, and other adversaries, which have charged Highland hundreds of millions of dollars.

The new bankruptcy-court-appointed management transitioned the bankruptcy from selling assets to pay the singular judgment prompting the reorganization to liquidating all of its assets. Mr. Dondero objected to these efforts as well beyond the original limited purpose of the bankruptcy and wasting Highland's resources and business, but the bankruptcy court approved them. App. 3a. The bankruptcy court repeatedly admonished Mr. Don-

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2. Ex. B to Mem. of Law in Supp. of Am. Renewed Mot. to Recuse Pursuant to 28 U.S.C. § 455, Jan. 9, 2020, Hr'g Tr. at 79:4–13, *In re Highland Cap. Mgmt., L.P.*, No. 19-34054-sgj11 (Bankr. N.D. Tex. Oct. 17, 2022) (Dkt. 3571-1).

3. *See* July 14, 2020, Hr'g Tr. at 99:9–13, *In re Highland Capital Mgmt., L.P.*, No. 3:19-34054-sgj (Bankr. N.D. Tex. July 14, 2020) (Dkt. 864).

dero for objecting, branding him a "'serial litigator'" and claiming that his oppositions to various motions were bad-faith attempts to disrupt the bankruptcy proceedings.[4]

On March 8, 2021, Mr. Dondero and his affiliated entities moved the bankruptcy judge to recuse herself, arguing that she entered the case with "personal bias or prejudice concerning a party" and that her "impartiality might reasonably be questioned." 28 U.S.C. § 455; *see* App. 4a. The bankruptcy court denied the motion, and Mr. Dondero appealed to the district court, but the district court dismissed the appeal as interlocutory. App. 5a.

## I. THE BANKRUPTCY JUDGE PUBLISHES TWO NOVELS THAT PORTRAY MR. DONDERO AND THE HEDGE-FUND INDUSTRY IN AN EXCEEDINGLY NEGATIVE LIGHT

During the bankruptcy proceedings, the bankruptcy judge wrote and published two novels, the second having been released in March 2022. The novels were entitled *He Watches All My Paths*[5] and *Hedging Death*.[6] The protagonist in the books is Judge Avery Lassiter. As does the bankruptcy judge below, the fictional Judge Lassiter serves as a bankruptcy judge in the Northern District of

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4. App. 3a; Order at 16–17, *In re Highland Cap. Mgmt. L.P.*, No. 19-34054-sgj11 (Bankr. N.D. Tex. Feb. 22, 2021) (Dkt. 1943).

5. Stacey G. Jernigan, *He Watches All My Paths*, SJ Novels (self-published) (Jan. 16, 2019), available on Amazon http://bit.ly/4nhfTRd. A published hard copy will be lodged with the Court.

6. Stacey G. Jernigan, *Hedging Death*, White Bird Publications (Mar. 22, 2022), available on Amazon at http://bit.ly/3KfFCL6. A published hard copy will be lodged with the Court.

Texas,[7] graduated from the University of Texas School of Law,[8] is married to a retired police officer,[9] and owns two Cavalier King Charles dogs.[10] The bankruptcy judge acknowledged that Judge Lassiter "may resemble herself." App. 90a.

In the novels, Judge Lassiter presides over a bankruptcy in which a hedge fund plays a prominent role. The villain of the books is Cade Graham, and his hedge fund is Ranger Capital.[11] The similarities between the fictional Mr. Graham and Mr. Dondero are endless. The bankruptcy judge borrowed the name of the books' hedge fund from Mr. Dondero: Mr. Dondero's Highland was for years known as "Ranger Asset Management."[12] The books describe Ranger Capital as a "multi-billion-dollar conglomerate, which manage[s] not just hedge funds, but private equity funds, CDOs, CLOs, REITs, life settlements, and

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7. App. 97a.
8. App. 107a (referring to Lassiter's "University of Texas Law School days"; Judge Stacey G. C. Jernigan Bio ("J.D., University of Texas School of Law, 1989"), http://bit.ly/4ndIg2r.
9. App. 112a ("Max [Lassiter] had 'escaped the confinement of the police department' and retired a couple of years ago . . . ."); About Me, *SJ Novels* (noting that Judge Jernigan "is married to a retired police officer"), https://sjnovels.com/about-the-author ("About Me").
10. App. 120a ("'Baxter Squared' was Max's nickname for the two new Cavalier King Charles Spaniel puppies that Avery recently adopted[.]"); About Me, *SJ Novels* (noting that Chief Judge Jernigan has "two Cavalier King Charles Spaniels"), About Me.
11. App. 112a.
12. *Kirschner v. Dondero*, No. 3:21-03076-sgj (Bankr. N.D. Tex. Feb. 27, 2023), Dkt. 310 at 16–17.

all manner of complicated financial products." App. 112a. Highland is one of the few hedge funds in the country, and the only one in Texas, that manages this blend of investments.[13] And Ranger, like Highland, faced investor litigation.[14]

The fictional Mr. Graham and the real Mr. Dondero have the same hair color and height.[15] They bounced back from the 2008 Great Recession in identical ways.[16] They have engaged in identical and unique litigation over credit-default swaps.[17]

To say the books paint a dark picture of Mr. Dondero's doppelganger would be an understatement. The plot of the books involves Judge Lassiter's battle to bring Ranger Capital and its manager to heel and stop all manner

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13. *See id.* ("As Judge Jernigan is well aware, HCMLP and its affiliates managed hedge funds, private equity funds, CDOs, CLOs, REITs, life settlement portfolios and private investment accounts for institutions around the world — exactly the same unusual mix of investments at issue in Judge Jernigan's second 'fictional' novel.").

14. *Id.*; App.116a ("[T]here was recently a lot of strange activity in some of his hedge funds — a lot of money disappearing. People were suing him . . . .").

15. App. 117a, 133a (describing Graham as "fifty-something" with "silver hair" and "a tanned complexion" and "tall, well-built, and handsome, with a confident Texas swagger").

16. App. 133a ("Graham had weathered the capital markets crash of 2008 quite well . . . .").

17. App. 139a (noting that "Graham had become entangled in some nasty litigation with some major players in the credit default swap (CDS) industry"); *UBS Secs. LLC v. Highland Cap. Mgmt., L.P.*, Index No. 650097/2009 (Sup. Ct. N.Y. Cnty.) (credit default swap litigation involving Highland).

of their financial perfidy. As a part of this struggle, *Hedging Death* describes Judge Lassiter tackling the hedge fund's "byzantine" international tax structures and offshore transactions, which the books describe as pretexts for hiding illegal activity and money laundering.[18] The very same jurisdictions derided in the books—including the Cayman Islands—are prominently at issue in the Acis and Highland cases.[19] The bankruptcy judge in this case has repeatedly used "byzantine" critically to describe Highland's and Mr. Dondero's use of those same jurisdictions and international tax structures.[20] *Hedging Death* describes as "creepy" the investments in life settlements, a piece of Highland's asset mix. App. 16a. More generally, the books deride:

> [t]hese high-flying hedge fund managers [that] essentially suck up money ("fresh powder" they call it) like an i-Robot vacuum cleaner from every corner of the universe and invest it, generally earning compensation of 20% of the assets they invest and another 2% of the profits that the assets earn. They make money no matter what—whether their investments are successful or not—because of their 20% cut.

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18. App. 144a ("Marcus grinned thinking about how Graham had kept all this information secret with his byzantine web of offshore companies.").

19. App. 141a.

20. June 30, 2020, Hr'g Tr. at 86:16–87:15, *In re Highland Capital Mgmt., L.P.*, No. 19-34054 (Bankr. N.D. Tex. June 30, 2020) (Dkt. 802);App. 16a, 144a.

App. 104a. *See also id.* at 100a ("[M]aybe they were hedge fund managers — they had that air of hubris about them that was so characteristic of those Wall Street assholes.").

Judge Lassiter also muses about "whether one of these hedge fund manager guys (they are mostly men — in a stereotypically competitive 'bro culture') could somehow have been connected to [the] death threats" she received in the book. App. 104a. A derisive description of "[t]he hedge fund managers in her courtroom right now" followed.[21] App. 105a.

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21. "Avery had been quietly daydreaming about whether one of these hedge fund manager guys (they are mostly men — in a stereotypically competitive 'bro culture') could somehow have been connected to her death threats — she was recalling the comment in the second threat letter about the 'rich who rule the universe.' Hedge fund managers were certainly worthy of that description. The hedge fund managers in her courtroom right now were rich alright — they were centimillionaires. They probably thought of anyone making $1–$5 million per year as middle class. Some of these managers were intelligent with impressive academic credentials. They all were bombastic talkers imbued with an outrageous amount of hubris. They vacationed in places like Lake Como and Bora Bora and consulted meditation gurus in places like the Bay of Bengal. They sailed catamarans around the world and bought airplanes and race horses like it was candy. Everything in their life was about winning. In the current lawsuit Avery had before her, the hedgies were accusing each other of being greedy sociopaths. As Avery's mind drifted deeper toward wondering if perhaps someone in her court involving one of these hedgies had perhaps sent her the death threats, Annalise quietly slipped into the courtroom and handed her a note, telling her that she needed to take a recess. That was never a good sign." App. 104a–105a.

In the foreword to *He Watches All My Paths*, Chief Judge Jernigan admits that some of the characters and events "are based loosely on actual persons and events." App. 94a.

Mr. Dondero's filings detailed the parallels between the books and Mr. Dondero and Highland to the bankruptcy court, as well as her negative public statements regarding hedge funds while presiding over the bankruptcy.

In response, the bankruptcy judge first took to the media, telling *The Daily Beast* that "*Hedging Death* is not about any pending case or litigants in my court," explaining that the hedge-fund manager "is an amalgamation of the dozens of hedge fund managers that I have seen or read about in my 34-year career in the law." Pilar Menendez & Emily Shugerman, *Did Judge Turn a Hedge Funder Into the Villain of Her Novel?*, The Daily Beast, May 5, 2023, http://bit.ly/46MgILM. *But see* Code of Conduct for United States Judges, Canon 3(A)(6) ("A judge should not make public comment on the merits of a matter pending or impending in any court."). Pertinent to the public perception of impartiality, the bankruptcy judge's writing of these books while presiding over this case received extensive media attention. *See* Erin Mulvaney, *Judge's Fictional Thriller Sparks Real-Life Courtroom Drama*, The Wall Street Journal, July 29, 2023; http://bit.ly/3Vr2UQH.[22]

The bankruptcy judge is releasing a new book with Avery Lassiter as the protagonist—*Mystic Spires Post*

22. *See also* Joe Edwards, *Fiction on the Bench? Dallas Judge Jernigan Is Turning Pages*, The Dallas Express, June 2, 2025, http://bit.ly/4mzjd93.

*Mortem—A Cold Case Legal Thriller*—on October 15, 2025. The bankruptcy judge's publisher—presumably with the judge's permission—is publicizing the books by touting the media controversy over her depiction of Mr. Dondero in prior novels as evidence that Judge Jernigan "is recognized as a public figure."[23] The publisher then comments upon the substance of the recusal controversy, apparently on Judge Jernigan's behalf, claiming that Mr. Dondero is "an individual who incorrectly asserted that one of her fictional characters was based on them."[24] The publisher goes so far as to reproduce in full the Wall Street Journal article regarding the controversy, which includes a large photo of Mr. Dondero.[25] The recusal issue is still pending, as this petition demonstrates, and the bankruptcy judge is still commenting on it in the media.

Turning back to official court filings, the bankruptcy judge denied the motion for recusal. App. 90a. Mr. Dondero petitioned for writ of mandamus in the district court. App. 44a. The district court denied mandamus. *Id.* Mr. Dondero appealed to the Fifth Circuit.

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23. Brown Books Publishing Group, Media Advisory *Mystic Spires Post Mortem: A Cold Case Legal Thriller by Stacey* Jernigan. This media advisory for Judge Jernigan's new book is available at http://bit.ly/48dS9ZF. A full color copy of it has been lodged with the Court.

24. *Id.* at 1.

25. *Id.* at 4-7.

## II. THE FIFTH CIRCUIT DECLINES TO MANDATE RECUSAL, WHILE ACKNOWLEDGING THAT "A STRONG ARGUMENT COULD BE MADE THAT" THE BANKRUPTCY JUDGE "HAD A DUTY TO RECUSE"

On November 5, 2024, the Fifth Circuit affirmed the district court's order denying mandamus. App. 22a–38a. With respect to the novels, the court's original panel opinion stated that the "similarities between the books and the cases before Chief Judge Jernigan may raise cause for concern" but were not "close enough" to show an "abuse [of] discretion" in declining recusal. App. 37a.

The Dondero parties petitioned for rehearing en banc, focused on the books. The hearing panel took control of the en banc petition, construed it as a petition for panel rehearing, granted it, and substituted an amended panel opinion that revised its discussion of the books. App. 2a–18a.

The Fifth Circuit then held that, on mandamus, a judge's declination to recuse is protected from appellate reversal by two strong layers of deference. App. 8a. It first held that "[r]ecusal decisions are reviewed for abuse of discretion" rather than subjected to de novo review, and that remains the case regardless of whether recusal is being challenged on direct appeal or on mandamus. App. 8a. And it further held that when a litigant challenges a declination to recuse on mandamus rather than on direct appeal, the petitioner must also establish that the "abuse of discretion" was "clear and indisputable." App. 8a.

The court of appeals put this double deference to work in its analysis of the novels. It began by chronicling some dissimilarities between the characters and hedge fund in

the novels and the Highland bankruptcy. The novel's hedge-fund manager, for example, had faked his own suicide, while Mr. Dondero has never done such a thing. App. 17a. The bankruptcy in the novels involved "a firm that received funding from a hedge fund manager," while the Highland proceedings before Chief Judge Jernigan involve a bankruptcy of the hedge fund itself. *Id.* And the court of appeals noted that the novels focus primarily on "the protagonist bankruptcy court judge," even though she often pitted herself against Mr. Dondero's doppelganger. *Id.*

Yet the court of appeals acknowledged that the many remaining similarities were still a problem.

> From the information we have in the record before us, whether a reasonable reader and observer of these proceedings could question [the bankruptcy judge's] impartiality in this case is debatable. Due to the similarities between the [novels' characters] and the litigants currently before her court, a strong argument could be made that she had a duty to recuse." *Id.* The Fifth Circuit continued: "To our knowledge, no court—apart from the district court that initially denied mandamus in this case—has ever analyzed § 455(a) on facts like these.

*Id.*

This "strong argument" for recusal, however, was not strong enough to show that the bankruptcy judge had "*clearly and indisputably*" abused her discretion. *Id.*

## REASONS FOR GRANTING THE PETITION

This Court should grant the petition and resolve the disagreements among the circuit courts on the standard for reviewing a judge's refusal to recuse. These issues concern more than the esoterica of appellate practice. They go to the core of the judicial function and protecting public confidence in the fairness and integrity of the federal judicial system.

Congress has acted to ensure fair and impartial adjudication of cases and controversies in the federal courts. To that end, Congress mandates that a judge "*shall* disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a) (emphasis added). Yet the Fifth Circuit reviews the decision of a judge not to recuse only for an abuse of discretion. And when that decision is reviewed on mandamus, it further requires that the "abuse of discretion" be "clear and indisputable."

Every circuit has weighed in on the appropriate standard of review for recusal, creating two splits of approach. The Seventh Circuit reviews recusal decisions *de novo*, even on mandamus, while each of the other circuits reviews these decisions for abuse of discretion. As the Seventh Circuit explained, Congress made recusal mandatory—not discretionary—in certain circumstances. *Balistrieri*, 779 F.3d at 1202 (describing mandatory nature of Section 455).

The circuits that use the abuse-of-discretion standard when reviewing recusal decisions are also divided on how that standard should apply in mandamus proceedings. The Third Circuit, for example, holds that a mandamus

petitioner who makes a "clear and indisputable" showing that recusal was warranted has *per se* established an abuse of discretion. But the Fourth, Fifth, and Ninth Circuits require mandamus petitioners seeking recusal to establish an abuse of discretion and *additionally* show that the abuse is "clear and indisputable."

It is crucial to resolve whether and to what extent some set of judges—whose impartiality is not questioned—take a fresh look at whether a judge must recuse. Any other rule will let public questions linger about whether justice is being impartially dispensed. The federal courts determine the most consequential matters facing the nation. And the public accepts judicial outcomes, in part, because the system ensures that judges come to cases without the appearance of bias, prejudice, or even partiality.

This case is an ideal vehicle to mend this fracture among the lower courts, given the standard of review's significant effect on the Fifth Circuit denial of relief even amidst "a strong argument" the bankruptcy judge "had a duty to recuse." App. 17a. The Court should grant the petition.

## I. THE COURTS OF APPEALS ARE DIVIDED ON THE STANDARD OF REVIEW THAT APPLIES TO RECUSAL DECISIONS UNDER 28 U.S.C. § 455

The Seventh Circuit long has held that orders denying recusal motions under 28 U.S.C. § 455 are subject to *de novo* review. *See United States v. Balistrieri*, 779 F.2d 1191, 1202–03 (7th Cir. 1985) ("[W]e . . . review decisions against disqualification under § 455(b)(1) *de novo*. We will evaluate the evidence for ourselves, applying the same

standard as the district court."). Every other circuit—including the First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, D.C., and Federal Circuits—rejects this approach and reviews a judge's recusal decisions under the abuse-of-discretion standard. *See infra* at 16–23; *United States v. Walsh*, 47 F.4th 491, 498 (7th Cir. 2022) ("[W]e stand alone as the only circuit to employ a de novo standard of review to § 455 recusal decisions; every other circuit reviews them for abuse of discretion.").

The Court should grant certiorari to decide whether *de novo* or deferential review applies to recusal decisions under 28 U.S.C. § 455.

### A. The Seventh Circuit's Approach—*De Novo* Review

In *Balistrieri*, the Seventh Circuit held that orders denying disqualification should be reviewed *de novo* because the judge deciding the motion may be "reluctant" to admit his own bias or prejudice—especially when the recusal request alleges misconduct or lack of integrity on the part of the presiding judge. The court explained its rationale as follows:

> Section 455 clearly contemplates that decisions with respect to disqualification should be made by the judge sitting in the case, and not by another judge. It requires the judge to *disqualify himself* when any one of the statutory conditions is met. It makes no provision for the transfer of the issue to another judge. We think that appellate review of a judge's decision not to disqualify himself, when he is asked to do so by a

> proper and timely motion supported by affidavits and perhaps other evidence, should not be deferential. The motion puts into issue the integrity of the court's judgment. The absence of the requirement that the judge take the factual averments of the moving party's affidavit as true "gives chance for the evil against which the section is directed." . . . In addition, a judge may be especially reluctant to recuse himself when to do so requires him to admit that his actual bias or prejudice has been proved. Accordingly, we will review decisions against disqualification under § 455(b)(1) *de novo*. We will evaluate the evidence for ourselves, applying the same standard as the district court.

*Balistrieri*, 779 F.2d at 1202–03.

The Seventh Circuit has consistently adhered to this stance in its subsequent cases evaluating recusal decisions. *See United States v. Simon*, 937 F.3d 820, 826 (7th Cir. 2019) ("[W]e review a preserved § 455(a) claim *de novo*."); *United States v. Barr*, 960 F.3d 906, 919 (7th Cir. 2020) ("We review preserved claims under § 455(a) *de novo*."); *United States v. Walsh*, 47 F.4th 491, 498 (7th Cir. 2022) ("We review a district court's denial of a defendant's motion for recusal made under 28 U.S.C. § 455 de novo."); *Dunkley v. Ill. Dep't of Human Servs.*, No. 23-2215, 2024 WL 1155448, at *3 (7th Cir. Mar. 18, 2024) ("We review the district court's denial of a motion to recuse de novo.").

The only wrinkle in the Seventh Circuit's approach is that it will review a district court's factual findings for clear error—even when those factual findings undergird

an order denying recusal under 28 U.S.C. § 455. *See Walsh*, 47 F.4th at 498 ("[W]e have never addressed the applicable standard of review for a district court's factual findings in [the 28 U.S.C. § 455] context. We conclude that a clear-error standard is appropriate."). But even when it established this deferential review for a district court's factual determinations, the Seventh Circuit reaffirmed its longstanding position that the ultimate order denying recusal is reviewed *de novo*. *See id.* ("We review a district court's denial of a defendant's motion for recusal made under 28 U.S.C. § 455 de novo."); *id.* ("[W]e stand alone as the only circuit to employ a de novo standard of review to § 455 recusal decisions; every other circuit reviews them for abuse of discretion.").

### B. The Approach of The First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, D.C., and Federal Circuits — Abuse-Of-Discretion Review

Every other circuit court has weighed in on this issue — and all of them reject the *de novo* review standard employed by the Seventh Circuit. In every other circuit except the Seventh, a denial of a motion to recuse is reviewed for abuse of discretion. *See United States v. Gottesfeld*, 18 F.4th 1, 17 (1st Cir. 2021) ("We review a ruling on a motion to recuse for abuse of discretion." (citation and internal quotation marks omitted));[26] *LoCascio v. United States*, 473 F.3d 493, 495 (2d Cir. 2007) (per curiam) ("Recusal motions are committed to the sound discretion

26. *See also United States v. Torres-Estrada*, 817 F.3d 376, 380 (1st Cir. 2016) (same); *United States v. Pulido*, 566 F.3d 52, 62 (1st Cir. 2009) (same).

of the district court, and this Court will reverse a decision denying such a motion only for abuse of discretion.");[27] *United States v. Ciavarella*, 716 F.3d 705, 717 n.4 (3d Cir. 2013) ("We review the District Court's denial of Ciavarella's recusal motions for abuse of discretion.");[28] *Megaro v. McCollum*, 66 F.4th 151, 163 (4th Cir. 2023) ("We review a district court's denial of a motion for recusal for abuse of discretion.");[29] *United States v. Brocato*, 4 F.4th 296, 301 (5th Cir. 2021) (per curiam) ("We review the denial of recusal motions under 28 U.S.C. § 144 and § 455 for abuse

27. *See also United States v. Hild*, No. 23-6136-CR, 2025 WL 2154206, at *3 (2d Cir. July 30, 2025) ("We review the denial of a recusal motion for abuse of discretion."); *United States v. Arena*, 180 F.3d 380, 398 (2d Cir. 1999), *abrogated on other grounds*, *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393 (2003) ("Recusal motions are committed to the sound discretion of the district court, and we review the denial of such a motion only for abuse of discretion."); *Diamondstone v. Macaluso*, 148 F.3d 113, 120 (2d Cir. 1998) ("We review a judge's denial of a recusal motion for abuse of discretion."); *United States v. Thompson*, 76 F.3d 442, 451 (2d Cir. 1996) ("The judge's denial of a recusal motion is reviewed for abuse of discretion.").

28. *See also Fink v. United States*, No. 20-3572, 2021 WL 4490240, at *2 (3d Cir. Oct. 1, 2021) (per curiam) ("We review the denial of Fink's recusal motion for abuse of discretion."); *Johnson v. Trueblood*, 629 F.2d 287, 290 (3d Cir. 1980) ("In this circuit, review by this court of a district court's action on recusal is by an abuse of discretion standard.").

29. *See also Kolon Indus. Inc. v. E.I. DuPont de Nemours & Co.*, 748 F.3d 160, 167 (4th Cir. 2014) ("We review a judge's recusal decision for abuse of discretion."); *United States v. Mitchell*, 886 F.2d 667, 671 (4th Cir. 1989) ("We review a judge's decision to refuse to disqualify himself only for an abuse of discretion.").

of discretion");[30] *United States v. Liggins*, 76 F.4th 500, 505 (6th Cir. 2023) ("We review a district court's denial of a motion for recusal for an abuse of discretion. . . .");[31] *United States v. Woods*, 978 F.3d 554, 570 (8th Cir. 2020) ("We review the denial of a motion for recusal for abuse of discretion.");[32] *United States v. McTiernan*, 695 F.3d 882, 891 (9th Cir. 2012) ("Rulings on motions for recusal are reviewed under the abuse-of-discretion standard.");[33]

30. *See also In re Chevron U.S.A., Inc.*, 121 F.3d 163, 165 (5th Cir. 1997) ("[W]e have recognized that the decision to recuse is committed to the sound discretion of the district court and typically is reviewed for an abuse thereof."); *In re City of Houston*, 745 F.2d 925, 927 (5th Cir. 1984) ("The issue of judicial disqualification . . . is a sensitive question of assessing all the facts and circumstances in order to determine whether the failure to disqualify was an abuse of sound judicial discretion." (citation and internal quotation marks omitted)).

31. *See also Garrett v. Ohio State Univ.*, 60 F.4th 359, 368 (6th Cir. 2023) ("[A]ll plaintiffs before us appeal the district court's denial of their motions to recuse . . . . We review [this] motion[] for an abuse of discretion."); *Alemarah v. Gen. Motors, LLC*, 980 F.3d 1083, 1086 (6th Cir. 2020) (per curiam) ("We review a district court's denial of a recusal motion for an abuse of discretion."); *Burley v. Gagacki*, 834 F.3d 606, 616 (6th Cir. 2016) ("We review a judge's decision on a motion to disqualify for an abuse of discretion.").

32. *See also In re Steward*, 828 F.3d 672, 681 (8th Cir. 2016) ("We review the lower courts' decisions on recusal for abuse of discretion.").

33. *See also United States v. Hunt*, No. 23-2342, 2025 WL 2460941, at *3 (9th Cir. Aug. 27, 2025) ("For recusal orders, we review for abuse of discretion."); *United States v. Wilkerson,* 208 F.3d 794, 797 (9th Cir. 2000) ("We review a district court's decision whether to grant a motion for recusal for an abuse of discretion.").

*Barnett v. Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C.*, 956 F.3d 1228, 1239 (10th Cir. 2020) ("We review for abuse of discretion the denial of a motion to disqualify.");[34] *McWhorter v. City of Birmingham*, 906 F.2d 674, 678 (11th Cir. 1990) (per curiam) ("A judge's refusal to recuse himself is reviewed under the abuse of discretion standard.");[35] *SEC v. Loving Spirit Found. Inc.*, 392 F.3d 486, 493 (D.C. Cir. 2004) ("We review a district judge's refusal to recuse under section 455(a) for abuse of discretion.");[36] *Allphin v. United States*, 758 F.3d 1336, 1343 (Fed. Cir. 2014) ("Appellants filed a motion seeking recusal

34. *See West-Helmle v. Denver Dist. Attorney's Office*, No. 24-1340, 2025 WL 2317368, at *6 (10th Cir. Aug. 12, 2025) ("We review the denial of a motion to recuse for abuse of discretion."); *Burke v. Regalado*, 935 F.3d 960, 1052 (10th Cir. 2019) ("We review a district court's denial of a motion to disqualify a judge for abuse of discretion."); *Weatherhead v. Globe Int'l, Inc.*, 832 F.2d 1226, 1227 (10th Cir. 1987) ("Because the decision to recuse is within the sound discretion of the district judge, this court reviews the denial of a motion to recuse only for abuse of discretion.").

35. *See also Ghee v. Flix N. Am., Inc.*, No. 24-12580, 2025 WL 2408957, at *2 (11th Cir. Aug. 20, 2025) (per curiam) ("We review a recusal ruling for abuse of discretion."); *Jaffree v. Wallace*, 837 F.2d 1461, 1465 (11th Cir. 1988) (per curiam) ("We review a judge's refusal to recuse himself under the abuse of discretion standard.").

36. *See also United States v. Pollard*, 959 F.2d 1011, 1031 (D.C. Cir. 1992) ("[W]e believe that Chief Judge Robinson did not abuse his discretion in denying Pollard's motion for disqualification.").

of the judge . . . . The judge denied the motion . . . . We review this decision for an abuse of discretion.").[37]

The approach used in the Tenth Circuit is somewhat more nuanced. In *Sac & Fox Nation of Oklahoma v. Cuomo*, 193 F.3d 1162 (10th Cir. 1999), the Tenth Circuit said that it "generally" reviews denials of recusal motions for abuse of discretion, but if the judge fails to "create a record or document her decision not to recuse," then the court will review the recusal decision *de novo*. *Id.* at 1168. Apart from the Tenth Circuit's one additional feature, the courts of appeals outside the Seventh Circuit are unanimous in applying the abuse-of-discretion standard rather than de novo review when reviewing orders denying recusal motions. So there is a 12-1 circuit split on the issue, and the Court should grant certiorari to resolve it.

## II. THERE IS AN ADDITIONAL CIRCUIT SPLIT ON THE STANDARD OF REVIEW WHEN LITIGANTS CHALLENGE A RECUSAL DECISION ON MANDAMUS

The Fifth Circuit's ruling implicates an additional circuit split over the standard of review when litigants challenge a refusal to recuse in mandamus proceedings. Orders denying recusal motions are almost always interlocutory and not subject to immediate appeal. So litigants seeking recusal will often seek immediate review by petitioning for mandamus, rather than waiting until the end of trial to appeal the recusal decision. *Cf. Cochran v. SEC*,

37. *See also Shell Oil Co. v. United States*, 672 F.3d 1283, 1288 (Fed. Cir. 2012) ("Consistent with the vast majority of courts to consider this issue, we review a judge's failure to recuse for an abuse of discretion.").

20 F.4th 194, 212 (5th Cir. 2021) (en banc) ("Given that disqualification disputes concern the basic integrity of a tribunal, they must be resolved at the outset of the litigation. So 'virtually every circuit' allows parties to promptly challenge a judge's decision not to recuse [on mandamus].").

It has long been established that mandamus will issue only when the petitioner shows that his entitlement to the writ is "clear and indisputable." *Cheney v. U.S. Dist. Ct. for the Dist. of Columbia*, 542 U.S. 367, 381 (2004). The Fifth Circuit combined the mandamus prerequisites with the abuse-of-discretion standard to create a double dose of deference to the underlying recusal decision—which required the Dondero parties to make a "clear and indisputable" showing that the bankruptcy judge had abused her discretion in denying the recusal motion. App. 8a, 17a–18a. The Fourth and Ninth Circuits adopt a similar approach when litigants seek mandamus in response to the denial of a recusal motion, laying the mandamus standard on top of abuse-of-discretion review to establish an even more deferential regime than what would govern on direct appeal. *See In re Moore*, 955 F.3d 384, 388 (4th Cir. 2020) ("This is not a direct appeal, in which we would review a judge's recusal decision under the ordinary abuse-of-discretion standard. Instead, Moore is seeking a writ of mandamus . . . . So to prevail here, Moore must show . . . that he has a 'clear and indisputable' right to that relief." (citations omitted)); *In re Creech*, 119 F.4th 1114, 1121 (9th Cir. 2024) (requiring a "clear abuse of discretion" before reversing a recusal decision on mandamus).

But the Third and Seventh Circuits take a different approach. The Seventh Circuit, as noted earlier, applies de

novo review to recusal decisions — even in mandamus proceedings. *See In re Hatcher*, 150 F.3d 631, 637 (7th Cir. 1998) ("Our review [of a denial of a motion to recuse] is *de novo*, though mandamus is an extraordinary remedy we do not grant lightly." (citations omitted)).

The Third Circuit steers in between the *de novo* review of the Seventh Circuit and the double-deference approach employed by the Fourth, Fifth, and Ninth Circuits. The Third Circuit equates the "abuse of discretion" standard of review with the "clear and indisputable" showing requirement that governs mandamus proceedings — and it collapses them into a single deferential standard that mirrors the abuse-of-discretion regime that applies on direct appeal. *See In re Kensington Int'l Ltd.*, 368 F.3d 289, 301 (3d Cir. 2004) ("When the need for a writ of mandamus is determined by this court to be 'clear and indisputable,' a district judge's decision not to recuse himself or herself necessarily also will have been an abuse of discretion or a clear legal error."); *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 163 n.9 (3d Cir. 1993) ("[O]rdinarily we review a district judge's refusal to recuse himself pursuant to 28 U.S.C. § 455 for abuse of discretion. When the need for a writ of mandamus is determined by this court to be 'clear and indisputable,' a district judge's decision not to recuse himself or herself necessarily also will have been an abuse of discretion or a clear legal error." (citations omitted)); *In re School Asbestos Litigation*, 977 F.2d 764, 778 n.15 (3d Cir. 1992) ("[I]f we determine that the need for a writ of mandamus is 'clear and indisputable,' then the district court's decision will necessarily also have been an abuse of discretion or a clear legal error.").

So there is a 3-1-1 circuit split over the standard of review that applies when reviewing recusal decisions on mandamus. Three circuits (the Fourth, Fifth, and Ninth) apply a double-deference regime that requires the mandamus petitioner to show both an abuse of discretion and a "clear and indisputable" showing of that abuse. One circuit (the Seventh) applies *de novo* review to recusal decisions even in mandamus proceedings. And one circuit (the Third) equates the abuse-of-discretion standard of review with the "clear and indisputable" showing requirement and collapses them into a single inquiry. The Court should resolve this dispute in addition to the question described in Section I, *supra*.

## III. RESOLVING WHETHER AND TO WHAT EXTENT APPELLATE COURTS TAKE A FRESH LOOK AT A JUDGE'S REFUSAL TO RECUSE IS IMPORTANT TO THE STRUCTURE AND INTEGRITY OF THE JUDICIARY

This Court also should grant review because it is crucially important that at least one set of judges—whose impartiality is not being questioned—determines whether recusal is warranted without excessively deferring to the decision of the judge who was asked to step aside.

This issue—regarding the standard for reviewing recusal decisions—goes to the core of the structure of and the public's confidence in the judicial system. This Court has not hesitated to promptly address the standards for handling accusations of judicial bias, even in the absence of addressing a circuit split. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

This Court has taken up disagreements among the circuit courts regarding the applicable standard of appellate review before, as they ensure that the level of judge or judges best suited to accurately resolve an issue is given an appropriate level of responsibility for it. *See, e.g.*, *Monasky v. Taglieri*, 589 U.S. 68 (2020); *Kucana v. Holder*, 558 U.S. 233 (2010); *INS v. Abudu*, 485 U.S. 94 (1988). This standard-of-review question—regarding whether a judge whose impartiality is questioned is given multiple layers of deference in addressing the suggestion—goes beyond increasing the chances of accurate judicial resolutions. It is interwoven with preserving the reality and perception of judicial integrity.

The Court should not let stand the Fifth Circuit's approach to this issue—providing two layers of deferential protection to a judge's resolution of her own recusal.

First, the Fifth Circuit should not have restricted review of a recusal decision to abuse of discretion because recusal *is not discretionary* in certain statutorily specified circumstances. Congress, instead, mandated: "Any justice, judge, or magistrate judge of the United States *shall* disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a) (emphasis added). The statutory "use of the word 'shall' 'creates an obligation impervious to judicial discretion.'" *Smith v. Spizzirri*, 601 U.S. 472, 476 (2024) (quoting *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998)).

The statutory language here is unlike the Federal Rules of Evidence, which specify what "is admissible" and provide (under certain circumstances) that a judge "may

exclude" certain evidence. The Court reviews judicial application of those rules for an abuse of discretion, understanding that the Court is closest to the conduct of a proceeding and the difficulties of obtaining full context from a cold written record. *Gen. Elec. Co. v. Joiner,* 522 U.S. 136, 141 (1997). With respect to recusal, Congress used mandatory language and removed discretion from the courts to protect the public perception of their integrity.

Nor is this the extraordinary situation where Congress used the word "shall" but really meant "may" or "should." *See Kennedy v. Braidwood Mgmt., Inc.*, 145 S. Ct. 2427, 2450 (2025). The recusal statute does not empower or authorize judicial acts but restricts them. *See DeMartinez v. Lemagno*, 515 U.S. 417, 432 n.9 (1995) ("Though 'shall' generally means 'must,' legal writers sometimes use, or misuse, 'shall' to mean 'should,' 'will,' or even 'may.' . . . For example, certain of the Federal Rules use the word 'shall' to authorize, but not to require, judicial action.").

And Congress's foreclosure of discretion is reinforced by the history of Section 455. The current version is the product of a 1974 amendment, eliminating language providing for recusal of a judge in circumstances that "rendered it improper, *in his opinion*, for him to sit." 28 U.S.C. § 455 (1970 ed.) (emphasis added); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 870 (1988) (Rehnquist, J., dissenting) (describing the 1974 amendments). Section 455 further provides discretion for judges to avoid otherwise mandatory recusal in certain circumstances, including where the basis for recusal is a financial interest, the case has been ongoing for some time before

recusal is raised, and the judge divests of that interest. *See* 28 U.S.C. § 455(f). "Adjacent" statutory provisions that provide for discretion reinforce that the term "shall impose[s] a mandatory duty." *Maine Cmty. Health Options v. United States*, 590 U.S. 296, 311 (2020).

Appellate courts should not review lower-court decisions for an "abuse of discretion" that are not discretionary. It is categorical error. *See INS v. Abudu*, 485 U.S. 94, 110 (1988) (abuse-of-discretion standard of review most appropriate for "adjudications not governed by specific statutory commands").

Second, allowing a judge's declination of statutorily mandated recusal to stand absent an abuse of discretion —much less an additional showing that the abuse was "clear and indisputable"—creates a pernicious structural issue for the judicial branch. Few principles of justice are older and more accepted than "no man is allowed to be a judge in his own cause," a proposition going back to Roman law: *Nemo judex in causa sua*. *Massey Coal*, 556 U.S. at 876 (applying that principle to require recusal of a State Supreme Court judge under the Due Process Clause); The Federalist No. 10, at 59 (James Madison) (J. Cooke ed., 1961) ("No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."). A standard of appellate review that defers to the very judge whose impartiality is questioned violates that maxim: It makes the person questioned herself the judge of whether she has the virtue of impartiality. It is one thing to let a judge evaluate her impartiality in the first instance; it is quite another to have every judge sitting in review let that

self-determination stand, absent an extraordinary showing of error.

This problem is particularly acute when the basis for questioning impartiality involves extra-judicial conduct. The judge's books in this case place it apart from the mine run of recusal cases, where litigants claim that the judge has developed a prejudice or personal bias against them due to events in a case or where a judge's routine financial investment might be affected by the outcome. App. 9a–18a (treating alleged bias arising from handling the case separately from the books). Here, the principal basis for recusal is the bankruptcy judge's extrajudicial statements in the books and in the media about her job and the people and motions in a case that she is handling. *See* Code of Conduct for United States Judges, Canon 3(A)(6) (forbidding such public comments). As the Seventh Circuit explained in adopting a *de novo* standard, reluctance to make adverse conclusions about one's self is human nature. *Balistrieri*, 779 F.2d at 1202–03

Removing layers of deference to the judge whose impartiality is questioned is also crucial to public confidence in judicial integrity. Congress, in mandating recusal in certain circumstances, was not concerned solely with the reality of partiality, but also its appearance. So it required recusal not only when a judge was actually prejudiced, biased, or partial to one side, but also when his "impartiality might reasonably be questioned." 28 U.S.C. § 455(a); *Liljeberg*, 486 U.S. 847, at 864–65. For that reason, this Court has repeatedly held that close calls are resolved in favor of recusal. *Liteky v. United States*, 510 U.S. 540, 552

(1994) ("Recusal is required *whenever* there exists a genuine question concerning a judge's impartiality.").

It is crucial to maintaining public confidence in the judiciary that a set of judges—whose impartiality no one has questioned—has taken a fresh look at whether the circumstances require recusal according to the standards set by Congress. At least then, the defense of the judiciary's integrity will not be circular, where it is largely up to the judge whose impartiality is questioned to determine whether he can be a fair judge.

## IV. THIS CASE PRESENTS A UNIQUE AND TIMELY VEHICLE TO RESOLVE THE CIRCUIT DISAGREEMENT REGARDING DEFERENCE TO A JUDGE'S REFUSAL TO RECUSE.

This case is an excellent vehicle to resolve the fractures among the circuit courts on the appropriate standard of review for declinations of recusal.

First, we are not aware of another case that so clearly isolates the legal issue of the standard for reviewing recusal decisions. Here, the Fifth Circuit acknowledged the many similarities between the hedge fund and its owner negatively depicted in the bankruptcy judge's books and the parties litigating before her in the actual case. The books' hedge fund and Highland are both located in Dallas. App. 16a. Both the books' hedge fund and Highland used the same tax structures and same foreign jurisdictions to reduce tax liability, activities the judge disapprovingly described as "'byzantine'" in both her books and in her opinions. *Id.* The books' hedge fund was named Ranger Capital, effectively the same name of Mr. Dondero's hedge fund ("Ranger Asset Management") before

he changed its name to Highland Capital. App. 112a; *Kirschner*, Dkt. 310 at 16–17. The books' hedge fund had the same mix of investments—including collateralized debt obligations and purchases of people's life insurance policies (so called "life settlements")—as Highland had. App. 112a. The books' antagonist was the same height, the same age, the same marital status, and had come from the same part of the country to Dallas, Texas, as Mr. Dondero.

The similarities between life and art aside, the books made public comments derogatory to both hedge funds and those who invest in life settlements describing the former as "suck[ing] up money . . . like an i-Robot vacuum" with "outrageous amount[s] of hubris" and the latter as "'creepy'" and something that ought to be illegal. App. 16a, 104a, 105a. Lest the bankruptcy judge's distaste for the industry be overlooked, the title of the second book took the root word of the hedge fund industry and combined it with dire destruction: *Hedging Death*. The bankruptcy judge did all of this writing and publishing while she was sitting on the Highland and Acis cases, the former of which she has described as consuming her regular attention over multiple years.

The Fifth Circuit, in response to a rehearing petition sharpening the issue, noted some dissimilarities between the books on the one hand, and Highland and Mr. Dondero on the other. App. 16a–17a. None of them is particularly comforting, such as noting that one of the books—*Hedging Death*—was "largely about the protagonist bankruptcy court judge." *Id.* at 17a. The book spilled much ink on the judge *and* her heroic actions fighting against an eerily similar hedge fund. The Fifth Circuit noted that the

"hedge fund manager" in the books "fakes his own suicide after linking up with Mexican drug cartels." *Id.* But a little literary license at the end has never absolved writers amidst many other links between literature and reality. *See, e.g.*, *Muzikowski v. Paramount Pictures Corp.*, 322 F.3d 918, 821 (7th Cir. 2003) (reversing dismissal of defamation claim despite film character resembling plaintiff committing several crimes and gambling, unlike plaintiff).

The circuit court held: "From the information we have in the record before us, whether a reasonable reader could question Chief Judge Jernigan's impartiality in this case is debatable. Due to the similarities between the characters in Chief Judge Jernigan's novel and the litigants before her court, "*a strong argument could be made that she had a duty to recuse*." App. 17a (emphasis added). In the Fifth Circuit, absent the deference of appellate review, that means recusal: "If the question of whether § 455(a) requires disqualification is a close one, the balance tips in favor of recusal." *Chevron*, 121 F.3d at 165.

In this case, the standard of review was a significant factor in preventing immediate appellate relief, as this "strong argument" was not "enough" to conclude that "the district court abused its discretion" and that the petitioners were "*clearly and indisputably* entitled to mandamus relief in the form of a recusal order." App. 17a, 16a. Resolving the split of circuit authority on the appropriate standard of review for recusal decisions is not an academic exercise in this case.

This petition is also timely. There is no question that many disappointed litigants turn to recusal motions, often without merit. But there are also recusal requests that

present "strong argument[s]." App. 17a. And recusals are now more frequently sought by the Department of Justice. *See, e.g.*, Chad Mizelle, "Complaint Against United States District Court Chief Judge Emeritus James E. Boasberg," Department of Justice, July 23, 2025 (complaint regarding judge's impartiality based on negative comments on Trump Administration); Mem. Op. & Order, *Perkins Coie LLP v. U.S. Dep't of Justice*, No. 1:25-cv-00716-BAH (D.D.C. Mar. 26, 2025), Dkt. 36 (denying government recusal motion); Defs.' Mot. for Recusal of a Dist. Judge Pursuant to 28 U.S.C. § 455 & Reassignment, *Cmty. Legal Servs. in E. Palo Alto v. U.S. Dep't of Health & Human Servs.*, No. 3:25-cv-02847-AMO (N.D. Cal. Apr. 9, 2025), Dkt. 47 (government motion for recusal in immigration case).

These requests, from a coordinate branch of government, cannot just be brushed aside as the long shots of congenitally disappointed litigants. At least because of who is making them, they raise serious questions with respect to the integrity and fairness of the judicial system. And this Court would be serving one of its primary functions in protecting the reality and appearance of the federal judiciary's fairness and integrity by granting review in this case and clarifying how appellate courts should evaluate recusal issues. *See*, *e.g.*, *Massey Coal*, 556 U.S. at 889 (courts correctly setting rules surrounding recusal serve an "'interest of the highest order'" in protecting the "'citizen's respect for judgments'" (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring))).

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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September 22, 2025

**APPENDIX**

United States Court of Appeals
Fifth Circuit
**FILED**
**April 16, 2025**

**Lyle W. Cayce**
**Clerk**

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

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No. 24-10287

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

*Plaintiffs–Appellants*,

*versus*

STACEY G. JERNIGAN; HIGHLAND CAPITAL MANAGEMENT, L.P.,

*Defendants–Appellees*.

---

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:23-CV-726

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ON PETITION FOR REHEARING

Before WIENER, WILLETT, and DUNCAN, *Circuit Judges*.

PER CURIAM:*

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* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

The petition for rehearing is GRANTED. We withdraw our prior opinion, *Dondero v. Jernigan*, No. 24-10287, 2024 WL 4678879 (5th Cir. Nov. 5, 2024), and substitute the following.

Appellants James Dondero and affiliated entities Highland Capital Management Fund Advisors, L.P., The Dugaboy Investment Trust, NexPoint Real Estate Partners, L.L.C., and Get Good Trust ("the Dondero Parties") are parties to a bankruptcy proceeding in the Northern District of Texas. They appeal a district court order denying their petition for mandamus that sought the recusal of the presiding bankruptcy judge.

The order of the district court is AFFIRMED.[1]

## I

Highland Capital Management, L.P. was a Dallas-based investment firm that managed billion-dollar, publicly traded investment portfolios for nearly three decades. *Matter of Highland Capital Mgmt., L.P. (Highland I)*, 48 F.4th 419, 424 (5th Cir. 2022). James Dondero was Highland's CEO. In 2019, after facing a $180 million adverse judgment in an arbitration, Highland voluntarily filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the District of Delaware. Shortly after, the Creditors Committee for Highland moved to transfer the bankruptcy case to the United States Bankruptcy Court for the Northern District of Texas on the basis that Chief Judge Jernigan was "already intimately

1. Also before us is a motion by the Dondero Parties requesting we take judicial notice of certain documents. We affirm the order of the district court without referring to these documents. Accordingly, the motion is DENIED AS MOOT.

familiar with the Debtor's principals and complex organizational structure," having presided over involuntary bankruptcy cases commenced against Acis Capital Management, L.P. and Acis Capital Management GP, L.L.C.—entities where Dondero had also served as an executive. The motion was granted, and the case was assigned to Chief Judge Jernigan.

In January 2020, Chief Judge Jernigan held the first hearing in the Highland case, regarding approval of a settlement between Highland and the Creditors Committee under which Dondero would surrender his control positions at Highland and be replaced by an Independent Board. *Highland I*, 48 F.4th at 425. Chief Judge Jernigan approved the agreed order, and Dondero stepped down as officer and director of Highland. *Id.* He remained an employee of Highland as a portfolio manager until October 2020, when the Independent Board demanded he step down.

Throughout 2020, Dondero proposed several reorganization plans, which the Committee and Independent Board opposed. *Id.* at 426. The Committee and Board instead formed their own plan. *Id.* Meanwhile, Dondero made various filings objecting to settlements, appealing orders, and seeking writs of mandamus. *Id.* He and other creditors filed over a dozen objections to the Independent Board's plan. *Id.* Chief Judge Jernigan confirmed the plan over objections at a hearing in February 2021, and it took effect on August 11, 2021. *Id.* The confirmation order included findings that Dondero was a "serial litigator," that he did not have a "good faith basis to lob objections to the Plan," and that the other board members were "marching pursuant to the orders of Mr. Dondero." *Id.* at 428.

Dondero appealed the confirmation order directly to this court, "objecting to the Plan's legality and some of the bankruptcy court's factual findings." *Id.* We affirmed the reorganization plan and confirmation order in full, with the exception of finding that the bankruptcy court exceeded its statutory authority in exculpating non-debtors in anticipation of "Dondero's continued litigiousness." *Id.* at 427, 432, 439. Though we vacated the exculpatory order as to non-debtors, we clarified that "[n]othing in [our] opinion should be construed to hinder the bankruptcy court's power to enjoin and impose sanctions on Dondero and other entities by following the procedures to designate them vexatious litigants." *Id.* at 439 n.19.

Since then, we have dealt with multiple appeals in this matter. *See, e.g.*, *Matter of Highland Capital Mgmt., L.P.*, 57 F.4th 494 (5th Cir. 2023); *Matter of Highland Capital Mgmt., L.P.*, 98 F.4th 170 (5th Cir. 2024); *Matter of Highland Capital Mgmt., L.P.*, 105 F.4th 830 (5th Cir. 2024).

The instant appeal focuses on a series of recusal motions filed by the Dondero Parties beginning in March 2021—after the reorganization plan had been confirmed but before it took effect. The motions argued that Chief Judge Jernigan had developed an animus against the Dondero Parties that caused her impartiality to be reasonably questioned and thus required recusal under 28 U.S.C. § 455.

The Dondero Parties filed the first recusal motion on March 18, 2021. Chief Judge Jernigan denied the motion and reasoned that it was untimely, having been filed 15 months after the case was transferred to the Northern District of Texas and on the eve of Dondero's contempt

hearing. She nevertheless analyzed the recusal motion on the merits and determined that recusal wasn't warranted. She reasoned that her presiding over the prior *Acis* case did not create bias because during that proceeding she only learned generalities about the industry and Highland's business structure, and it is appropriate for a bankruptcy court to preside over cases of affiliated business entities of a party. She also stated, citing *Lieb v. Tillman*, 112 B.R. 830, 835–36 (Bankr. W.D. Tex. 1990), that she did not believe that "she harbors, or has shown, any personal bias or prejudice" against Dondero and that the Dondero Parties' assertions did not "rise to 'the threshold standard of raising a doubt in the mind of a reasonable observer' as to the judge's impartiality." The Dondero Parties appealed to the district court, which concluded that the order was interlocutory and not immediately appealable.

Five months later, the Dondero Parties filed a second recusal motion asking Chief Judge Jernigan to issue a final appealable order and supplementing the first recusal motion with additional evidence of alleged bias. Chief Judge Jernigan denied the motion without prejudice on procedural grounds. She noted that the Dondero Parties could file another "simple motion" asking the court to revise the first recusal order to make it final and appealable but without including the supplemental evidence. Alternatively, they could file a new recusal motion based on any alleged new evidence.

The Dondero parties chose to file a third, renewed recusal motion. Chief Judge Jernigan again denied the motion, determining that it was untimely and failed on the merits for the same reasons as the previous recusal motions. Additionally, she catalogued several instances in

the motion where the Dondero Parties misstated or mischaracterized events of alleged bias. Chief Judge Jernigan also addressed the Dondero Parties' new accusations regarding her two published novels, which the Dondero Parties contended were patterned after Dondero and expressed exceedingly negative views about his industry. Chief Judge Jernigan stated that her novels "are not about Mr. Dondero or the hedge fund industry in general" and declined to recuse on that basis.

The Dondero Parties filed a petition for writ of mandamus in the district court seeking an order directing Chief Judge Jernigan to recuse herself.[2] The district court denied the petition, finding that the Dondero Parties had "not proved 'exceptional circumstances' sufficient to justify the extraordinary remedy of a writ of mandamus.'" The Dondero Parties timely appealed.

## II

Mandamus relief is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004) (internal quotation marks omitted); *see also U.S. v. U.S. Dist. Ct. for S. Dist. of Tex.*, 506 F.2d 383, 384 (5th Cir. 1974). Three conditions must be satisfied before the writ may issue:

> First, the party seeking issuance of the writ must have no other adequate means to attain

2. The Dondero Parties initially filed the mandamus petition in the same case as their previous appeal of Chief Judge Jernigan's recusal order. The district court unfiled it and directed the Dondero Parties to file a new action for mandamus relief. The new action is the relevant petition in this appeal.

> the relief he desires . . . . Second, the petitioner must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable. . . . Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.

*In re LeBlanc*, 559 F. App'x 389, 392 (5th Cir. 2014) (per curiam) (citing *Cheney*, 542 U.S. at 380–81).

We review the denial of mandamus for abuse of discretion. *United States v. White*, 67 F. App'x 253, at *1 (5th Cir. 2003) (per curiam) (citing *United States v. Denson*, 603 F.2d 1143, 1146 (5th Cir. 1979) (en banc)); *see also Cheney*, 542 U.S. at 380.

## III

### A

As to the first requirement for mandamus relief, the Dondero Parties must show that they have no "other adequate means to attain the relief." *Cheney*, 542 U.S. at 380–81. In other words, they must show that any error by Chief Judge Jernigan is "irremediable on ordinary appeal." *In re Occidental Petroleum Corp.*, 217 F.3d 293, 295 (5th Cir. 2000) (emphasis removed). The Dondero Parties' petition easily meets this condition.

We have held that "a petition for mandamus is the appropriate legal vehicle for challenging denial of a disqualification motion." *In re Chevron U.S.A., Inc.*, 121 F.3d 163, 165 (5th Cir. 1997); *see also United States v. Gregory*, 656 F.2d 1132, 1136 (5th Cir. 1981); *In re Placid Oil Co.*, 802 F.2d 783, 786 (5th Cir. 1986); *In re Cameron Int'l Corp.*, 393 F. App'x 133, 134–35 (5th Cir. 2010). That

is because "remedy by appeal is inadequate" in instances of apparent bias. *Berger v. United States*, 255 U.S. 22, 36 (1921). If a party could not challenge bias until appealable final judgment has issued, prejudice will have already "worked its evil." *Id.* As the Second Circuit has held, "[a] claim of personal bias and prejudice strikes at the integrity of the judicial process, and it would be intolerable to hold that the disclaimer of prejudice by the very jurist who is accused of harboring it should itself terminate the inquiry until an ultimate appeal on the merits." *In re Int'l Bus. Mach. Corp.*, 618 F.2d 923, 926–27 (2d Cir. 1980); *see also* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3553 (3d ed.).

Claims of judicial bias cannot wait for the ordinary appeals process to run its course. Mandamus is thus the appropriate means for relief here.

B

As to the second requirement for mandamus relief, the Dondero Parties must show that their right to the writ is "clear and indisputable." *Cheney*, 542 U.S. at 380–81. That is, it must be clear and indisputable that Chief Judge Jernigan is required to recuse.

Recusal decisions are reviewed for abuse of discretion, and in general, "if a matter is within the district court's discretion, the litigant's right to a particular result cannot be 'clear and indisputable.'" *Kmart Corp. v. Arends*, 123 F.3d 297, 300–01 (5th Cir. 1997); *Chevron*, 121 F.3d at 165. The Dondero Parties fail to meet this high burden. *See Chevron*, 121 F.3d at 165 (explaining that mandamus relief of disqualification is "granted only in exceptional circumstances").

Federal law requires a judge to recuse "in any proceeding in which [her] impartiality might reasonably be questioned" or "[w]here [she] has a personal bias or prejudice concerning a party . . . ." 28 U.S.C. § 455(a), (b)(1). The bar for recusal under § 455 is a high one. "[J]udicial rulings and comments standing alone rarely will suffice to disqualify a judge." *Chevron*, 121 F.3d at 165 (citing *Liteky v. United States*, 510 U.S. 540, 555 (1994)). Even comments "that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Id.* (quoting *Liteky*, 510 U.S. at 555). Recusal is not required when the judge's comments about a particular party are based on proceedings in open court or information learned in earlier proceedings. *See Liteky*, 510 U.S. at 551. Bias requiring recusal must be *personal* rather than *judicial*. *United States v. Scroggins*, 485 F.3d 824, 829–830 (5th Cir. 2007). Judicial bias in the form of adverse rulings and comments on the record ordinarily does not constitute grounds for recusal, unless it "reveal[s] an opinion based on an extrajudicial source or demonstrate[s] such a high degree of antagonism as to make fair judgment impossible." *United States v. Brocato*, 4 F.4th 296, 302 (5th Cir. 2021) (quoting *Scroggins*, 485 F.3d at 830); *see also* WRIGHT & MILLER, at § 3542.

The Dondero Parties cite various instances throughout the case that they contend show Chief Judge Jernigan "harbors an actual and enduring bias and animus" against them "that is 'personal rather than judicial in nature.'" Placed in their proper context, none of these instances suffice to show that Chief Judge Jernigan's impartiality might be reasonably questioned or that she

had a personal bias against the Dondero Parties requiring recusal under § 455.

The Dondero Parties first take issue with Chief Judge Jernigan's statements expressing negative opinions about Dondero based on information she learned while presiding over the *Acis* case. They cite specifically Chief Judge Jernigan's statement at the January 2020 settlement hearing:

> I can't extract what I learned during the *Acis* case, it's in my brain, and we did have many moments during the *Acis* case where the Chapter 11 trustee came in and credibly testified that, whether it was Mr. Dondero personally or others at Highland, they were surreptitiously liquidating funds, they were changing agreements, assigning agreements to others. They were doing things behind the scenes that were impacting the value of the Debtor in a bad way.

Based on those concerns, Chief Judge Jernigan ordered that the settlement contain language reading, "Mr. Dondero shall not cause any related entity to terminate any agreements with the Debtor" and that "his role as an employee of the Debtor will be subject at all times to the supervision, direction, and authority of the Debtors." She noted from the bench (though did not order it be included in the settlement language) that if Dondero "violates these terms, he's violated a federal court order, and contempt will be one of the tools available to the Court."

Chief Judge Jernigan's comments regarding the *Acis* case and resulting orders are insufficient to show bias. Her statements about Dondero's role and reliability were judicial, rather than personal, in nature and relevant to her determination that the settlement was prop-

er. And they were based not on any extrajudicial personal bias against Dondero, but on arguments raised by the Creditors Committee and U.S. Trustee about the *Acis* case and on credible testimony from the *Acis* case itself. Chief Judge Jernigan's comments about potentially holding Dondero in contempt of court did nothing but emphasize the law—that failure to follow a court order constitutes contempt. None of this was improper. *See Liteky*, 510 U.S. at 551 (holding that recusal is not required when the judge's comments are based on proceedings in open court); *see also Tejero v. Portfolio Recovery Assocs., L.L.C.*, 955 F.3d 453, 463–64 (5th Cir. 2020) (holding that a judge's knowledge of a party gained from previous cases involving that party does not qualify as extrajudicial knowledge); WRIGHT & MILLER, at § 3542 ("Nor is the judge disqualified because [s]he has presided over some other case involving the same party or closely-related facts.").

Next, the Dondero Parties take issue with Chief Judge Jernigan's *sua sponte* questioning of the parties about a headline she saw about Dondero or Highland affiliates receiving Paycheck Protection Program loans. At that hearing, Chief Judge Jernigan acknowledged that she is "only supposed to consider evidence [she] hear[s] in the courtroom," but since she inadvertently came upon the headline while reading the news she "needed to ask about this," including about the potential that Dondero was implicated. However, as she later noted in her order denying the third recusal motion, "Neither Mr. Dondero nor any of his affiliated entities were directed to provide any information, no action was taken against them, and the issue was never raised again by the bankruptcy court." A newspaper article is certainly an "extrajudi-

cial" source. *See Brocato*, 4 F.4th at 302. But Chief Judge Jernigan never expressed an opinion on it or took any prejudicial action against Dondero based on it. Her brief comments about the article would not lead a reasonable person to question her impartiality toward Dondero and certainly do not show bias so clear and indisputable as to warrant mandamus.

The Dondero Parties also take issue with Chief Judge Jernigan's various comments characterizing Dondero as "transparently vexatious" and litigious. However, comments disapproving of or hostile to a party aren't sufficient to support a partiality challenge, especially not when they are based on information learned in the judicial process. *See Liteky*, 510 U.S. at 551, 555. And there is ample evidence in the record to support these comments. Such evidence, as laid out in Chief Judge Jernigan's order denying the third recusal motion, includes testimony from one of the Highland independent directors and from Highland's new CEO, Dondero's filing 50 proofs of claim (which were later withdrawn), and "the many dozens of motions; the many dozens of objections; and the many dozens of appeals" Dondero pursued throughout the bankruptcy case. Chief Judge Jernigan's comments, though certainly critical of Dondero, were based on this record evidence and not on any improper extrajudicial information and as such can't constitute grounds for recusal. *See Brocato*, 4 F.4th at 302.

The Dondero Parties also accuse Chief Judge Jernigan of bias because she often speculated that Dondero was behind motions filed by other parties in the case. For example, Chief Judge Jernigan stated at one hearing that she "agree[d] with part of the theme . . . asserted by the Debtor here today that this is Mr. Dondero, through

different entities, through a different motion." And at another hearing on a motion to release funds of a non-debtor party, Chief Judge Jernigan speculated that "likely Mr. Dondero . . . had some involvement" in the decision to bring the motion, which she ultimately denied. Such speculation doesn't constitute grounds for recusal. *See Blanche Road Corp. v. Bensalem Tp.*, 57 F.3d 253, 266 (3d Cir. 1995) (explaining that the court's "suggestion that plaintiffs' counsel had somehow 'maneuvered' to ensure [someone's] appearance as a witness" and its general skepticism of plaintiffs' witnesses weren't grounds for recusal).

The Dondero Parties cite various other instances where Chief Judge Jernigan made rulings or comments adverse to them as evidence of her bias. But in each case, the Dondero Parties largely mischaracterize the context of Chief Judge Jernigan's comments, and there is at least some evidence in the record to support her judgments.

For example, the Dondero Parties cite the following rulings and comments as evidence of bias, none of which are supported by the record:

- The Dondero Parties argue that Chief Judge Jernigan was biased in making certain findings adverse to Dondero after a February 2021 hearing. But Chief Judge Jernigan's order explicitly stated that her findings were based on "all of the proceedings had before this Court, the legal and factual bases set forth in the Debtor's Papers, and the evidence submitted at the Hearing."
- The Dondero Parties argue that Chief Judge Jernigan appeared biased when she expressed

concern that Dondero improperly exercised "powers of persuasion" on the Highland board. But, notwithstanding that comment, Chief Judge Jernigan stated that her adverse ruling was because she just "[did]n't think the evidence has been there to convince [her]" on the merits of the motion.

- The Dondero Parties argue that Chief Judge Jernigan showed bias when she threatened to hold Dondero in contempt at a preliminary injunction hearing. But the record shows Chief Judge Jernigan contemplated holding him in contempt based on evidence including he and his entities doing "things like . . . filing a motion for an examiner 15 months into the case."
- The Dondero Parties argue that Chief Judge Jernigan showed bias when she criticized the Dondero-controlled entities' decision to each retain separate counsel. But Chief Judge Jernigan stated a valid basis for her criticism—concern for judicial economy because the Dondero-controlled entities were each filing the same types of motions or objections when perhaps their resources could have been consolidated.
- The Dondero Parties argue an appearance of bias in what they characterize as "punitive" orders requiring Dondero and certain Dondero-affiliated entities to appear personally at all hearings. But Chief Judge Jernigan explained in her order denying the third recusal motion that she ordered Dondero to attend hearings

only after he failed to attend a hearing on or even read a temporary restraining order entered against him.

- The Dondero Parties argue that Chief Judge Jernigan's *sua sponte* order requiring the Dondero-affiliated entities to make disclosures to establish their standing shows bias. But further review of the order shows Chief Judge Jernigan required these disclosures "in the interests of judicial economy" and in the interest of "reducing administrative expenses of the estate" because the entities "frequently file lengthy and contentious pleadings."

The Dondero Parties haven't shown that Chief Judge Jernigan based any of the above rulings on any extrajudicial information or pursued them for any personal, rather than judicial, reasons. As a district court judge, Chief Judge Jernigan is entitled to make credibility judgments based on the evidence before her, and it is not our duty to second guess those judgments. *See Ayers v. United States*, 750 F.2d 449 (5th Cir. 1985). Indeed, most of Chief Judge Jernigan's rulings have been upheld on appeal to the district court and our court.[3] *See Regions Bank v. Legal Outsource PA*, 800 F. App'x 799 (11th Cir. 2020) (per curiam) (finding judicial ruling didn't constitute bias where appellate court had affirmed the ruling). Though the Dondero Parties may disagree with her deci-

3. For example, the Dondero Parties argue that bias is apparent in one of Chief Judge Jernigan's orders holding him in contempt of court. But we have already affirmed Chief Judge Jernigan's finding of civil contempt. *In re Highland Capital Mgmt., L.P.*, 98 F.4th 170, 172–75 (5th Cir. 2024).

sions, that is not evidence of bias, or even the appearance of bias. *See Crummey v. Comm'r of Internal Revenue*, 684 F. App'x 416 (5th Cir. 2017) (per curiam). Chief Judge Jernigan's adverse rulings alone—or even paired with negative comments about Dondero—are not sufficient to warrant recusal. *See Litecky*, 510 U.S. at 555.

Finally, the Dondero Parties argue that Chief Judge Jernigan was required to recuse under § 455 because she published two novels which they argue espouse negative views of Dondero and the financial industry in which he operates. The Dondero Parties cite three parallels between the books and their case which they find problematic. First, Chief Judge Jernigan's novel *Hedging Death* involves a Dallas-based investment fund that manages the same mix of investments as Highland. Her novel *He Watches All My Paths* is also about the financial industry. Second, *Hedging Death* describes certain international tax structures used by Highland and Dondero as "byzantine," a word that Chief Judge Jernigan used several times on the record to describe Highland and Dondero's tax activities. Third, *Hedging Death* describes the life settlement industry as "creepy," and Highland and Dondero invested in the life settlement industry.

The texts of the novels are not in the record before us. But we find the three parallels cited by the Dondero Parties on their own are insufficient to show that they are *clearly and indisputably* entitled to mandamus relief in the form of a recusal order. As the district court emphasized, the novels are fiction. And Chief Judge Jernigan explains in her order denying the third recusal motion that the books are largely about other topics. *He Watches All My Paths* is about a federal judge who receives death threats from a young, former tort victim.

*Hedging Death*, though it involves a bankruptcy case and a firm that received funding from a hedge fund manager, is largely about the protagonist bankruptcy court judge. The hedge fund manager character who the Dondero Parties believe is patterned on Dondero is an individual who fakes his own suicide after linking up with Mexican drug cartels—far from the real-life James Dondero.

From the information we have in the record before us, whether a reasonable reader and observer of these proceedings could question Chief Judge Jernigan's impartiality in this case is debatable. Due to the similarities between the characters in Chief Judge Jernigan's novel and the litigants currently before her court, a strong argument could be made that she had a duty to recuse. But, while some similarities between the books and the cases before Chief Judge Jernigan may raise cause for concern, the similarities are not close enough to find that the district court abused its discretion denying the petition.

To our knowledge, no court—apart from the district court that initially denied mandamus in this case—has ever analyzed § 455(a) on facts like these. Even assuming that the Dondero Parties have shown possible error in the district court's denial of a writ of mandamus, it is not certain that the district court has "*clearly and indisputably* erred." *In re Avantel, S.A.*, 343 F.3d 311 (5th Cir. 2003) (emphasis added). Under § 455(a), judges have a duty to recuse. But we will not issue a writ of mandamus "to correct a duty that is to any degree debatable." *In re Corrugated Container Antitrust Litig.*, 614 F.2d 958 (5th Cir. 1980). The district court thus didn't abuse its discre-

tion in finding that the Dondero Parties lack a clear and indisputable right to mandamus relief.

C

As to the third requirement for mandamus relief, having found that the Dondero Parties lack a clear and indisputable right to mandamus, we also find that mandamus is not "appropriate under the circumstances." *Cheney*, 542 U.S. at 380–81.

IV

Because the Dondero Parties failed to show they have a clear and indisputable right to mandamus relief, the order of the district court denying the petition for writ of mandamus is AFFIRMED.

United States Court of Appeals
Fifth Circuit
**FILED**
**May 23, 2025**

**Lyle W. Cayce**
**Clerk**

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

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No. 24-10287

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

*Plaintiffs–Appellants*,

*versus*

STACEY G. JERNIGAN; HIGHLAND CAPITAL MANAGEMENT, L.P.,

*Defendants–Appellees*.

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Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:23-CV-726

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ON PETITION FOR REHEARING EN BANC

Before WIENER, WILLETT, and DUNCAN, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R.40 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P.40 and 5TH CIR. R.40), the petition for rehearing en banc is DENIED.

United States Court of Appeals
Fifth Circuit
**FILED**
**November 5, 2024**

**Lyle W. Cayce**
**Clerk**

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

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No. 24-10287

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

*Plaintiffs–Appellants*,

*versus*

STACEY G. JERNIGAN; HIGHLAND CAPITAL MANAGEMENT, L.P.,

*Defendants–Appellees*.

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Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:23-CV-726

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Before WIENER, WILLETT, and DUNCAN, *Circuit Judges*.

PER CURIAM:*

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* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

Appellants James Dondero and affiliated entities Highland Capital Management Fund Advisors, L.P., The Dugaboy Investment Trust, NexPoint Real Estate Partners, L.L.C., and Get Good Trust ("the Dondero Parties") are parties to a bankruptcy proceeding in the Northern District of Texas. They appeal a district court order denying their petition for mandamus that sought the recusal of the presiding bankruptcy judge.

The order of the district court is AFFIRMED. [1]

I

Highland Capital Management, L.P. was a Dallas-based investment firm that managed billion-dollar, publicly traded investment portfolios for nearly three decades. *Matter of Highland Capital Mgmt., L.P. (Highland I)*, 48 F.4th 419 (5th Cir. 2022). James Dondero was Highland's CEO. In 2019, after facing a $180 million adverse judgment in an arbitration, Highland voluntarily filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the District of Delaware. Shortly after, the Creditors Committee for Highland moved to transfer the bankruptcy case to the United States Bankruptcy Court for the Northern District of Texas on the basis that Chief Judge Jernigan was "already intimately familiar with the Debtor's principals and complex organizational structure," having presided over involuntary bankruptcy cases commenced against Acis Capital Management, L.P. and Acis Captial Management GP, L.L.C.—entities

1. Also before us is a motion by the Dondero Parties requesting we take judicial notice of certain documents. We affirm the order of the district court without referring to these documents. Accordingly, the motion is DENIED AS MOOT.

where Dondero had also served as an executive. The motion was granted, and the case was assigned to Chief Judge Jernigan.

In January 2020, Chief Judge Jernigan held the first hearing in the Highland case, regarding approval of a settlement between Highland and the Creditors Committee under which Dondero would surrender his control positions at Highland and be replaced by an Independent Board. *Highland I*, 48 F.4th at 425. Chief Judge Jernigan approved the agreed order, and Dondero stepped down as officer and director of Highland. *Id.* He remained an employee of Highland as a portfolio manager until October 2020, when the Independent Board demanded he step down.

Throughout 2020, Dondero proposed several reorganization plans, which the Committee and Independent Board opposed. *Id.* at 426. The Committee and Board instead formed their own plan. *Id.* Meanwhile, Dondero made various filings objecting to settlements, appealing orders, and seeking writs of mandamus. *Id.* He and other creditors filed over a dozen objections to the Independent Board's plan. *Id.* Chief Judge Jernigan confirmed the plan over objections at a hearing in February 2021, and it took effect on August 11, 2021. *Id.* The confirmation order included findings that Dondero was a "serial litigator," that he did not have a "good faith basis to lob objections to the Plan," and that the other board members were "marching pursuant to the orders of Mr. Dondero." *Id.* at 428.

Dondero appealed the confirmation order directly to this court, "objecting to the Plan's legality and some of the bankruptcy court's factual findings." *Id.* We affirmed the reorganization plan and confirmation order in full,

with the exception of finding that the bankruptcy court exceeded its statutory authority in exculpating non-debtors in anticipation of "Dondero's continued litigiousness." *Id.* at 427, 432, 439. Though we vacated the exculpatory order as to non-debtors, we clarified that "[n]othing in [our] opinion should be construed to hinder the bankruptcy court's power to enjoin and impose sanctions on Dondero and other entities by following the procedures to designate them vexatious litigants." *Id.* at 439 n.19.

Since then, we have dealt with multiple appeals in this matter. *See, e.g.*, *Matter of Highland Capital Mgmt., L.P.*, 57 F.4th 494 (5th Cir. 2023); *Matter of Highland Capital Mgmt., L.P.*, 98 F.4th 170 (5th Cir. 2024); *Matter of Highland Capital Mgmt., L.P.*, 105 F.4th 830 (5th Cir. 2024).

The instant appeal focuses on a series of recusal motions filed by the Dondero Parties beginning in March 2021—after the reorganization plan had been confirmed but before it took effect. The motions argued that Chief Judge Jernigan had developed an animus against the Dondero Parties that caused her impartiality to be reasonably questioned and thus required recusal under 28 U.S.C. § 455.

The Dondero Parties filed the first recusal motion on March 18, 2021. Chief Judge Jernigan denied the motion and reasoned that it was untimely, having been filed 15 months after the case was transferred to the Northern District of Texas and on the eve of Dondero's contempt hearing. She nevertheless analyzed the recusal motion on the merits and determined that recusal wasn't warranted. She reasoned that her presiding over the prior *Acis* case did not create bias because during that pro-

ceeding she only learned generalities about the industry and Highland's business structure, and it is appropriate for a bankruptcy court to preside over cases of affiliated business entities of a party. She also stated, citing *Lieb v. Tillman*, 112 B.R. 830 (Bankr. W.D. Tex. 1990), that she did not believe that "she harbors, or has shown, any personal bias or prejudice" against Dondero and that the Dondero Parties' assertions did not "rise to 'the threshold standard of raising a doubt in the mind of a reasonable observer' as to the judge's impartiality." The Dondero Parties appealed to the district court, which concluded that the order was interlocutory and not immediately appealable.

Five months later, the Dondero Parties filed a second recusal motion asking Chief Judge Jernigan to issue a final appealable order and supplementing the first recusal motion with additional evidence of alleged bias. Chief Judge Jernigan denied the motion without prejudice on procedural grounds. She noted that the Dondero Parties could file another "simple motion" asking the court to revise the first recusal order to make it final and appealable but without including the supplemental evidence. Alternatively, they could file a new recusal motion based on any alleged new evidence.

The Dondero parties chose to file a third, renewed recusal motion. Chief Judge Jernigan again denied the motion, determining that it was untimely and failed on the merits for the same reasons as the previous recusal motions. Additionally, she catalogued several instances in the motion where the Dondero Parties misstated or mischaracterized events of alleged bias. Chief Judge Jernigan also addressed the Dondero Parties' new accusations regarding her two published novels, which the Dondero

Parties contended were patterned after Dondero and expressed exceedingly negative views about his industry. Chief Judge Jernigan stated that her novels "are not about Mr. Dondero or the hedge fund industry in general" and declined to recuse on that basis.

The Dondero Parties filed a petition for writ of mandamus in the district court seeking an order directing Chief Judge Jernigan to recuse herself.[2] The district court denied the petition, finding that the Dondero Parties had "not proved 'exceptional circumstances' sufficient to justify the extraordinary remedy of a writ of mandamus.'" The Dondero Parties timely appealed.

II

Mandamus relief is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367 (2004) (internal quotation marks omitted); *see also U.S. v. U.S. Dist. Ct. for S. Dist. of Tex.*, 506 F.2d 383 (5th Cir. 1974). Three conditions must be satisfied before the writ may issue:

> First, the party seeking issuance of the writ must have no other adequate means to attain the relief he desires . . . . Second, the petitioner must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable. . . . Third, even if the first two prereq-

2. The Dondero Parties initially filed the mandamus petition in the same case as their previous appeal of Chief Judge Jernigan's recusal order. The district court unfiled it and directed the Dondero Parties to file a new action for mandamus relief. The new action is the relevant petition in this appeal.

> uisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.

*In re LeBlanc*, 559 F. App'x 389 (5th Cir. 2014) (per curiam) (citing *Cheney*, 542 U.S. at 380–81).

We review the denial of mandamus for abuse of discretion. *United States v. White*, 67 F. App'x 253, at *1 (5th Cir. 2003) (per curiam) (citing *United States v. Denson*, 603 F.2d 1143 (5th Cir. 1979) (en banc)); *see also Cheney*, 542 U.S. at 380.

## III

### A

As to the first requirement for mandamus relief, the Dondero Parties must show that they have no "other adequate means to attain the relief." *Cheney*, 542 U.S. at 380–81. In other words, they must show that any error by Chief Judge Jernigan is "irremediable on ordinary appeal." *In re Occidental Petroleum Corp.*, 217 F.3d 293 (5th Cir. 2000) (emphasis removed). The Dondero Parties' petition easily meets this condition.

We have held that "a petition for mandamus is the appropriate legal vehicle for challenging denial of a disqualification motion." *In re Chevron U.S.A., Inc.*, 121 F.3d 163 (5th Cir. 1997); *see also United States v. Gregory*, 656 F.2d 1132 (5th Cir. 1981); *In re Placid Oil Co.*, 802 F.2d 783 (5th Cir. 1986); *In re Cameron Int'l Corp.*, 393 F. App'x 133 (5th Cir. 2010). That is because "remedy by appeal is inadequate" in instances of apparent bias. *Berger v. United States*, 255 U.S. 22 (1921). If a party could not challenge bias until appealable final judgment has issued, prejudice will have already "worked its evil." *Id.*

As the Second Circuit has held, "[a] claim of personal bias and prejudice strikes at the integrity of the judicial process, and it would be intolerable to hold that the disclaimer of prejudice by the very jurist who is accused of harboring it should itself terminate the inquiry until an ultimate appeal on the merits." *In re Int'l Bus. Mach. Corp.*, 618 F.2d 923 (2d Cir. 1980); *see also* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3553 (3d ed.).

Claims of judicial bias cannot wait for the ordinary appeals process to run its course. Mandamus is thus the appropriate means for relief here.

B

As to the second requirement for mandamus relief, the Dondero Parties must show that their right to the writ is "clear and indisputable." *Cheney*, 542 U.S. at 380–81. That is, it must be clear and indisputable that Chief Judge Jernigan is required to recuse.

Recusal decisions are reviewed for abuse of discretion, and in general, "if a matter is within the district court's discretion, the litigant's right to a particular result cannot be 'clear and indisputable.'" *Kmart Corp. v. Arends*, 123 F.3d 297 (5th Cir. 1997); *Chevron*, 121 F.3d at 165. The Dondero Parties fail to meet this high burden. *See Chevron*, 121 F.3d at 165 (explaining that mandamus relief of disqualification is "granted only in exceptional circumstances").

Federal law requires a judge to recuse "in any proceeding in which [her] impartiality might reasonably be questioned" or "[w]here [she] has a personal bias or prejudice concerning a party . . . ." 28 U.S.C. § 455(a), (b)(1). The bar for recusal under § 455 is a high one. "[J]udicial rulings and comments standing alone rarely

will suffice to disqualify a judge." *Chevron*, 121 F.3d at 165 (citing *Liteky v. United States*, 510 U.S. 540 (1994)). Even comments "that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Id.* (quoting *Liteky*, 510 U.S. at 555). Recusal is not required when the judge's comments about a particular party are based on proceedings in open court or information learned in earlier proceedings. *See Liteky*, 510 U.S. at 551. Bias requiring recusal must be *personal* rather than *judicial*. *United States v. Scroggins*, 485 F.3d 824, 829–830 (5th Cir. 2007). Judicial bias in the form of adverse rulings and comments on the record ordinarily does not constitute grounds for recusal, unless it "reveal[s] an opinion based on an extrajudicial source or demonstrate[s] such a high degree of antagonism as to make fair judgment impossible." *United States v. Brocato*, 4 F.4th 296 (5th Cir. 2021) (quoting *Scroggins*, 485 F.3d at 830); *see also* WRIGHT & MILLER, at § 3542.

The Dondero Parties cite various instances throughout the case that they contend show Chief Judge Jernigan "harbors an actual and enduring bias and animus" against them "that is 'personal rather than judicial in nature.'" Placed in their proper context, none of these instances suffice to show that Chief Judge Jernigan's impartiality might be reasonably questioned or that she had a personal bias against the Dondero Parties requiring recusal under § 455.

The Dondero Parties first take issue with Chief Judge Jernigan's statements expressing negative opinions about Dondero based on information she learned while presiding over the *Acis* case. They cite specifically

Chief Judge Jernigan's statement at the January 2020 settlement hearing:

> I can't extract what I learned during the *Acis* case, it's in my brain, and we did have many moments during the *Acis* case where the Chapter 11 trustee came in and credibly testified that, whether it was Mr. Dondero personally or others at Highland, they were surreptitiously liquidating funds, they were changing agreements, assigning agreements to others. They were doing things behind the scenes that were impacting the value of the Debtor in a bad way.

Based on those concerns, Chief Judge Jernigan ordered that the settlement contain language reading, "Mr. Dondero shall not cause any related entity to terminate any agreements with the Debtor" and that "his role as an employee of the Debtor will be subject at all times to the supervision, direction, and authority of the Debtors." She noted from the bench (though did not order it be included in the settlement language) that if Dondero "violates these terms, he's violated a federal court order, and contempt will be one of the tools available to the Court."

Chief Judge Jernigan's comments regarding the *Acis* case and resulting orders are insufficient to show bias. Her statements about Dondero's role and reliability were judicial, rather than personal, in nature and relevant to her determination that the settlement was proper. And they were based not on any extrajudicial personal bias against Dondero, but on arguments raised by the Creditors Committee and U.S. Trustee about the *Acis* case and on credible testimony from the *Acis* case itself. Chief Judge Jernigan's comments about potentially holding Dondero in contempt of court did nothing but em-

phasize the law—that failure to follow a court order constitutes contempt. None of this was improper. *See Liteky*, 510 U.S. at 551 (holding that recusal is not required when the judge's comments are based on proceedings in open court); *see also Tejero v. Portfolio Recovery Assocs., L.L.C.*, 955 F.3d 453 (5th Cir. 2020) (holding that a judge's knowledge of a party gained from previous cases involving that party does not qualify as extrajudicial knowledge); WRIGHT & MILLER, at § 3542 ("Nor is the judge disqualified because [s]he has presided over some other case involving the same party or closely-related facts.").

Next, the Dondero Parties take issue with Chief Judge Jernigan's *sua sponte* questioning of the parties about a headline she saw about Dondero or Highland affiliates receiving Paycheck Protection Program loans. At that hearing, Chief Judge Jernigan acknowledged that she is "only supposed to consider evidence [she] hear[s] in the courtroom," but since she inadvertently came upon the headline while reading the news she "needed to ask about this," including about the potential that Dondero was implicated. However, as she later noted in her order denying the third recusal motion, "Neither Mr. Dondero nor any of his affiliated entities were directed to provide any information, no action was taken against them, and the issue was never raised again by the bankruptcy court." A newspaper article is certainly an "extrajudicial" source. *See Brocato*, 4 F.4th at 302. But Chief Judge Jernigan never expressed an opinion on it or took any prejudicial action against Dondero based on it. Her brief comments about the article would not lead a reasonable person to question her impartiality toward Dondero and

certainly do not show bias so clear and indisputable as to warrant mandamus.

The Dondero Parties also take issue with Chief Judge Jernigan's various comments characterizing Dondero as "transparently vexatious" and litigious. However, comments disapproving of or hostile to a party aren't sufficient to support a partiality challenge, especially not when they are based on information learned in the judicial process. *See Liteky*, 510 U.S. at 551, 555. And there is ample evidence in the record to support these comments. Such evidence, as laid out in Chief Judge Jernigan's order denying the third recusal motion, includes testimony from one of the Highland independent directors and from Highland's new CEO, Dondero's filing 50 proofs of claim (which were later withdrawn), and "the many dozens of motions; the many dozens of objections; and the many dozens of appeals" Dondero pursued throughout the bankruptcy case. Chief Judge Jernigan's comments, though certainly critical of Dondero, were based on this record evidence and not on any improper extrajudicial information and as such can't constitute grounds for recusal. *See Brocato*, 4 F.4th at 302.

The Dondero Parties also accuse Chief Judge Jernigan of bias because she often speculated that Dondero was behind motions filed by other parties in the case. For example, Chief Judge Jernigan stated at one hearing that she "agree[d] with part of the theme . . . asserted by the Debtor here today that this is Mr. Dondero, through different entities, through a different motion." And at another hearing on a motion to release funds of a non-debtor party, Chief Judge Jernigan speculated that "likely Mr. Dondero . . . had some involvement" in the decision to bring the motion, which she ultimately denied.

Such speculation doesn't constitute grounds for recusal. *See Blanche Road Corp. v. Bensalem Tp.*, 57 F.3d 253 (3d Cir. 1995) (explaining that the court's "suggestion that plaintiffs' counsel had somehow 'maneuvered' to ensure [someone's] appearance as a witness" and its general skepticism of plaintiffs' witnesses weren't grounds for recusal).

The Dondero Parties cite various other instances where Chief Judge Jernigan made rulings or comments adverse to them as evidence of her bias. But in each case, the Dondero Parties largely mischaracterize the context of Chief Judge Jernigan's comments, and there is at least some evidence in the record to support her judgments.

For example, the Dondero Parties cite the following rulings and comments as evidence of bias, none of which are supported by the record:

- The Dondero Parties argue that Chief Judge Jernigan was biased in making certain findings adverse to Dondero after a February 2021 hearing. But Chief Judge Jernigan's order explicitly stated that her findings were based on "all of the proceedings had before this Court, the legal and factual bases set forth in the Debtor's Papers, and the evidence submitted at the Hearing."

- The Dondero Parties argue that Chief Judge Jernigan appeared biased when she expressed concern that Dondero improperly exercised "powers of persuasion" on the Highland board. But, notwithstanding that comment, Chief Judge Jernigan stated that her adverse ruling was because she just "[did]n't think the evi-

dence has been there to convince [her]" on the merits of the motion.

- The Dondero Parties argue that Chief Judge Jernigan showed bias when she threatened to hold Dondero in contempt at a preliminary injunction hearing. But the record shows Chief Judge Jernigan contemplated holding him in contempt based on evidence including he and his entities doing "things like . . . filing a motion for an examiner 15 months into the case."
- The Dondero Parties argue that Chief Judge Jernigan showed bias when she criticized the Dondero-controlled entities' decision to each retain separate counsel. But Chief Judge Jernigan stated a valid basis for her criticism—concern for judicial economy because the Dondero-controlled entities were each filing the same types of motions or objections when perhaps their resources could have been consolidated.
- The Dondero Parties argue an appearance of bias in what they characterize as "punitive" orders requiring Dondero and certain Dondero-affiliated entities to appear personally at all hearings. But Chief Judge Jernigan explained in her order denying the third recusal motion that she ordered Dondero to attend hearings only after he failed to attend a hearing on or even read a temporary restraining order entered against him.
- The Dondero Parties argue that Chief Judge Jernigan's *sua sponte* order requiring the

> Dondero-affiliated entities to make disclosures to establish their standing shows bias. But further review of the order shows Chief Judge Jernigan required these disclosures "in the interests of judicial economy" and in the interest of "reducing administrative expenses of the estate" because the entities "frequently file lengthy and contentious pleadings."

The Dondero Parties haven't shown that Chief Judge Jernigan based any of the above rulings on any extrajudicial information or pursued them for any personal, rather than judicial, reasons. As a district court judge, Chief Judge Jernigan is entitled to make credibility judgments based on the evidence before her, and it is not our duty to second guess those judgments. *See Ayers v. United States*, 750 F.2d 449 (5th Cir. 1985). Indeed, most of Chief Judge Jernigan's rulings have been upheld on appeal to the district court and our court.[3] *See Regions Bank v. Legal Outsource PA*, 800 F. App'x 799 (11th Cir. 2020) (per curiam) (finding judicial ruling didn't constitute bias where appellate court had affirmed the ruling). Though the Dondero Parties may disagree with her decisions, that is not evidence of bias, or even the appearance of bias. *See Crummey v. Comm'r of Internal Revenue*, 684 F. App'x 416 (5th Cir. 2017) (per curiam). Chief Judge Jernigan's adverse rulings alone—or even paired with

3. For example, the Dondero Parties argue that bias is apparent in one of Chief Judge Jernigan's orders holding him in contempt of court. But we have already affirmed Chief Judge Jernigan's finding of civil contempt. *In re Highland Capital Mgmt., L.P.*, 98 F.4th 170, 172–75 (5th Cir. 2024).

negative comments about Dondero—are not sufficient to warrant recusal. *See Litecky*, 510 U.S. at 555.

Finally, the Dondero Parties argue that Chief Judge Jernigan was required to recuse under § 455 because she published two novels which they argue espouse negative views of Dondero and the financial industry in which he operates. The Dondero Parties cite three parallels between the books and their case which they find problematic. First, Chief Judge Jernigan's novel *Hedging Death* involves a Dallas-based investment fund that manages the same mix of investments as Highland. Her novel *He Watches All My Paths* is also about the financial industry. Second, *Hedging Death* describes certain international tax structures used by Highland and Dondero as "byzantine,"a word that Chief Judge Jernigan used several times on the record to describe Highland and Dondero's tax activities. Third, *Hedging Death* describes the life settlement industry as "creepy," and Highland and Dondero invested in the life settlement industry.

The texts of the novels are not in the record before us. But we find the three parallels cited by the Dondero Parties insufficient to show that they are clearly and indisputably entitled to mandamus relief in the form of a recusal order. As the district court emphasized, the novels are fiction. And Chief Judge Jernigan explains in her order denying the third recusal motion that the books are largely about other topics. *He Watches All My Paths* is about a federal judge who receives death threats from a young, former tort victim. *Hedging Death*, though it involves a bankruptcy case and a firm that received funding from a hedge fund manager, is largely about the protagonist bankruptcy court judge. The hedge fund manager character who the Dondero Parties believe is

patterned on Dondero is an individual who fakes his own suicide after linking up with Mexican drug cartels—far from the real-life James Dondero. Because the three parallels are so minor when compared to the larger discrepancies between the books and the case, from the information we have in the record before us, it seems that a reasonable reader and observer of these proceedings would not necessarily question Chief Judge Jernigan's impartiality in this case. While some similarities between the books and the cases before Chief Judge Jernigan may raise cause for concern, the similarities are not close enough to find that the district court abused its discretion denying the petition.

Altogether, none of Chief Judge Jernigan's actions or comments "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Liteky*, 510 U.S. at 555. It is not clear and indisputable that Chief Judge Jernigan had personal bias against the Dondero Parties or that her impartiality might be reasonably questioned requiring recusal under 28 U.S.C. § 455. The district court thus didn't abuse its discretion in finding that the Dondero Parties lack a clear and indisputable right to mandamus relief.

C

As to the third requirement for mandamus relief, having found that the Dondero Parties lack a clear and indisputable right to mandamus, we also find that mandamus is not "appropriate under the circumstances." *Cheney*, 542 U.S. at 380–81.

IV

Because the Dondero Parties failed to show they have a clear and indisputable right to mandamus relief, the

order of the district court denying the petition for writ of mandamus is AFFIRMED.

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

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| IN RE: JAMES DONDERO, HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., THE DUGABOY INVESTMENT TRUST, GET GOOD TRUST, and NEXPOINT REAL ESTATE PARTNERS, LLC. | § § § § § § § § § § | CIVIL ACTION NO. 3:23-CV-0726-S |

**ORDER**

Before the Court is the Petition for Writ of Mandamus ("Petition") [ECF No. 1 ], the Appendix to the Petition for Writ of Mandamus ("Appendix") [ECF Nos. 1-1 through 1-5], the Joint Supplemental Appendix ("Supplemental Appendix") [ECF No. 8], Highland Capital Management, L.P.'s Response to Petition for Writ of Mandamus ("Response") [ECF No. 17], and the Reply in Support of Petition for Writ of Mandamus ("Reply") [ECF No. 23]. Petitioners James Dondero, Highland Capital Management Fund Advisors, L.P., The Dugaboy Investment Trust, Get Good Trust, and NexPoint Real Estate Partners, LLC, seek a writ of mandamus ordering the recusal of Bankruptcy Judge Stacey G. Jernigan ("Judge Jernigan") from the Chapter 11 bankruptcy proceedings concerning Highland Capital Management, L.P. ("Debtor"). For the reasons articulated in the Memorandum Opinion and Order Denying "Amended Renewed Motion to Recuse, Pursuant to 28 U.S.C. § 455" ("Third Order Denying Recusal"), the Court finds that Petitioners failed to present any objective manifestations of bias

or prejudice that would constitute grounds for Judge Jernigan's recusal. *See* App. 2–37. Accordingly, the Court finds that Petitioners have not shown that the extraordinary remedy of a writ of mandamus is warranted. For the following reasons, the Petition is **DENIED**.

## I. BACKGROUND

On October 16, 2019, Debtor filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the District of Delaware ("Bankruptcy Case"), and that court transferred venue to the United States Bankruptcy Court for the Northern District of Texas. *Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt. L.P.),* No. 19-34054-SGJ-11, 2022 WL 780991, at *l (Bankr. N.D. Tex. Mar. 11, 2022). Fifteen months after the case was transferred, Petitioners filed a motion to recuse under 28 U.S.C. § 455 ("First Recusal Motion"). App. 39-75. Judge Jernigan denied the First Recusal Motion, Suppl. App. 3593-603, and Petitioners appealed ("First Appeal"), *id.* at 3732-64. Concluding that Judge Jemigan's order was interlocutory and not immediately appealable as a matter of right, the district court dismissed the First Appeal for lack of jurisdiction. *Id.* at 5777–90.

Five months later, Petitioners filed their Motion for Final Appealable Order and Supplement to Motion to Recuse Pursuant to 28 U.S.C. § 455, which they later amended ("Second Recusal Motion"). *Id.* at 5793–801 (original motion); *id.* at 6523–30 (amended motion). In the Second Recusal Motion, Petitioners asked Judge Jernigan to reconsider the First Recusal Motion along with Petitioners' supplemental evidence and arguments and to "enter a final, appealable order on th[e] issue." *Id.* at 6530. Judge Jernigan held a status conference on August

31, 2022, regarding the Second Recusal Motion. *Id.* at 14659–85. At the hearing and in a written order, Judge Jernigan denied the Second Recusal Motion as procedurally improper. *Id.* at 14656–58, 14681–84. The order was entered "without prejudice to the Movants' right to file (1) a simple motion . . . seeking only a revised and amended Recusal Order . . . and/or (2) a new motion to recuse this bankruptcy judge based on any alleged new evidence or grounds for recusal" that were not included in the First Recusal Motion. *Id.* at 14658. Petitioners chose the second option.

On October 17, 2022, Petitioners filed their Amended Renewed Motion to Recuse Pursuant to 28 U.S.C. § 455 ("Third Recusal Motion"). App. 2800–28. Judge Jernigan issued the Third Order Denying Recusal on March 6, 2023. *Id.* at 2–37. On April 4, 2023, Petitioners filed a Petition for Writ of Mandamus in the First Appeal, but District Judge Ed Kinkeade ("Judge Kinkeade") unfiled it because the First Appeal was dismissed, and the Petition for Writ of Mandamus was not "in any way . . . a continuation of the bankruptcy appeal that was before the Court." Suppl. App. 5791–92. Judge Kinkeade directed Petitioners to file a new action if they wished to seek relief as to the Third Order Denying Recusal. *Id.* This action before yet another district court ensued.

## II. ANALYSIS

A writ of mandamus is an "extraordinary remedy" justified only by "exceptional circumstances." *In re Gordon*, No. 18-60869, 2019 WL 11816606, at *1 (5th Cir. 2019) (citation omitted). As such, the Supreme Court has established three requirements that must be met before a writ may issue. "First, the party seeking issuance of the writ must have no other adequate means to attain

the relief he desires. . . . Second, the petitioner must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable." *In re LeBlanc,* 559 F. App'x. 389 (5th Cir. 2014) (citation omitted). And third, "the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Id.* For the reasons set forth in the Response, the Court finds these three requirements have not been met. Resp. 16–20.

To meet the first requirement, Petitioners must show that the alleged error is "*irremediable on ordinary appeal,* thereby justifying emergency relief in the form of mandamus." *In re Occidental Petroleum Corp.*, 217 F.3d 293 (5th Cir. 2000) (footnote and citation omitted). "That is a high bar: The appeals process provides an adequate remedy in almost all cases, even where defendants face the prospect of an expensive trial." *In re Depuy Orthopaedics, Inc.,* 870 F.3d 345, 352 (5th Cir. 2017) (citation omitted). Petitioners fail to make the required showing. As examples of Judge Jernigan's alleged bias, Petitioners cite comments made by Judge Jernigan throughout the course of the Bankruptcy Case, *see* Pet. 5–7; however, the Court finds that these statements, when taken in context, provide no basis for reasonably questioning Judge Jernigan's impartiality or finding personal bias or prejudice. As further evidence of Judge Jernigan's alleged bias, Petitioners also cite rulings they never appealed and rulings that were appealed and affirmed in all material aspects. *See, e.g.,* App. 20–28; Resp. 7–8. If anything, Judge Jemigan's rulings could arguably constitute grounds for appeal, not for recusal.

As to the second requirement, because Petitioners have not shown that recusal was warranted, Petitioners

do not demonstrate a "clear and indisputable" right to mandamus. *In re LeBlanc,* 559 F. App'x. at 392 (citation omitted). 28 U.S.C. § 455, which applies to bankruptcy courts through Federal Rule of Bankruptcy Procedure 5004(a), provides in relevant part that any judge "shall disqualify [her]self in any proceeding in which [her] impartiality might reasonably be questioned" or "[w]here [s]he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." 28 U.S.C. § 455(a), (b)(l). A party seeking recusal must clear the following hurdles: "They must (1) demonstrate that the alleged comment, action, or circumstance was of 'extrajudicial' origin, (2) place the offending event into the context of the entire trial, and (3) do so by an 'objective' observer's standard." *Andrade v. Chojnacki,* 338 F.3d 448 (5th Cir. 2003). The Court finds that Petitioners have not cleared the required hurdles.

Petitioners allege that Judge Jernigan displayed personal bias and animus toward Dondero and his affiliates based on rulings and statements made by Judge Jernigan throughout the Bankruptcy Case, Pet. 3–9, but none of the grounds Petitioners assert merit disqualification. Petitioners do not place the contested rulings and statements in the appropriate context within the Bankruptcy Case. As set forth in the Third Order Denying Recusal, the Third Recusal Motion "contains several misstatements or partial descriptions of events during the case, in several places, that create misimpressions." App. 19. Further, these challenges arise from "intrajudicial sources." *Andrade,* 338 F.3d at 460. To lead to disqualification, events in court must "reveal such a high degree of favoritism or antagonism as to make fair judgment im-

possible." *Id.* at 462 (citation omitted). Petitioners fail to identify any action or statement revealing a sufficient degree of antagonism.

Petitioners also contend that two *fiction* novels authored by Judge Jernigan are "the most revealing evidence of [her] bias." Pet. 1. The Court is not persuaded by Petitioners' far-reaching comparison between the books and the parties to the Bankruptcy Case. Petitioners fail to show how any portion of the crime novels could raise a doubt in the mind of a reasonable observer as to Judge Jernigan's impartiality.

As to the third requirement, Petitioners have not shown that a writ of mandamus is appropriate under the circumstances. After a careful review of the record, the Court concludes that a reasonable and objective observer, aware of all the facts and circumstances, would not harbor doubts about Judge Jernigan's impartiality in the Bankruptcy Case. The Court agrees with Judge Jernigan in finding that Petitioners' allegations are wholly conclusory and baseless and do not establish Judge Jernigan's personal bias or prejudice for or against any party, or any other basis upon which Judge Jemigan's impartiality might reasonably be questioned. *See* 28 U.S.C § 455(a)–(b); FED. R. BANKR. P. 5004(a).

## III. CONCLUSION

The Court finds that Petitioners have not proved "exceptional circumstances" sufficient to justify the extraordinary remedy of a writ of mandamus. *In re Gordon*, 2019 WL 11816606, at * 1. For the foregoing reasons, the Petition for Writ of Mandamus [ECF No. l] is **DENIED.**

**SO ORDERED.**

SIGNED March 8, 2024.

/s/ Karen Gren Scholer
**KAREN GREN SCHOLER**
**UNITED STATES DISTRICT JUDGE**

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

**Signed March 5, 2023** /s/ Stacey G.C. Jernigan
**United States Bankruptcy Judge**

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**UNITED STATES BANKRUPTCY COURT**
**NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

| | | |
|---|---|---|
| **IN RE:** | § | |
| | § | |
| **HIGHLAND CAPITAL** | § | **CASE NO. 19-34054-** |
| **MANAGEMENT, L.P.,** | § | **SGJ-11** |
| | § | **(Chapter 11)** |
| **Reorganized Debtor.** | § | |

**MEMORANDUM OPINION AND ORDER DENYING "AMENDED RENEWED MOTION TO RECUSE, PURSUANT TO 28 U.S.C. § 445"**

**(ruling on the most recent motion to recuse filed in the main bankruptcy case, *see* DE ## 3570 & 3571)**

There have been multiple motions to recuse the presiding bankruptcy judge ("Presiding Judge") in the main bankruptcy case of Highland Capital Management, L.P. ("Highland," "Reorganized Debtor," or sometimes "Debtor"). Each one has been filed by James Dondero, Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., The Dugaboy Investment Trust, The Get Good Trust, and NexPoint Real Estate Partners, LLC, f/k/a HCRE Partners, LLC, a Delaware limited liability company (collectively, the "Movants").[1] This Memorandum and Order relates to the one entitled *Amended Renewed Motion to Recuse Pursuant to 28 U.S.C. § 455* (with supporting Brief), filed October 17, 2022 [DE ## 3570 & 3571]—which is either the second or third such motion filed in the main bankruptcy case, depending upon how one counts. For ease of reference, the court will refer to this motion and brief at DE ## 3570 & 3571 as the "Third Motion to Recuse." This Memorandum Opinion and Order denies the Third Motion to Recuse.

## I. FOR CLARIFICATION, THE FOUR MOTIONS TO RECUSE FILED BY MOVANTS.

First Motion to Recuse. Movants filed the first *Motion to Recuse Pursuant to 28 U.S.C. § 455* on March 18, 2021, along with a supporting Brief and an Appendix [DE ## 2060, 2061, & 2062] (hereinafter, the "First Mo-

1. An entirely separate, fourth Motion to Recuse the Presiding Bankruptcy Judge was filed February 27, 2023, by one of the Movants—Highland Capital Management Fund Advisors, L.P.—in related Adversary Proceeding # 21-3076 styled *Kirschner v. Dondero, et al.* [DE # 309]. This Memorandum Opinion and Order is not intended to address that motion.

tion to Recuse"). This was collectively 2,763 pages in length. This was approximately one month after the bankruptcy court confirmed a Chapter 11 plan in this case—specifically, the court confirmed a plan (the "Plan") on February 22, 2021. This was also approximately 17 months after the bankruptcy case was filed in October 2019. The First Motion to Recuse was also filed just two business days before the bankruptcy court was scheduled to hear a motion of Highland to hold Mr. Dondero in contempt of a TRO. The court denied the First Motion to Recuse in an order dated March 23 ("First Order Denying Recusal") [DE # 2083]. The Movants appealed the First Order Denying Recusal, and that appeal was dismissed for lack of jurisdiction on February 9 ("District Judge Kinkeade's Order") (reported at 2022 WL 394760). District Judge Kinkeade's Order held that: (a) an order denying a motion to recuse is an interlocutory order; (b) it is not subject to the collateral order doctrine; (c) it is not an appealable interlocutory order under 28 U.S.C. § 1292(a); (d) Movants were not entitled to leave to appeal under 28 U.S.C. § 1292(b); (e) Movants were not entitled to withdrawal of the reference on the First Motion to Recuse; and (f) Movants were not entitled to have their appeal construed as a petition for writ of mandamus.

Second Motion to Recuse. A new motion was filed on August 25, 2022, five months after District Judge Kinkeade's Order. It was entitled "Amended Motion for Final Appealable Order and Supplement to Motion to Recuse Pursuant to 28 U.S.C. § 455 and Brief in Support" [DE ## 3470 & 3471] ("Second Motion to Recuse"). This was six days after the Fifth Circuit ruled on the appeal of the Highland Plan confirmation order, af-

firming it in substantial part. The Second Motion to Recuse, which, with Appendix, was 162 pages in length, expressed Movants' interpretation of District Judge Kinkeade's Order: that the only reason the First Order Denying Recusal was not final and appealable was because of one sentence at the end of the order, wherein the bankruptcy court ***reserved the right to supplement or amend the order***. The bankruptcy court promptly set a status conference (six days later—on August 31, 2022) regarding the Second Motion to Recuse to clarify Movants' basis for its new motion. For one thing, the bankruptcy court questioned Movants' interpretation that this one sentence in the First Order Denying Recusal was the actual basis for District Judge Kinkeade's Order,[2] since he cited a litany of authority for the proposition that a recusal order does not become final until a final judgment has been entered in the overall proceeding. District Judge Kinkeade's Order, penultimate paragraph ("Appellants must await final judgment, or other final resolution, of their bankruptcy proceeding in order to appeal the Recusal Order."). In other words, could the bankruptcy court truly "fix" the lack of finality problem by simply deleting that one sentence in the First Order Denying Recusal? Moreover, the court questioned the procedural propriety of Movants' request to "supplement" the record on the First Motion to Recuse with approximately 154 pages of extra evidence. This request appeared to the court to be either a very untimely Rule 59 motion or, in essence, a new motion to recuse—urging

2. The bankruptcy court put that sentence in the First Order Denying Recusal because it expected the Movants might file a Rule 59 motion requesting a hearing or seeking more findings.

consideration of new grounds/evidence that arose subsequent to the First Motion to Recuse. After a status conference, on September 1, 2022, the court issued an order denying the Second Motion to Recuse [DE # 3479] ("Second Order Denying Recusal") for ***procedural defects***, but ruled that the order was:

> without prejudice to the Movants' right to file (1) a simple motion (without an appendix or attached proposed supplements to the record) under the appropriate procedural rule(s), seeking only a revised and amended Recusal Order that removes the following language contained at the end of the Recusal Order, but otherwise leaves the Recusal Order unchanged: "The court reserves the right to supplement or amend this ruling;" and/or (2) a new motion to recuse this bankruptcy judge based on any alleged new evidence or grounds for recusal that were not considered by this bankruptcy judge at the time of its consideration of the original Recusal Order.

Third Motion to Recuse. The Movants chose the latter option. Specifically, approximately six weeks later, on October 17, 2022, the Movants filed the current motion before the court entitled *Amended Renewed Motion to Recuse Pursuant to 28 U.S.C. § 455* and supporting brief [DE ## 3570 & 3571] (the "Third Motion to Recuse"). This was 10 days after the Fifth Circuit had issued, on October 7, 2022, a denial of a request for a stay in connection with its ruling on the Plan and confirmation order. The court is aware that there is a petition for *writ of certiorari* pending at the U.S. Supreme Court regarding the Plan and confirmation order. In any event, the Third

Motion to Recuse is 280 pages in length (the motion, brief and appendix combined)—with the additional appendix intended to supplement the 2,763 pages of materials filed with the First Motion to Recuse. The Reorganized Debtor filed a Response and Brief objecting to the Third Motion to Recuse (56 pages in length) and filed an appendix in support (4,035 pages in length), both on October 31, 2022. DE # 3595 & 3596. Movants then filed a motion to file a reply brief in excess of the page limit and a Reply [DE ## 3618 & 3623] on November 10, and November 14, 2022, respectively. These documents were collectively 58 pages. ***Because more than 7,000 pages of material were submitted***, and also because this court has other court business (including typically at least three Highland contested matters or adversary rulings under advisement at any given point in time), this court has had the Third Motion to Recuse under advisement (that is the subject of this Order).

Fourth Motion to Recuse. Meanwhile a fourth motion to recuse the Presiding Judge was filed on February 27, 2023 in the separate Adversary Proceeding #21-3076 by one of the same Movants that is a defendant therein.[3] It

3. *See HCMFA's Motion to Recuse pursuant to [2]8 U.S.C. §§ 144 and 455* and brief in support [Adv. Pro. No. 21-3076 DE ## 309, 310]. The court notes anecdotally that this Fourth Motion to Recuse was filed several hours after the bankruptcy court issued an opinion and order conforming the Highland Plan to the ruling of the Fifth Circuit. It may very well be coincidental, but the various motions to recuse have each followed on the heels of a significant case development that Movants may perceive to be adverse to their interests—*i.e.*, the Plan confirmation order; affirmance by the Fifth Circuit of the Plan confirmation order; denial of a stay by the Fifth Circuit of its ruling on the confirmation order; a ruling of the bankruptcy court conforming the Plan

(continued…)

appears that some of the same arguments are made in the Fourth Motion to Recuse with one significant new argument: Movant believes that a character in one of the fiction legal thriller novels written by the Presiding Judge is based on Mr. James Dondero and, thus, shows the Presiding Judge has a bias towards him or the hedge fund industry generally. This court will separately rule on the Fourth Motion to Recuse in due course, after the parties have had the chance to respond.

## II. THE SPECIFIC GROUNDS URGED IN THE CURRENT MOTION.

Movants are requesting that the Presiding Judge recuse herself from presiding over the Chapter 11 case of Highland (all of it). With regard to the specific grounds urged by Movants, they state that they perceive the Presiding Judge has animus towards Mr. Dondero and parties connected with him or deemed under his control (the "Affected Entities"). Mr. Dondero and the Affected Entities argue that the Presiding Judge's impartiality can be reasonably questioned. Specifically, they express concerns that the Presiding Judge formed negative opinions of Mr. Dondero in a prior bankruptcy case over which the Presiding Judge presided (*In re Acis Capital Management, L.P.,* Case No. 18-30264);[4] that those opinions have supposedly carried over to the Highland case; that the Presiding Judge has been unable to extricate those opinions from her mind; and that this has

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to the Fifth Circuit's ruling. Again, this may be purely coincidental.

4. Acis Capital Management, L.P. ("Acis") was formerly a company in the Highland corporate organizational structure.

resulted in an actual bias against Mr. Dondero that has prejudiced or is prejudicing him and the Affected Entities.

Accordingly, the Movants ask that the Presiding Judge recuse herself from any future contested matters and adversary proceedings arising in the Highland case.

**III. RELEVANT CASE BACKGROUND.**

By way of further background, the Highland case has been pending since October 16, 2019. It was filed in the Bankruptcy Court for the District of Delaware. Venue was transferred to the Bankruptcy Court for the Northern District of Texas, Dallas Division, on motion of the Official Unsecured Creditors Committee ("UCC") on December 4, 2019. The UCC in this case consisted of non-insider creditors asserting more than $1 billion worth of claims against the Debtor.

On January 9, 2020, a significant corporate governance settlement between Highland and the UCC was reached and presented to this court. It was approximately one month after the Highland case was transferred to the Presiding Judge. The settlement involved the removal of Mr. Dondero as CEO and from all decision making at Highland, ***at the insistence of the UCC***, and an entirely new corporate governance structure was imposed on the Debtor, with extensive oversight by the UCC. This new corporate governance structure was negotiated by the Debtor under pressure from both the UCC and the United States Trustee—both of whom expressed positions that a Chapter 11 Trustee should be appointed in this case due to Mr. Dondero's alleged conflicts of interest, inability to act as a fiduciary, and purported mismanagement. Mr. Dondero signed off on the corporate governance settlement and this court approved it. A new

three-member independent board controlled the Debtor for the remainder of the bankruptcy case until the Plan went effective in August 2021. That board consisted of a retired bankruptcy judge (Russell Nelms); a second individual with extensive experience serving as an independent board member of companies undergoing bankruptcy or restructuring (John Dubel); and a third individual (later appointed CEO) with broad experience managing distressed debt investments and other products similar to what Highland managed (James P. Seery). Mr. Dondero stayed on with Highland during the entire first year of the bankruptcy case (through October 2020), as an unpaid portfolio manager, but with no governance role, at the request of the Debtor. The UCC acquiesced to that arrangement (although they had not negotiated this and expressed reservations about Mr. Dondero's role—albeit limited). The United States Trustee was opposed to the new corporate government structure and preferred a Chapter 11 Trustee instead. This court overruled the United States Trustee's objection and determined that the corporate governance structure negotiated by the UCC was more likely to preserve value and foster reorganization efforts than the more drastic step of appointing a Chapter 11 Trustee.

After more than a year, under direction of the new board, Highland obtained confirmation of a Chapter 11 Plan on February 22, 2021. The Plan was proposed after many months of contentiousness with several large creditors and the UCC. In fact, in August 2020, the bankruptcy court required the key parties to stand down and engage in mediation before two respected co-mediators (Retired Bankruptcy Judge Allan Gropper, S.D.N.Y. and Attorney/Mediator Sylvia Mayer, Houston). Highland

(either during or after mediation) reached key settlements with the largest creditors in this case (including Acis, which asserted more than a $70 million disputed claim; the Redeemer Committee for the Crusader Fund, which asserted more than a $250 million claim and had been in litigation in multiple fora with Highland and affiliates for approximately a decade; and UBS Securities, which asserted more than a $1 billion claim and had also been in litigation with Highland and certain affiliates for more than a decade). Mr. Dondero participated in the mediation, but settlements were not reached with him. The independent board members asked for Mr. Dondero's resignation from Highland in October 2020 (i.e., from his role as a portfolio manager). At this point, things became very contentious among the Movants and the Debtor; dozens of contested motions and objections were filed among the Movants and Debtor. Accusations were made by the Debtor that Mr. Dondero was interfering with Highland business, employees, and had even destroyed a company phone to hide evidence. TROs were sought and obtained. Finally, the court confirmed the Plan in February 2021. The Plan was supported by the UCC and overwhelmingly (99%+) by non-insider creditors. Other large, non-insider creditors that supported the Plan, besides those mentioned above, were Patrick Daugherty (a former executive of Highland who has been in litigation with Highland and Mr. Dondero for more than a decade) and HarbourVest—each of whom asserted multi-million dollar claims in this case. In any event, the Movants appealed the confirmation order, and it was affirmed in substantial part by the Fifth Circuit. The plan has been in effect since August 2021.

## IV. LEGAL STANDARD APPLICABLE TO THE MOTION TO RECUSE.

Before addressing the substance of the Third Motion to Recuse, the court will address the governing legal authority: 28 U.S.C. § 455, Fed. R. Bankr. P. 5004(a), and certain case law interpreting same. The relevant portions of 28 U.S.C. § 455 provide that:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . . .

28 U.S.C. § 455(a) & (b)(1).

Bankruptcy Rule 5004(a) further provides that, "A bankruptcy judge shall be governed by 28 U.S.C. § 455, and disqualified from presiding over the proceeding or contested matter in which the disqualifying circumstance arises or, if appropriate, shall be disqualified from presiding over the case."

*A. Timeliness?*

The court first notes that the applicable statute and rule do not address the concept of timeliness of a motion to recuse. However, several courts have taken timeliness into account.

The Fifth Circuit has noted, in *Delesdernier v. Porterie*, 666 F.2d 116 (5th Cir. 1982), that, while there were arguments in favor of not reading a timeliness requirement into the statute, "the lack of a timeliness rule has its own problems."[5] The Fifth Circuit, in concluding that it was "convinced that timeliness may not be disregarded in all cases regarding disqualification under § 455(a)," stated,[6]

> Lack of a timeliness requirement encourages speculation and converts the serious and laudatory business of insuring judicial fairness into a mere litigation stratagem. Congress did not enact § 455 to allow counsel to make a game of the federal judiciary's ethical obligations; we should seek to preserve the integrity of the statute by discouraging bad faith manipulation of its rules for litigious advantage.

Regarding the specific motion for disqualification of a district court judge in that case, the Fifth Circuit notes "that the motion raised for the first time on appeal, and after two full trials on the merits, is too tardily made for us to consider it now."[7]

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5. *Delesdernier*, 666 F.2d at 121.

6. *Id.*

7. *Id.* at 122–23. The Ninth Circuit and Tenth Circuit have also taken timeliness into account when considering a § 455 motion for recusal. *See Davies v. C.I.R.*, 68 F.3d 1129, 1130–31 (9th Cir. 1995) (a motion for recusal filed "one year after a ruling was considered untimely."); *Willner v. Univ. of Kansas*, 848 F.2d 1023 (10th Cir. 1988).

*B. Hearing Needed? If So, Who Presides?*

The court next notes that the applicable statute and rule do not expressly state whether the presiding judge or some other judge should decide a motion to recuse/disqualify or whether a hearing—evidentiary or otherwise—is required.

Case authority has interpreted the provisions set forth above to give the targeted judge authority (at least initially) to decide a motion to disqualify. *United States v. Bremers*, 195 F.3d 221 (5th Cir. 1999) (a motion to recuse is committed to the discretion of the targeted judge, and the denial of such motion will only be reversed upon the showing of an abuse of discretion); *Wilborn v. Wells Fargo Bank, N.A. (In re Wilborn)*, 401 B.R. 848 (Bankr. S.D. Tex. 2009) (citing *United States v. Mizell*, 88 F.3d 288 (5th Cir. 1996) (the targeted judge has broad discretion in determining whether disqualification is appropriate)).[8]

Additionally, the court notes that the applicable statute and rule do not expressly state what type of hearing is required, if any. Case authority has interpreted that a motion for disqualification does not necessarily confer upon a movant a right to make a record in open court, nor does it confer upon them a right to an evidentiary hearing. *Lieb v. Tillman (In re Lieb)*, 112 B.R. 830, 835–36 (Bankr. W.D. Tex. 1990). *See generally* 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*

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8. The Fifth Circuit discourages transfer of a disqualification motion because "[t]he challenged judge is most familiar with the alleged bias or conflict of interest" and "is in the best position to protect the nonmoving parties from dilatory tactics." *Chitimacha Tribe of La. v. Harry L. Laws Co.*, 690 F.2d 1157, 1162 (5th Cir. 1982).

§ 3550, at 629 (a section 455 motion can be supported by an affidavit, a verified memorandum, or a statement of facts in some form). The procedure for a targeted judge to follow, as set forth in *Levitt v. University of Texas*, 847 F.2d 221 (5th Cir. 1988), and as more specifically articulated in *Lieb v. Tillman*, 112 B.R. at 836, is: (a) first, the targeted judge should decide whether the "claim asserted" by the movants "rises to the threshold standard of raising a doubt in the mind of a reasonable observer" as to the judge's impartiality; (b) if not, then the judge should not recuse himself; and (c) if so, another judge should "decide what the facts are," *i.e.,* hold an evidentiary hearing, and presumably then this other judge would decide whether disqualification is appropriate. If a movant appeals a decision not to disqualify or recuse and the district court finds the record and documents submitted to be inadequate for a determination, it may remand and direct another judge to conduct an evidentiary hearing to enlarge the record. Such procedure is consistent with *Levitt. See Lieb v. Tillman*, 112 B.R. at 836.

*C. Motions to Recuse are Very Fact-Specific.*

Next, with regard to evaluating a motion to recuse, the Fifth Circuit has recognized that section 455(a) claims are fact-driven, and as a result, the analysis of a particular section 455(a) claim must be guided, not by a comparison to similar situations addressed by prior jurisprudence, but rather by an independent examination of the unique facts and circumstances of the particular claim at issue. *United States v. Jordan,* 49 F.3d 152 (5th Cir. 1995). Disqualification is appropriate if a reasonable person, knowing all of the relevant circumstances, would harbor doubts about the impartiality of the judge. *Chitimacha Tribe*, 690 F.2d at 1165.

*D. On the Topic of Bias or Animus.*

As a matter of law, the existence of clashes between the court and counsel for a party is an insufficient basis for disqualification, and "Circuit Courts have refused to base disqualification under section 455 upon apparent animosity towards counsel." *In re Lieb*, 112 B.R. at 835 (citing *Davis v. Board of School Comm'rs*, 517 F.2d 1044, 1050–52 (5th Cir. 1975) (holding that disqualification should be determined "on the basis of conduct which shows a bias or prejudice or lack of impartiality by focusing on a party rather than counsel.")) (other citations omitted); *see also, Focus Media, Inc. v. NBC (In re Focus Media),* 378 F.3d 916, 929–31 (9th Cir. 2004) (adverse rulings and negative remarks ordinarily do not support a bias challenge). More significant, the U.S. Supreme Court has stated that "expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display" do not establish bias or partiality" and that[9]

> judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

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9. *Liteky v. United States*, 510 U.S. 540, 555–556 (1994).

What might amount to a "high degree of favoritism or antagonism"? The example given by the *Liteky* Court was a 1921, WWI-espionage case where the District Court Judge allegedly said of the German American defendants: "'One must have a very judicial mind, indeed, not [to be] prejudiced against the German Americans' because their 'hearts are reeking with disloyalty.'" A very recent Fifth Circuit case echoes these principles as well. In *Brocato*, the court noted that "a judge is not generally required to recuse for bias, even if the judge is 'exceedingly ill disposed towards the defendant,' when the judge's 'knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings[.]'"[10]

## V. THE UNIQUE FACTS AND CIRCUMSTANCES APPLICABLE HERE.

First, the court determines that the Third Motion to Recuse and the previous motions to recuse have not been timely. Again, the original one was filed more than 15 months after the Presiding Judge was transferred the Highland case from Delaware. It was the 2060th pleading on the docket maintained in the bankruptcy case (this does not count the docket entries in the nine, separate adversary proceedings related to the Highland case), and it was filed after many dozens of orders had been issued by the court, including the confirmation order that was subsequently affirmed on appeal. The current Third Motion to Recuse was the 3570th pleading on the docket of the bankruptcy case and was filed exactly three years after the bankruptcy case was filed. The tim-

10. *United States v. Brocato*, 4 F.4th 296, 302–03 (5th Cir. 2021).

ing does not seem to pass muster—if, indeed, timeliness is a factor, as Circuit-level authority has suggested.

But, since the Third Motion to Recuse—and all of them for that matter—raise serious issues, the court will nevertheless analyze the pending motion as though it is timely. The court will address whether the overall circumstances might cause a reasonable observer to question or harbor doubts about the bankruptcy court's impartiality. Would the claims asserted in the Third Motion to Recuse rise to the threshold standard of raising a doubt in the mind of a reasonable observer as to the court's impartiality?

*A. The Acis Case.*

The Third Motion to Recuse revisits the Acis bankruptcy case and suggests that the Presiding Judge gained extrajudicial knowledge and developed opinions of Mr. Dondero and the Affected Entities during that case and that this has created animus or bias towards them in the Highland bankruptcy case and related adversary proceedings. Evaluating this contention requires some examination of just what the bankruptcy court heard and adjudicated in the Acis case.

Acis Capital Management, L.P. ("Acis LP"), a Delaware limited partnership, and Acis Capital Management GP, L.L.C. ("Acis GP/LLC"), a Delaware limited liability company—were two entities within the approximately 2,000-entity organizational structure of Highland that were forced into an involuntary bankruptcy case in January 2018 (for convenience, the court will collectively refer to them as "Acis"). The Presiding Judge presided over the Acis case. Mr. Dondero was the president of the two Acis debtors, as well as the CEO of Highland at the time. The Presiding Judge's recollection is that Mr. Don-

dero testified ***only once*** during the lengthy Acis proceedings (during the trial on the involuntary petitions in the Spring of 2018) and, at all other times, various inhouse counsel at Highland (Scott Ellington, Isaac Leventon, and J.P. Sevilla) served as the witnesses for Acis and Highland.

As far as "extrajudicial knowledge," what the Presiding Judge learned from the Acis case was largely regarding the "CLO Industry." The court learned that Highland was a pioneer, among registered investment advisors, in the securitization investment product known as a "CLO" (collateralized loan obligations) and Acis, for many years, was the vehicle through which Highland's CLO business was managed. The court learned about the typical structure of these CLOs (the various tranches of debt and the rights they enjoyed), the typical governing documents for and life cycle of a CLO, the typical portfolio management agreements, the shared services agreements, and the sub-advisory agreements that undergirded the whole operation. The court learned about Highland's role in these and the role of Acis, historically, and the role of an entity known as Highland CLO Funding "("HCLOF"). If the Presiding Judge made any specific rulings with regard to Mr. Dondero or the Affected Entities during the Acis case, she cannot recall. The court certainly does recall accusations made by Acis against ***Highland*** and ***HCLOF*** with regard to alleged fraudulent transfers and alleged denuding of Acis assets to thwart a judgment creditor, Josh Terry. The court has never ruled on the actual fraudulent transfer claims and, the claims (at least among Acis and Highland) have been settled.

In summary, the extrajudicial knowledge—if it should be considered that—the Presiding Judge gained

from the Acis case, that is now suggested to have created bias or animus, was knowledge about the highly complex CLO products industry, knowledge about the forms of agreements that typically set forth parties' rights and obligations, and some knowledge about the Highland business structure and the shared services and sub-advisory services model it typically used. The Presiding Judge, at all times, has been aware that Mr. Dondero was a founder of Highland and was the President of Acis and CEO of Highland at relevant times. To be clear, a Chapter 11 Trustee was appointed in the Acis case soon after an order for relief was entered, and the Presiding Judge only recalls Mr. Dondero testifying once in court during the Acis case. The Presiding Judge has a vague recollection that deposition testimony may have been presented at another time. The court cannot recall any of the other Affected Entities ever being parties appearing in the Acis case or providing testimony.

Assuming, *arguendo*, that the Presiding Judge gained some knowledge about Highland and at least one of the Movants (i.e., Mr. Dondero) from the Acis case, the governing case law suggests that this sort of awareness would not qualify as extrajudicial knowledge.[11] In *Tejero*, for example, the Fifth Circuit made it clear that a judge's knowledge of a party gained from previous cases involving that party does not qualify as extrajudicial knowledge.[12] There, the judge relied on knowledge gained

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11. *See, e.g., Liteky*, 510 U.S. at 555–556; *Tejero v. Portfolio Recovery Assocs., L.L.C.*, 955 F.3d 453, 463–64 (5th Cir. 2020).

12. *See Tejero*, 955 F.3d at 463 (citing *United States v. Reagan* 725 F.3d 471, 491 (5th Cir. 2013)).

from presiding over three previous cases involving the party that moved for the judge's recusal.[13]

The court notes, anecdotally, that 28 U.S.C. § 1408(2) contemplates that venue is proper over a case "in which there is pending a case under title 11 concerning such person's affiliate, general partner, or partnership." Thus, it is not *per se* improper (in fact, it is generally proper) for a presiding judge to preside over cases of affiliated business entities of a party. It happens all the time.

Without showing that the Presiding Judge relied on extrajudicial knowledge to form her opinion, the Movants bear the burden of showing that the Presiding Judge 'display[ed] a deep-seated favoritism or antagonism that would make fair judgment impossible.[14]

*B. Bias or Animus, More Generally?*

More generally, the court does not believe that the provisions of 28 U.S.C. § 455 are implicated here. The Presiding Judge does not believe she harbors, or has shown, any personal bias or prejudice against the Movants. She does not believe she has displayed deep-seated favoritism or antagonism.

As earlier mentioned, case law has held that clashes between a court and counsel for a party is an insufficient basis for disqualification, and courts "have refused to base disqualification under section 455 upon apparent animosity towards counsel." *In re Lieb*, 112 B.R. at 835 (citing *Davis v. Board of School Comm'rs*, 517 F.2d 1044, 1050–52 (5th Cir. 1975) (holding that disqualification should be determined "on the basis of conduct which

13. *See id.*

14. *Liteky*, 510 U.S. at 555.

shows a bias or prejudice or lack of impartiality by focusing on a party rather than counsel.")) (other citations omitted). Not only has this court shown proper respect for Mr. Dondero's and each of the Affected Entities' counsel, but the court has no disrespect or animus toward Mr. Dondero on a personal level or any of the Movants. This court desperately wants to believe (and has, and always will, keep its mind open to the belief) that the foremost goal of the Movants is to preserve their economic and proprietary rights—even though, over time, things have gotten more and more contentious and even seemingly personal among certain parties (the court is reminded of when the former general counsel of Highland sued another prior general counsel of Highland for "stalking" him, and the suit was removed from the state court to the bankruptcy court; the bankruptcy court swiftly remanded it back to state court—believing it had no place in a business reorganization). In any event, the Presiding Judge has commented several times that she believes Mr. Dondero, more than anything else, just wanted to get the company he built back. The Presiding Judge has said this, in spite of hearing sworn testimony that Mr. Dondero has threatened out of court to "burn the place down" if he cannot get what he believes he should get from the bankruptcy process.

This court has merely addressed motions, objections, and other pleadings as they have been presented. It has issued and enforced orders when requested and warranted. This court has provided Movants with a full and fair opportunity to present and pursue their objections and motions. In many situations, the court has issued very lengthy findings of fact and conclusions of law, opinions, or reports and recommendations to the District

Court. Sometimes Movants have appealed (in fact, more than two dozen times) and many times they did not. This court's rulings have mostly been affirmed or otherwise undisturbed in the appeals that have been resolved so far.

*C. Misstatements, Partial Descriptions, or Misunderstandings of Various Case Events.*

Regrettably, the brief in support of the Third Motion to Recuse (filed by counsel who never appeared during the bankruptcy case until filing the First Motion to Recuse) contains several misstatements or partial descriptions of events during the case, in several places, that create misimpressions. Some of the more problematic examples of this are set forth below (in no particular order).

The Bankruptcy Court's Orders Requiring Mr. Dondero's (and Allegedly His Sister's?) Attendance at Bankruptcy Court Hearings. In the brief in support of the Third Motion to Recuse, Movants assert as one example of the Presiding Judge's alleged bias, certain of her orders—entered in January 2021, May 2021, and June 2021—"target[ing] Mr. Dondero (as well as his sister Nancy Dondero) by requiring their presence at all hearings, regardless of whether their presence is needed." Third Motion to Recuse (brief in support), at p. 16 [DE # 3542]. This entirely misstates what happened.

First, almost 100% of the dozens of Highland hearings over the last 3+ years have been conducted virtually through WebEx (due to COVID and the large number of out-of-town participants). The court does not believe Nancy Dondero has ever physically been in the bankruptcy court, and Mr. Dondero rarely has. Certainly, they have never been penalized for that.

More importantly, what Movants omit was that, during a January 8, 2021 hearing to determine whether the court should grant a requested preliminary injunction against Mr. Dondero (regarding his alleged interference with the Debtor's business and certain employees of the Debtor), Mr. Dondero testified that he had not attended an earlier TRO hearing regarding this alleged conduct, nor read the transcript from the hearing, nor read the TRO itself to know what conduct it addressed.[15] The bankruptcy court was concerned that Mr. Dondero's failure to attend or participate in bankruptcy court hearings that impacted him or might result in obligations imposed upon him would create an opportunity for "plausible deniability." Thus, this court ordered Mr. Dondero to appear at all hearings to ensure both awareness of and compliance with this court's orders. Again, these were almost always video hearings. Mr. Dondero subsequently failed to appear at a hearing, thereby validating the court's concerns. Consequently, this court entered an order on May 24, 2021, clarifying that Mr. Dondero was required to appear at all hearings in the bankruptcy case [DE # 2362]. Notably, Mr. Dondero did not appeal the preliminary injunction or the May 24, 2021 order.

More generally, it is not atypical for this bankruptcy court to order principals of a party to appear at hearings when there are concerns regarding: (a) the contentiousness of a case, or (b) whether clients and lawyers are completely in sync and in communication with each other.

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15. See DE # 3596, Ex. 31, Appx. 3755 ("Q . . . At least as of today, you never bothered to read the TRO that was entered against you, correct? A Correct.").

As for Nancy Dondero, the bankruptcy court has never ordered Nancy Dondero to appear at any hearings. Instead, on June 17, 2021, the court ordered the trustee of the Dugaboy and Get Good Trusts (i.e., Mr. Dondero's family trusts) to appear at all hearings and proceedings but only "where either of the Trusts are a party or take a position" [DE # 2458]. The trusts (Dugaboy, in particular) have been very active during the bankruptcy case and the court believed their standing was very tenuous. The court provided a detailed rationale for its order and it was never appealed. Nevertheless, Movants now disturbingly assert that Nancy Dondero was required to appear at all hearings "regardless of whether [her] presence [was] needed."

August 4, 2021 Order Finding Mr. Dondero in Contempt of Court. In the brief in support of the Third Motion to Recuse, Movants cite an order entered by the bankruptcy court on August 4, 2021, holding Mr. Dondero in civil contempt of court [DE # 2660] (the "Contempt Order"), as "[p]erhaps one of the most telling" examples of the Presiding Judge's bias. Third Motion to Recuse (brief in support), at p. 14-15 [DE # 3571]. Movants do not accurately or fully describe the facts leading up to entry of this Contempt Order (which was appealed and affirmed in all material respects).[16]

First, the Contempt Order stemmed from an April 12, 2021 complaint (the "HarbourVest Complaint") filed against Highland in the District Court, by an entity

16. *Charitable DAF Fund L.P. v. Highland Cap. Mgmt.,* L.P., 2022 U.S. Dist. LEXIS 175778 (N.D. Tex. Sept. 28, 2022). The only finding not affirmed was the payment of $100,000 if an unsuccessful appeal was filed.

known as CLO Holdco and its parent company that is referred to as the "DAF"—both believed to be under the control of Mr. Dondero (more on that below). The HarbourVest Complaint was filed less than two months after Highland's Plan was confirmed and before it went effective. Movants allege that the HarbourVest Complaint addressed Highland's "brokering [during the bankruptcy case] the sale of CLO interests held by HarbourVest . . . without prior notice to other CLO investors and without respecting those investors' right of first refusal" in violation of some alleged duty. Third Motion to Recuse (brief in support), at 14. This is an inaccurate description of the events in the bankruptcy case that are the subject of the HarbourVest Complaint, and it also does not make clear why the bankruptcy court was motivated to enter the Contempt Order regarding the filing of the HarbourVest Complaint.

The facts were that, prior to Highland's bankruptcy case, a third-party unrelated to Highland called HarbourVest purchased a 49.98% equity interest in a non-Debtor entity called HCLOF for approximately $80 million. Highland and the entity CLO Holdco also owned equity interests in HCLOF. After Highland's bankruptcy, HarbourVest filed claims against Highland in excess of $300 million and sought rescission of its investment in HCLOF, alleging it was fraudulently induced by factual misrepresentations and omissions made by Mr. Dondero and certain of Highland's employees prior to the bankruptcy case. Highland and HarbourVest settled HarbourVest's claims, and Highland filed a Rule 9019 motion seeking court approval of the settlement. DE # 1625. The motion for approval of the settlement went out on normal notice to creditors and parties-in-interest in the

bankruptcy case. Under the settlement, HarbourVest received allowed claims in the bankruptcy case totaling $80 million in the aggregate and transferred its interests in HCLOF to a Highland subsidiary, effectively rescinding HarbourVest's investment in HCLOF. All aspects of the settlement were publicly disclosed in Highland's motion. DE # 1625. Mr. Dondero, his family trusts, and CLO Holdco (the same entity that later filed the HarbourVest Complaint) all objected to the settlement with HarbourVest. CLO Holdco argued it had a right of first refusal to HarbourVest's 49.98% interest in HCLOF. However, after reviewing Highland's pleadings, HCLOF's governing documents, and applicable law, CLO Holdco announced through counsel at a bankruptcy court hearing on the settlement that it had determined it had no such right and withdrew its objection. The bankruptcy court approved the settlement, including the transfer of HarbourVest's 49.98% interest in HCLOF to Highland and/or its designee.

Then, three months later, CLO Holdco and its parent company DAF filed the HarbourVest Complaint seeking, among other things, to enforce CLO Holdco's alleged right of first refusal—a right CLO Holdco had conceded did not exist in open bankruptcy court. The HarbourVest Complaint raises claims against Highland for breaches of fiduciary duty under the Investment Advisers Act[17]

17. While specific statutory references to the federal Investment Advisers Act are sparse in the HarbourVest Complaint, subsequent pleadings of the Plaintiffs made clear they are referring to at least 15 U.S.C. § 80b-6 and 80b-15(a) (which they cite as imposing both a duty of care and a duty of loyalty, each unwaivable, on investment advisors, in favor of funds and its investors, citing *SEC v. Tambone*, 550 F.3d 106, 146 (1st Cir. 2008));
(continued…)

and/or state law, breach of contract, negligence, violations of the Racketeer Influenced and Corrupt Organizations statute (15 U.S.C. § 1961, et seq. ("RICO")), and tortious interference — all relating to the settlement that the bankruptcy court had approved on notice to creditors and after an evidentiary hearing. With regard to the RICO count, CLO Holdco and DAF alleged that Highland and certain co-Defendants it named were an "association-in-fact" engaged in a pattern of racketeering activity for failing to disclose the valuation of the 49.98% equity interest and ultimately effectuating the Harbour-Vest Settlement. Shortly thereafter, CLO Holdco sought to add Mr. James Seery (Highland's CEO) as a defendant in clear violation of various bankruptcy court orders [e.g., DE # 854]. Accordingly, the bankruptcy court, after an evidentiary hearing, issued the Contempt Order finding Mr. Dondero and others in contempt. To be clear, not only were the Plaintiffs seeking to sue Mr. Seery in violation of bankruptcy court orders, but this had the appearance of an end-run around the bankruptcy court — i.e., suing a Debtor (Highland was still a Debtor, with a confirmed plan that had not reached its effective date) for post-petition conduct that had been approved by the bankruptcy court after notice to creditors, and, all the while, one of the plaintiffs had objected to the post-

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15 U.S.C. § 206(2) (which they cite as requiring investment advisers to seek "best execution" for all their clients' transactions, citing *SEC v. Ambassador Advisors, LLC*, 576 F. Supp. 3d 286, 300 (E.D. Pa. 2021)); and 15 U.S.C. § 215 (which they cite as recognizing "a limited private right of action for equitable relief including disgorgement, wherein one may seek to void the rights of a violator who performs a contract in violation of the Advisers Act").

petition conduct, by objecting to the HarbourVest Settlement, and then withdrew such objection. Moreover, even if there was a legal theory to pursue claims against Highland regarding the whole HarbourVest Settlement, there was a process for pursuing administrative claims in the confirmation order and Plan, and this process had not been followed.

Movants state in their brief in support of their Third Motion to Recuse, at p. 15, that Mr. Dondero credibly testified "he was not involved at all in authorizing or preparing the motion to add Mr. Seery" to the HarbourVest Complaint and that there was no evidence to the contrary. This is directly contradicted by the actual record. As the District Court explained when affirming the bankruptcy court's Contempt Order:

> Ample evidence supports the bankruptcy court's factual findings. Dondero has had a significant role in DAF for over a decade. DAF's assets come in part from Dondero and his "family trusts." Dondero "was DAF's managing member until 2012," and he remains "DAF's informal investment advisor." After Dondero stepped down as managing member, that role went to Grant Scott, "Dondero's longtime friend, college housemate, and best man at his wedding." Scott ultimately resigned due to "disagreements with . . . Dondero."
>
> [Mark] Patrick replaced Scott as "DAF's general manager on March 24, 2021"—19 days before the Seery Motion. Patrick initially had "no reason to believe that Mr. Seery had done anything wrong with respect to the HarbourVest transaction." Only once "Dondero told

[him] that an investment opportunity was essentially usurped" did Patrick "engage[] the Sbaiti firm to launch an investigation" and ask "Mr. Dondero to work with the Sbaiti firm with respect to their investigation of the underlying facts." After that, Dondero "communicated directly with the Sbaiti firm"—Patrick did not. Dondero "saw versions of the complaint before it was filed" and had "conversations with attorneys" about the complaint pre-filing. That complaint focused on "Seery's allegedly deceitful conduct" and "mention[ed] Mr. Seery 50 times." Further, when listing the parties, the complaint listed each party named in the caption along with "[p]otential party James P. Seery, Jr.," providing his citizenship and domicile.

Further, although Dondero averred that he did not direct the Sbaiti firm to add Seery to the complaint, Dondero also contradicted himself, first claiming that he did not know that "the Sbaiti firm intended to file a motion for leave to amend their complaint to add Mr. Seery," but then agreeing during the hearing that he "[p]robably" was "aware that that motion was going to be filed prior to the time that it actually was filed." He also testified to conversations about the Seery Motion, noting that it involved a "very complicated legal preservation" issue.

Based on all that evidence, the Court is not left with a definite and firm conviction that the bankruptcy court erred. After being stymied in

> the bankruptcy court, Dondero manufactured the exigency for the lawsuit that challenged Seery's conduct. Dondero's claim that he "did not suggest that Mr. Seery should be added as a defendant" is not credible. Dondero gave Patrick the idea of challenging Seery's conduct, and he worked with the Sbaiti firm to bring that idea to fruition in the complaint—a complaint that clearly contemplated adding Seery to the lawsuit. Likewise, his plea that he "had no involvement with the Seery Motion" is not credible. Dondero himself testified to the contents of attorney communications concerning the Seery Motion, eventually admitting that he "probably" had knowledge of the Motion before it was filed. In short, the bankruptcy court did not err, after considering the "totality of the evidence," in finding that Dondero had "the idea of" suing to "challenge Mr. Seery's . . . conduct," that he "encouraged Mr. Patrick to do something wrong," and that Patrick "abdicated responsibility to Mr. Dondero with regard to . . . executing the litigation strategy."[18]

The District Court, like the bankruptcy court, included ample citations to the record, including the direct testimony of both Mr. Dondero and Mr. Mark Patrick, to support its factual findings concerning Mr. Dondero's direct involvement in violating the bankruptcy court's orders and processes.

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18. *Charitable DAF Fund, L.P.*, 2022 U.S. Dist. LEXIS 175778, at **18–21.

Finally, Movants allegations about the lack of support for the amount of bankruptcy court's sanctions is incorrect. Movants alleged that Highland submitted invoices showing it had incurred just $38,796.50 defending against Mr. Dondero's contempt in connection with the HarbourVest Complaint. But, in fact, Highland submitted invoices for $187,795. [DE # 2421-1, 2421-2; Ex. 34, Appx. 4048-4102]. The bankruptcy court added to that amount to compensate for additional costs, and the bankruptcy court's sanction of $239,655 was affirmed by the District Court.[19]

Hearing on Debtor's Application to Employ Foley Gardere as Special Counsel on February 19, 2020. The bankruptcy court held a hearing early in the bankruptcy case on Debtor's application to retain the law firm Foley Gardere to pursue appeals of the Acis involuntary petition and the Acis confirmation order (the "Application to Employ") on behalf of ***Neutra Ltd. (which is or was a company owned by Mr. Dondero***). During this hearing, retired Bankruptcy Judge Russell Nelms, one of the three independent directors appointed to Debtor's new board, testified that, as to the board's business judgment, the Application to Employ was considered by the independent directors, and they concluded that it was in the ***Debtor's*** best interest for Foley Gardere to perform this legal work. Movants assert that, despite this testimony, the bankruptcy court displayed a predisposition to contest positions that could possibly benefit Mr. Dondero on the pre-determined basis that any person sharing an opinion with Mr. Dondero (including, apparently, a mem-

19. *Id.* at **13–17.

ber of the independent board) was somehow being unduly influenced by him).

Movants are less-than-clear regarding the bankruptcy court's comments and concerns regarding the Foley Gardere Application. To be clear, through the Foley Gardere Application, Highland sought to retain Foley Gardere on behalf of ***both*** Highland and the non-Debtor entity, Neutra Ltd., in the appeal of the Acis confirmation order and related matters (the "Acis Appeal"). In support of the Foley Gardere Application, Highland disclosed that: (a) Neutra Ltd. was owned by Mr. Dondero and his partner, Mark Okada, and (b) ***Highland*** intended to pay for Foley Gardere's representation of Neutra Ltd. in the Acis Appeal. The UCC and Acis objected to the Foley Gardere Application on the ground that ***Highland*** should not be permitted to use estate assets to support Neutra, a Dondero-controlled entity. [DE # 120]

Mr. Nelms testified in support of the Foley Gardere Application and was subject to a lengthy cross-examination.[20] The bankruptcy court approved Highland's retention of Foley Gardere but determined that the evidence was insufficient to justify expending estate assets to pay ***Neutra, Ltd.'s*** legal fees, a non-Debtor entity in which Highland held no interest.[21] The bankruptcy court's ruling on the Foley Gardere Application was based on its determination that Highland failed to prove that the estate would benefit by paying a non-Debtor's (Neutra Ltd.'s) legal fees. The bankruptcy court stated: "I cannot believe there is a chance in the world there is economic benefit to Highland if these things get revers-

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20. DE # 3596, Ex. 24, Appx. 3086–3142.

21. *Id.* Appx. 3204–3209.

ed. Economic benefit to Neutra: Yeah, maybe. . . . But benefit to Highland? I just don't think the evidence has been there to convince me it's reasonable business judgment for Highland to pay the legal fees associated with the appeal."[22]

The bankruptcy court is at a loss to understand how its comments on the Foley Gardere Application constitute a manifestation of bias towards Mr. Dondero or Movants.

The January 2021 Examiner Motion. On January 14, 2021, Mr. Dondero's family trusts, requested the bankruptcy court exercise its discretion to direct the appointment of a neutral third-party examiner pursuant to 11 U.S.C. § 1104(c) as an allegedly less costly means to resolve various issues that had arisen in the Highland bankruptcy (the "Examiner Motion"). The Examiner Motion was made 15 months after the case was filed, after months of global mediation had occurred, where most of the significant claims against the estate had been settled, and less than three weeks before the scheduled confirmation hearing, which the court had been told was likely to have support of the major creditor constituencies. Despite the family trusts' request, the bankruptcy court declined to set that motion for an emergency hearing, meaning it was set for hearing in the ordinary course, after the date of the confirmation hearing. It became moot after confirmation of the Plan—although it would not have been moot if confirmation had been denied. Movants assert that the court's failure to set the Examiner Motion on an emergency basis shows bias. No creditor supported the Examiner Motion. When the

22. *Id.* Appx. 3205–3206.

court ultimately denied the Examiner Motion, nobody appealed.

Questioning of Highland About Possibility of PPP Loans at the July 2020 Exclusivity Hearing. Movants contend that certain questions of the bankruptcy court regarding COVID-related "PPP loans" at a July 8, 2020 exclusivity hearing were evidence of bias against Mr. Dondero. As fully disclosed by this court, the inquiries were prompted by an extrajudicial source (a newspaper article) that the Presiding Judge happened to read one day, which noted that "Mr. Dondero or affiliates" received PPP loans. Because of the vagueness of the article, the bankruptcy court sought information from Highland — not Movants — and ordered Highland to disclose any PPP loans it had received post-petition. Highland responded to the court at a subsequent hearing that Highland had not obtained any PPP loans. Neither Mr. Dondero nor any of his affiliated entities were directed to provide any information, no action was taken against them, and the issue was never raised again by the bankruptcy court. Movants' suggestion that this somehow showed biased towards them is hard to understand. The court was merely inquiring about the possibility of Highland having obtained a post-petition COVID loan. Mr. Dondero was not even in control of Highland at this time.[23]

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23. In mid-2020, it was very unclear whether Chapter 11 debtors were eligible for PPP loans. The Presiding Judge was hearing different things in different court hearings and in the press. The Presiding Judge was partly simply curious as to whether Highland had been able to get one — in addition to being concerned it should be disclosed to creditors if it did.

Court's Usage of Terms Such as "Litigious" or "Vexatious." This court and all courts sometimes use strong words as part of managing complex and contentious cases. Did the Presiding Judge ever refer to Mr. Dondero or Movants as "litigious"? Yes. This was based on evidence. This was a view formed against the backdrop of having heard about more than a decade of litigation with UCC members and certain other creditors in courts in Texas, Delaware, New York, the Cayman Islands, Bermuda, and Guernsey.[24] For example, one of the new, independent directors of the Debtor, John Dubel—a man with decades of experience working on some of the largest, most complex Chapter 11s around the country—credibly testified as follows:

> Q Did you form a view as to the causes of the bankruptcy filing?
>
> A Litigation. That was my clear view. This company had been in litigation with multiple parties, various different parties, since around 2008. Generally, you would see litigation like the types that were, you know, that were here, you know, you'd litigate for a while, then you'd try and settle it. It did not appear to me that there was any intention on the—the Debtor to settle these litigations, but would rather just continue the process and proceed forward on the litigation until the very last minute. And so

24. An overview of prepetition litigation involving Highland and Dondero-related parties is set forth in the Disclosure Statement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P., DE # 1473 at 20–24.

> it was obvious that this was going to—that the Debtor was a, as I said, a highly-litigious shop, and that was one of the causes, obviously, the cause of the filing, along with the fact that judgments were about to be entered against the Debtor.[25]

Continuing on, Mr. Dubel elaborated:

> Q And can you elaborate a little bit on I think you said you had done some diligence and you had formed a view as to the causes of the bankruptcy filing, but did this case present any specific concerns or issues that you and the board members had to address perhaps above and beyond what you experienced in some of the other cases you described?
>
> A Well, as I said earlier, the fact that the litigation—the various litigations with the creditors have been going on for what I viewed as an inordinate amount of years, and that it was clear from my diligence that I had done that this had been directed by Mr. Dondero, to keep this moving forward in the litigation, and to, in essence, just, you know, never give up on the litigation.
>
> It was important that the types of protections that we were afforded in the January 9th order were put in place, because we—none of us—none of the three of us, and myself in par-

25. DE # 1894, pp. 271–272 (Transcript of Confirmation Hearing, 2/2/21, Testimony of Independent Director John Dubel).

> ticular, did not want to be in a position where we would be sued and harassed through lawsuits for the next, you know, ten years or so. That's not something anybody would want to sign up for.[26]

Did the Presiding Judge ever use the term "vexatious"? Yes. This was as a result of learning of the decade of unresolved litigation in the multiple fora set forth above. But it was also a perception formed after witnessing Movants and other Dondero-affiliates file over 50 proofs of claim (most of which were later withdrawn). It was also a view that any reasonable person might develop after reading the many dozens of motions; the many dozens of objections; and the many dozens of appeals that were pursued by Movants in the bankruptcy case. It was also borne out when multiple witnesses testified that there was a phenomenon in the insurance industry colloquially referred to as ***the "Dondero Exclusion"***—meaning that cost-effective liability insurance could not be obtained for the officers of Highland because of the company's historical inclination toward litigation.

For example, the new Highland CEO, Mr. James Seery, credibly testified on direct examination by Debtor's counsel as follows:

> Q Did you have any involvement in the Debtor's efforts to obtain D&O insurance for the independent board?
>
> A I did.

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26. *Id.* at 274.

Q Can you just describe for the Court what role you played and what issues came up as the Debtor sought to obtain that insurance?

A Sure. The Debtors had been looking to get an insurance policy in place. They were not able to do that. I happen to have worked with an insurance broker on D&O situations in some very difficult situations over the years and brought them into the mix. They were able to go out to the market and find a policy that would cover us, the—kind of the key components of that policy, though, were, number one, the guaranty that HCMLP would give—I'm sorry, the guaranty that HCMLP would give to Strand's obligations, and also the—I'll call it the gatekeeper provision was very important because these parties did not want to have—they wanted to have what was referred to, commonly referred to as the Dondero Exclusion.

So while we were—we purchased a policy that covered us, it did have an exclusion, unless there were no assets left, and then the what I'll call—we refer to as kind of a Side A policy would kick in.

Q OK. What do you mean by the Dondero Exclusion?

A The insurers did not want to cover the—any litigation that Mr. Dondero would bring against directors. It was pretty commonly known in the marketplace that Mr. Dondero was very litigious, and insurers were not will-

> ing to write the insurance without the protections that this order afforded because they did not want to be hit with frivolous—hit with claims on the policy for frivolous litigation that might be brought.[27]
>
> Q And do you recall at confirmation what impediments were described to the Court in terms of obtaining D&O insurance at that time?
>
> A Yes. I think the main impediment which was discussed by Mr. Tauber is what they colloquially refer to in insurance markets as the Dondero Exclusion. Basically, getting coverage to cover Mr. Dondero's actions is very difficult because of his litigious nature. And so one of the keys was to build in and continue the gatekeeper function.[28]

And then, again, more testimony about the "Dondero Exclusion" came on direct examination of Debtor's counsel from an executive in the insurance industry, Marc Tauber, of Aon Financial:

> Q Okay. And, finally, you mentioned Mr. Dondero. What role did he play in your ability to obtain insurance for the Strand board?
>
> A Well, that's a very significant role. As, you know, as mentioned, the underwriters are very risk-averse, so the litigiousness of Mr.

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27. *Id.* at 276–277.
28. DE # 2598, Transcript from 7/21/21 hearing (direct examination of James P. Seery).

> Dondero is a very strong red flag prohibiting a number of people from writing the insurance at all. And the ones that were writing, that were willing to provide options, were looking for protections from Mr. Dondero.
>
> Q And what kind of protections were they looking for?
>
> A Well, the gatekeeper function was a key factor. That was really the only way we could even start a conversation with any of the people that we were able to engage. And in addition, they wanted a, you know, sort of a belts and suspenders additional protection of having an exclusion preventing any litigation brought by or on behalf of Mr. Dondero.
>
> Q Were you able to identify any carrier who was prepared to underwrite D&O insurance for Strand without the gatekeeper provision or without a Dondero exclusion?
>
> A We were not.[29]

In any event, Movants' statement that this court found the Movants to be "vexatious litigants" is not consistent with the record. This court did not specifically find or conclude that Movants are "vexatious litigants." Rather, this court determined that Mr. Dondero's litigation history supported the inclusion of a gatekeeper provision in the Plan. *See* Confirmation Order, at ¶¶ 80–81 [DE # 1943]. All of the above-quoted testimony was in

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29. DE # 1905, at pp. 31–32 (Transcript from 2/3/21 Confirmation Hearing, Testimony of Marc Tauber of Aon Financial).

connection with the bankruptcy court considering whether gatekeeper provisions proposed in the Plan were necessary and appropriate. Significantly, the Fifth Circuit affirmed this court's findings and concluded that the gatekeeper provision was justified and "sound."[30]

The fact that the Presiding Judge commented on litigiousness (often—by the way—in the context of yearning for settlement) should not be interpreted as "bias" or "prejudice" toward Movants or any other party, for that matter. Not only was there significant credible evidence of this, but it is simply about rule enforcement and managing a docket consistent with this court's duty to the public.

The Presiding Judge's Fiction Novels. As noted early on, there is now a Fourth Motion to Recuse filed February 27, 2023, in Adversary Proceeding No. # 21-3076 which is styled *Kirschner v. Dondero. et al*. The Presiding Judge intends to rule on that Fourth Motion to Recuse after all parties in that adversary proceeding have had the opportunity to respond.

While the Presiding Judge had intended to remain silent on this subject until such time as the time had run for parties in the Adversary Proceeding to respond, the court observed that on March 3, 2023, Movants filed a new pleading entitled *Supplemental Memorandum of Law in Support of Renewed Motion to Recuse Pursuant to 28 U.S.C. § 455*, in which Movants supplement their Third Motion to Recuse "with information regarding two books published by Judge Jernigan, which Movants recently learned about and read." DE # 3673. Movants

30. *NexPoint v. Highland Capital Management*, 48 F.4th 419, 435 (5th Cir. 2022).

state in this new pleading that the Presiding Judge's fiction novels "contain derisive commentary about financial industry executives, the financial industry generally, and the financial instruments specifically at issue in HCMLP's bankruptcy" and that the second novel in particular "appears based on Judge Jernigan's experiences with HCMLP and Mr. Dondero in the Bankruptcy Proceedings." The Movants conclude that "any reasonable person would agree appear [that the Presiding Judge's novels are] patterned after Mr. Dondero, are additional evidence that the Court harbors exceedingly negative views about hedge fund managers and the hedge fund industry, generally, as well as Mr. Dondero specifically." *Id.*, at 4.

The Presiding Judge's novels—again entirely fiction—are not about Mr. Dondero or the hedge fund industry in general. The first novel (*He Watches All My Paths*) is entirely about a federal judge who receives death threats and the impact of that on her family, as well as the U.S. Marshals who provide protection. The ultimate perpetrator of the threats in the novel is not a person in the hedge fund industry but, rather, a young, former tort victim who feels wronged by the American justice system. The second novel (*Hedging Death*) is partly a sequel to the first—in that it involves a manhunt for a criminal from the first book—and it also happens to involve a bio-medical research firm in a Chapter 11 case in the protagonist judge's court, whose president is a Chechen immigrant to the U.S. and received funding from a hedge fund manager named Cade Graham. Cade Graham is the book character that Movants believe is "patterned" after Mr. Dondero. The character Cade Graham is an individual who fakes his own death in Mex-

ico ("pseudocide") after linking up with Mexican drug cartels. He is described as a Dallas native, raised by an oil man, who graduated from Princeton. He has a Brazilian girlfriend with whom he has a son, Ethan, with whom he engages in business. The book mentions a "Ranger Capital" exactly seven times (on six pages in more than 300 pages) as a company of Cade Graham's. There is another hedge fund mentioned in the book called Toro Capital. Movants state now that Highland once did business under the name of "Ranger." This was never mentioned in the bankruptcy case. It is not in the Highland disclosure statement. The Presiding Judge cannot find the name in any of the numerous organizational charts that were presented to her in the last three years. The Presiding Judge has never once heard this.

The Presiding Judge regrets this sideshow. Many sitting judges write books—albeit it is more common for them to write legal nonfiction books than fiction books. Ironically, the former can be much more fraught with peril—creating the possibility that someone is going to infer a legal viewpoint that might signal how the judge might rule in a future case. The Presiding Judge made clear that everything in the two books should be viewed as fiction. For example, on the copyright information page of *Hedging Death*:

> Hedging Death is a work of fiction. Names, characters, places, and incidents are the products of the author's imagination or are used fictitiously. Any resemblance to actual events, locales, or persons, living or dead, is entirely coincidental.

Then, again on the Author's Page before the Prologue:

> Because I am a sitting United States judge, and I am also married to a police officer, I feel compelled, at the outset, to clarify certain points regarding this novel. First, with the exception of the Prologue herein (which describes real-life events that happened July 7, 2016, in Dallas, Texas) the following is a work of fiction. While some of the characters and events beyond the Prologue may be loosely based on actual persons and events, and some of the places (in my home state of Texas and in various other faraway spots) are certainly very real, the human characters in this novel are absolutely fictional. Judge Avery Lassiter, the main character in this novel, is not me. Second, one should not assume that any statement or opinion expressed or implied by any characters in this novel are necessarily mine or are somehow a reflection on how I might rule on any particular issue in any case in the future.

The author Oscar Wilde once wrote: "Life imitates art far more than art imitates life."[31] That being true, many fiction authors do, indeed, write about "what they know." Many fiction authors write stories where characters are loosely based on real life people or weave plots that are loosely based on real life events. The examples are countless. Agatha Christie wrote a story line about a kidnapping of a child from a wealthy American family (based on the Lindberg child kidnapping) in *Murder on*

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31. Oscar Wilde, The Decay of Lying—An Observation (essay in his collection of essays titled *Intentions* in THE NINTEENTH CENTURY periodical (Jan. 1889)).

*the Orient Express*. Practically, everything Ernest Hemingway ever wrote was a highly fictionalized story from his past: *A Farewell to Arms* (story of an American expatriate working as an ambulance driver in the Italian Army who is wounded and falls in love with an Italian nurse—Hemingway was wounded as an ambulance driver working for the Italian Army in World War I); *The Sun Also Rises* (story of a group of young American and British expatriates who become friends living in Paris and go to the bull fights in Pamplona—once again, Hemingway spent years in Paris, hanging out with the likes of F Scott Fitzgerald, Pablo Picasso, and Gertrude Stein, occasionally going to see the bull fights in Spain); *The Old Man and the Sea* (story about an old fisherman in Cuba—again, Hemingway spent several years of his life fishing, writing, and drinking in Cuba on a boat called the *Pillar*). The Presiding Judge is somewhat embarrassed to discuss these literary greats in the same paragraph in which she is mentioning her own fiction works—it is merely to make a point. While the Presiding Judge's protagonist characters in her books (Judge Avery Lassiter and Max Lassiter) may resemble herself and her spouse, and while certain judges, lawyers, and U.S. Marshal characters in her books may resemble real life persons (i.e., heroes) that she has been honored to see or know during her lifetime, there are no characters or entities in her books that have been inspired by or modeled after the Movants.

**VI. CONCLUSION.**

The Presiding Judge has not specifically addressed herein every single ground asserted by the Movants as a manifestation of her alleged bias or animus. The submissions on this issue are enormous (as mentioned, thou-

sands of pages have been filed). Distilled to its essence, the Third Motion to Recuse has failed to present any objective manifestations of bias or prejudice.

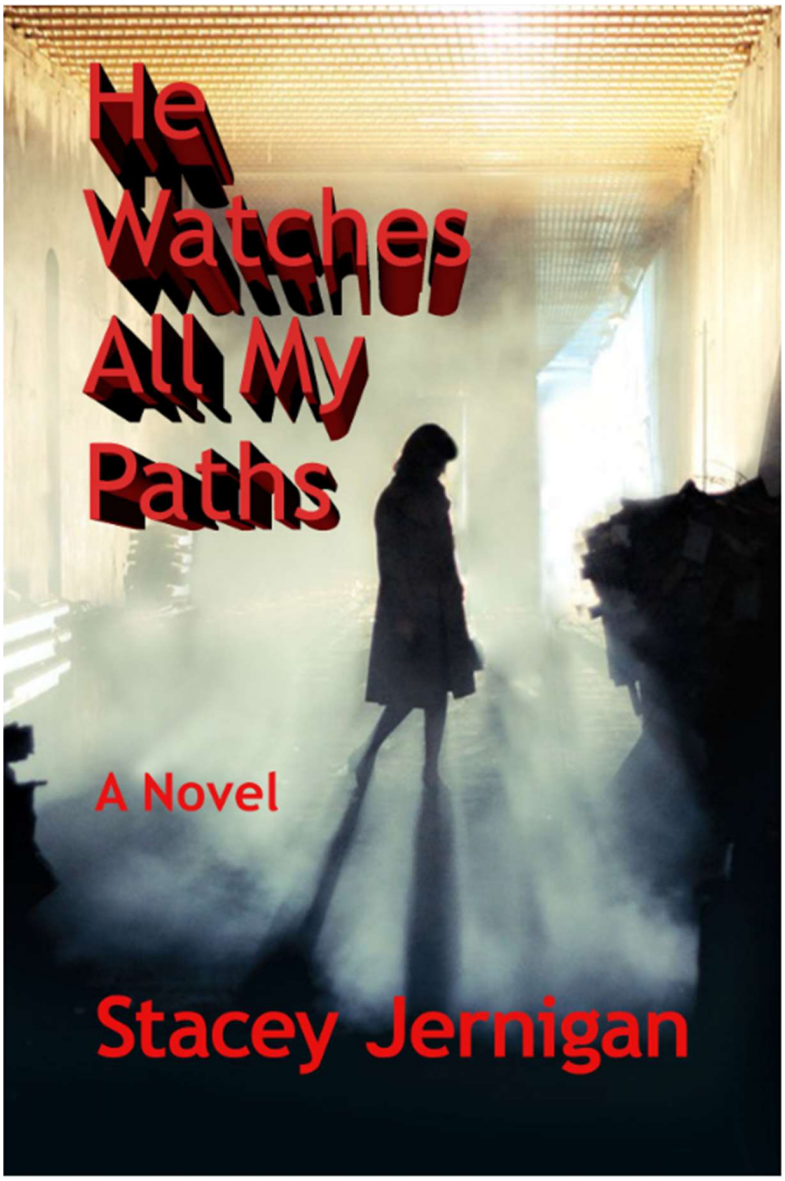
The court does not believe any of the assertions of the Movants rise to "the threshold standard of raising a doubt in the mind of a reasonable observer" as to the judge's impartiality. This court does not believe that any objective person would find that the Movants are the victims of improper judicial conduct rising to the extraordinary remedy of recusal.

WHEREFORE, it is hereby

ORDERED that the Third Motion to Recuse is denied.

It is so ORDERED.

**### END OF MEMORANDUM OPINION AND ORDER ###**




Excerpts from He Watches All My Paths
By Stacey Jernigan

Excerpt 1:
Author's Note
(emphasis added in **bold**)

## AUTHOR'S NOTE

Because I am a sitting United States judge, and I am also married to a police officer, I feel compelled, at the outset, to clarify certain points regarding this novel.

First, the following is a work of fiction. **Some of the characters and events herein are based loosely on actual persons and events,** and some of the places (in my home state of Texas and in various other faraway spots) are certainly very real. Moreover, in my capacity as a judge, I have been the recipient of death threats that ultimately required United States Marshal Service protection, like the main character in this novel. But, the human characters in this novel are absolutely fictional. Judge Avery Lassiter, the main character in this novel, is not me and my own situation with threats did not transpire in the same manner as hers.

Second, one should not assume that any statement or opinion expressed or implied by any characters in this novel are necessarily mine or are somehow a reflection on how I might rule on any particular issue in any case in the future.

Third—and perhaps most importantly—the references herein to certain federal judges, public officials, and lawyers (and families) who have been assassinated in this country in the past are, sadly, true—as are certain facts presented regarding the United States Marshals Service. As mentioned earlier, these honorable souls are among those to whom this novel is dedicated.

The author, Stacey G. C. Jernigan, has served as a federal bankruptcy judge, since the year 2006, in Dallas, Texas. Before that, she practiced law many years at a large international law firm, Haynes and Boone, LLP, based in Texas. **She is married to a police officer and**

**has a son and a daughter who are both young adults now.** She writes and travels extensively in her spare time.

Excerpt 2:
Pages 26–27
(emphasis added in **bold**)

Thanksgiving—while strange and unrelaxed—was relatively uneventful for the most part. But Judge Lassiter's extended family was, without a doubt, somewhat traumatized and had never realized that Avery's job had risks like this attached to it. Officer Max's job—sure. He definitely experienced his share of dangerous encounters (practically daily, serving on his covert undercover special task force). Officer Max's and his colleagues' catch phrase was "every day we play the deadly game." But now Avery's and the kids' lives seemed vulnerable to a possibly dangerous predator. This was unsettling and unexpected. Until recently, Avery had been a corporate attorney representing Fortune 500 companies and other wealthy institutional clients for her entire legal career, at a prestigious international law firm. **Now she presided over civil and bankruptcy matters in her court. She had no criminal law background or docket whatsoever. She handled financial disputes and ruled in money matters—not murder and mayhem. The most exciting legal matter that she ever encountered was a financial super-web that needed unraveling.** Avery's Southern Belle mother, in her pearls and navy, knit St. John suit, and perfectly hair-sprayed bob, kept wringing her hands that Thanksgiving Day and saying, "I thought you didn't handle criminal matters, Honey? Why would somebody want to kill you over money? It's just money! It's only money!" Avery always said that her mother could be incredibly naïve about such things. Strange, considering Avery's mother's appreciation for all things Biblical—and money being "the root of all evil" and such.

Excerpt 3:
Pages 60–62
(emphasis added in **bold**)

The man's thoughts were suddenly distracted when the clerk told the jury panel to listen and turn their attention to the overhead monitors where they would be shown a 15-minute video about the importance of jury service. After that, folks would be told where to go next. The man shifted in his chair uncomfortably and glared up at the nearest screen. Good God. The video featured some of the pillars of the Dallas community, telling him how special jury duty was and how important they all were. He'd go through the motions today. But what a joke.

About an hour later, the clerk finally started calling people for jury panels. The man had a low number, so he suspected his chances were pretty high of being put on a jury panel. He was right. He was in the second group called. He was told to report to a courtroom on the 5th floor. He followed the line of people moving like sheep toward the outrageously slow elevators. He avoided eye contact and speaking with the masses. He didn't want to be there with them.

Finally, about thirty minutes after being forced to sit shoulder-to-shoulder with strangers on the cold, hard pews in the courtroom of the Honorable Wayne T. Barnes, there was some activity. Approximately a half-dozen lawyers came into the front of the courtroom, exiting from the chamber doors of Judge Barnes, and started settling into places at the counsel table. There were dozens of banker boxes piled up around the walls of the courtroom, and lawyers began pulling files and notepads and laptop computers out of them. **It was obvious that one group of lawyers (four of them) represented a deep pocket corporation, and the other two lawyers were likely representing a humbler client. One group**

**of lawyers (all men) wore slicked back perfect hair and expensive dark wool suits with tailor made shirts, silk red ties, cufflinks, and Italian loafers. They each had a polished, fraternal, athletic look. They had similarly well-dressed clients who were sipping Starbucks lattes, constantly checking cell phones, and looking incensed about being in a courtroom. They no doubt had billion-dollar companies that they needed to be running, or a golf game or three-martini lunch at the Dallas Country Club that they would be missing. Or maybe they were hedge fund managers—they had that air of hubris about them that was so characteristic of those Wall Street assholes.** The two other lawyers had bad haircuts and cheap, ill-fitting suits (one wearing Seersucker in January), with brown, smudged loafers, and looked as though they had been up all night. They had an elderly man and three blue collar looking adults in their 30's or 40's sitting next to them. A courtroom deputy suddenly jerked to attention and yelled "all rise; the 199th Judicial District Court of Dallas County, Texas is now in session. The Honorable Wayne T. Barnes presiding." A tall, lanky African American, bald man in a black robe said hello and kindly smiled, telling the jury panel members and lawyers to take a seat.

The man found the next thirty minutes to be absolutely excruciating. During this phase of jury duty, the lawyers informed the jury panel a bit about the trial for which they were seeking jurors. The lawyer in the Seersucker suit starting things off, standing up and wandering toward the jury panel with a lumbering gait and an exposed large girth. He began speaking in a velvety Baritone voice with a very Southern drawl: "May it please

the court. And ladies and gentlemen. Let me share with you fine citizens of Dallas County some of the salient facts of the case at bar."

"Why did fucking lawyers have to talk that way?" the man thought. "Salient facts. Why can't they just say 'hey, here's what happened."

The lawyer soon shared that the plaintiffs were the surviving widower (age 74) and three adult offspring of Mrs. Dottie Wilson. The plaintiffs alleged that they had suffered damages due to the death of Mrs. Wilson, on August 6, 2015, allegedly caused by Mrs. Wilson's exposure to asbestos dust and fibers when she handled and laundered the allegedly asbestos-laden clothing of her husband, Myron Wilson. Mr. Wilson had been employed for 30 years at a large natural gas field and processing facility in East Texas, known as the Chandler Lake Refinery. In the course of performing his work, Mr. Wilson allegedly was occupationally exposed to large quantities of asbestos-containing insulation products that were utilized and/or handled by, or in the close proximity of, Mr. Wilson. Mr. Wilson's initial job for Chandler was a switcher. When he was a switcher, he worked with steam coils on certain flow lines and each of them was covered with insulation containing asbestos. Also, certain heaters within the work area had insulation in them. Mr. Wilson later became a compressor operator and then a chief operator. When he was a compressor operator, he worked with turbochargers, engines, and compressors that had insulation on them. Mr. Wilson later became a member of a maintenance crew (fixing anything that broke throughout the plant). Mr. Wilson also believed that he was exposed to asbestos at the Chandler Lake Refinery through certain pipe insulation — specifically "hot oil pip-

ing" used in the process of "drying" natural gas—that is, getting propane and pentanes out of the hydrocarbon gas. Mr. Wilson believed, in particular, that he may have been exposed to asbestos dust in the compressor building at the Chandler Lake Refinery where, once a year or so, he would have to pull out, repair, or rip off pipe insulation. Upon completion of Mr. Wilson's daily work, he would leave the worksite and return home with asbestos dust and fibers on his clothing and person. Mrs. Dottie Wilson was allegedly then exposed to the asbestos dust and fibers when she gathered, handled, and laundered Mr. Wilson's dust-laden clothing and ultimately sustained a very serious injury to her body. In 2015, Mrs. Wilson suddenly developed pain and trouble breathing. Shortly thereafter, Mrs. Wilson was diagnosed with the asbestos-related lung cancer known as mesothelioma. Mrs. Wilson's contraction of mesothelioma resulted in immediate disability, physical pain and suffering, and severe mental stress, and she soon passed away, on August 6, 2015.

The plaintiffs soon filed their petition for survival and wrongful death damages in Dallas County, Texas, where the behemoth Chandler Corporation was headquartered. Chandler Corporation somehow had avoided mass tort litigation from the plaintiffs' bar until the Wilson lawsuit, and they were not going to go down without a fight. If they lost this suit, it would be the tip of the iceberg and they would soon be fighting hundreds or thousands of copycat lawsuits just like this one. They had to stop the floodgates.

Excerpt 4:
Pages 78
(emphasis added in **bold**)

She was dealing with a nasty dispute involving two feuding hedge fund managers. There were several SMU law students in her courtroom observing the court proceedings. The students had wanted to learn something about what hedge funds were and how they made their money. **Avery had been explaining to the students before court about how hedge funds work—describing how they are a less-regulated side of capital finance.** Avery had further lectured to the students that hedge funders raise money from wealthy "accredited" individuals and institutions, such as government pension funds or university endowments, and the hedge funders deploy (that is, invest) that money as they see fit. **These high-flying hedge fund managers essentially suck up money ("fresh powder" they call it) like an iRobot vacuum cleaner from every corner of the universe and invest it, generally earning compensation of 20% of the assets they invest and another 2% of the profits that the assets earn. They make money no matter what—whether their investments are successful or not—because of their 20% cut.** Avery explained, to the law students' surprise, that lawyers, physicians, and investment bankers were now yesteryear's rich, esteemed professions. The law students were probably starting to rethink their decision to attend law school (that had not been Avery's intention). **Avery had been quietly daydreaming about whether one of these hedge fund manager guys (they are mostly men—in a stereotypically competitive "bro culture") could somehow have been connected to her death threats—she was recalling the comment in the second threat letter about the "rich who rule the universe."** Hedge fund managers were certainly worthy of that description. The hedge

fund managers in her courtroom right now were rich alright—they were centimillionaires. They probably thought of anyone making $1–$5 million per year as middle class. Some of these managers were intelligent with impressive academic credentials. **They all were bombastic talkers imbued with an outrageous amount of hubris.** They vacationed in places like Lake Como and Bora Bora and consulted meditation gurus in places like the Bay of Bengal. They sailed catamarans around the world and bought airplanes and race horses like it was candy. **Everything in their life was about winning. In the current lawsuit Avery had before her, the hedgies were accusing each other of being greedy sociopaths.** As Avery's mind drifted deeper toward wondering if perhaps someone in her court involving one of these hedgies had perhaps sent her the death threats, Annalise quietly slipped into the courtroom and handed her a note, telling her that she needed to take a recess. That was never a good sign. Avery had a call holding from one of Mad Max's police department colleagues, saying that Officer Max was at a local hospital emergency room, because he had been injured in a mishap while on duty, but it appeared that he was going to be alright. Avery would probably want to come to the hospital—but he thought Mad Max would be fine.

Excerpt 5:
Pages 165 to 168
(emphasis added in **bold**)

Avery was packing up a bag in her bedroom at home on an especially nice warm Wednesday in November. She would be driving down to Austin with Ward Scott and the Deputy Marshals midmorning. She and Ward were going to be making a presentation at a bankruptcy law conference in Austin. She and Ward would be speaking to 300 or so lawyers and other professionals in the restructuring and insolvency community regarding oil and gas law issues. "A riveting subject, to be sure," Avery joked.

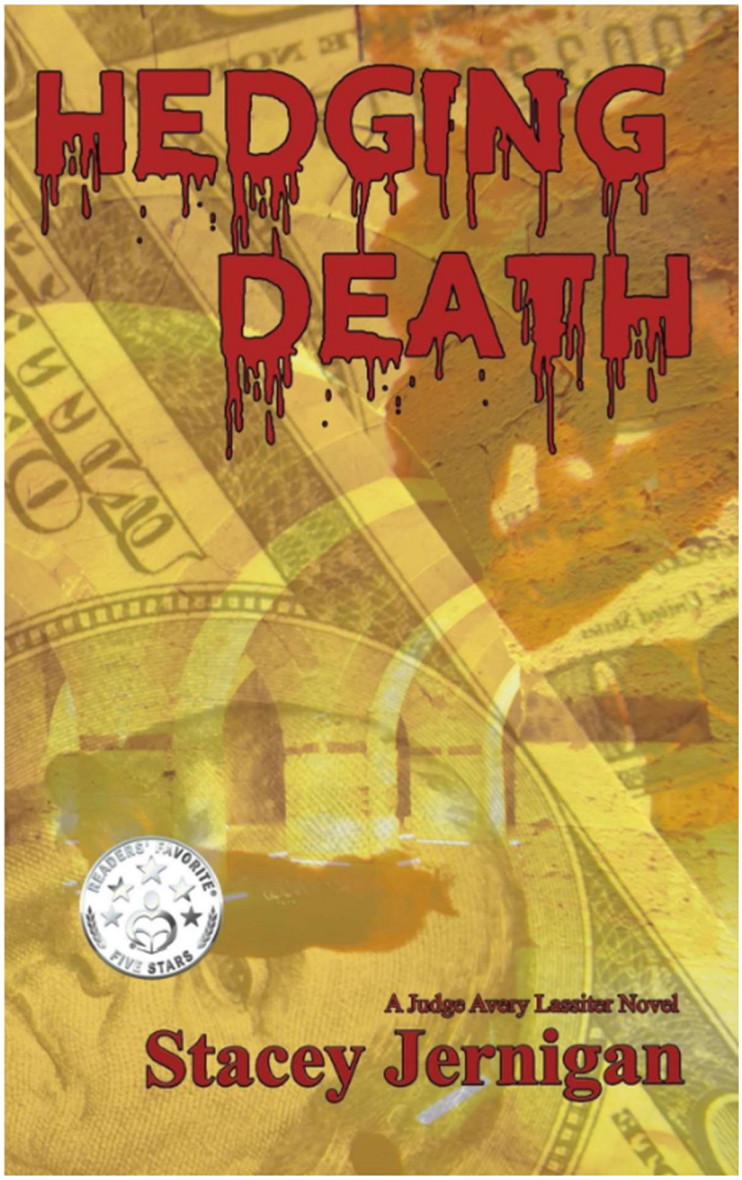
The Deputy Marshals hated it when Avery engaged in public speaking, but she didn't really care. She did a lot of it—it is expected of judges. Avery went down to this particular law conference in Austin every November. She had an old law professor from her University of Texas Law School days that she always enjoyed seeing. She also always took the opportunity to visit with some of her former law clerks, interns, and externs who were still in the Austin area or who otherwise traveled to the conference for continuing legal education. And, best of all, she seized the opportunity to stay a couple of days at the Four Seasons Hotel and Spa on Lady Bird Lake and visit some of her old law school haunts on nearby Sixth Street in downtown Austin.

As Avery packed, she stopped to listen to the latest daily cable news coverage about Karl Lee. There was still no proof of his death, and the legal and family drama engulfing the Lee empire had now reached an absolute crisis level. The quarreling among Lee's wife and his grown children was more rancorous than ever. They had all taken to Twitter on an almost hourly basis, publicly airing their disputes in a very distasteful and embarrassing way. The boards of directors at all of Lee's corporations were bickering as well. **Meanwhile, certain ex-**

**tremely aggressive hedge funds were starting to buy up blocking positions in the shares of his companies, as well as debt all over the capital structure of the Lee empire—an obvious sign that they smelled opportunity. Hedge funds are drawn to distressed companies like sharks are drawn to blood.** The Regent Hotel & Casino was particularly hard hit. Bondholders of the casino were starting to form ad hoc committees consisting of the largest holders of the debt and would soon be conducting "beauty contests"—that is, interviewing legal counsel and financial advisors for a possible out-of-court restructuring and likely Chapter 11 bankruptcy case. It barely made any sense to Avery. Lee disappeared three months ago, and it was as though all of his companies fell off of a financial cliff. How could one man be so indispensable to his companies? Avery guessed it was really true, that companies needed to have succession plans for this type of thing and Lee's companies—as well run as they were—did not have any. Avery wondered how Judges Lupinaci and Murphy would feel if one of their most high profile and successful corporate restructuring cases ended up being a "Chapter 22" (lawyer-lexicon for a second Chapter 11 case; 11 times 2).

Avery imagined that the lawyers at the conference in Austin would be gossiping nonstop about the possibility of another Regent bankruptcy case and other possible Lee companies that might need to be run through the cleansing bath of bankruptcy. Lawyers in the corporate restructuring field can be like vultures, waiting to swoop onto the carcass of a dying company. A variation of "barbarians at the gate," as some have called it. They are in the misery business for sure. Ward sometimes grumpily called them "the lowest common denominator" in the

lawyer food chain. Avery always chastised him that this was not entirely fair. Actually, the lawyers in the corporate restructuring field tended to be creative problem solvers who were great at cleaning up financial messes. They were the "fixers." They were often brilliant—having chosen an area of law practice that was far more complex than something like tort law or criminal law. One had to be both a financial wizard and legal wizard to be successful in the field. Still, Avery hated how the lawyers in this field loved to gossip about tragedy. The only thing that this group of lawyers loved to do more than gossip about corporate calamity was talk about how busy they were and how many billable hours they racked up in the preceding month. Toxic chest pounding. It was Avery's personal belief that lawyers tended to lie spectacularly to one another about how many hours they billed. Just like the cliché of the fisherman who lies about the size of the fish he catches daily.




Excerpts from *Hedging Death*
By Stacey Jernigan

Excerpt 1:
Pages 18–23
(emphasis added in **bold**)

Faked deaths. Also known as "staged deaths." Evanescing without a trace.

"Yes, feigning one's own death is a 'thing,'" Avery was explaining to Julia one Saturday afternoon while the two of them rinsed and diced vegetables for a salad. Avery was apprising Julia as to why her father would be away from home for an indeterminate length of time, while next coaching Julia through preparation of Baba Jo's favorite recipe for meaty, cheesy manicotti.

"No, silly, your dad is not faking his own death! Oh my gosh, Julia!"

Julia looked back at her mother with a kittenish half smile.

Max Lassiter was taking an extended trip down to Mexico to investigate what was believed to be a pretend death of a man named Cade Graham, a well-known wealthy playboy and high-flying, Dallas hedge fund manager. Graham was the founder and CEO of Dallas-based Ranger Capital, a multibillion-dollar conglomerate, which managed not just hedge funds but private equity funds, CDOs, CLOs, REITs, life settlements, and all manner of complicated financial products. This investigation was part of Max's new post-retirement gig—working as an investigator for Premier Mutual Life Insurance Company.

Max had "escaped the confinement of the police department" and retired a couple of years ago—not long after the July 2016 police massacre. He had started this "strange new endeavor," as Avery called it, last January. He now referred to himself as a professional "finder." And he was referring to this Mexico assignment of his as "Operation Hedge Hog." His investigative assignments always had some catchy code name. Just like with the

corporate transactional lawyers Avery used to work with at her old law firm. It appears one could not ever use actual names for their projects—whether there were legitimate confidentiality concerns or not. "Project Orion," "Juno," "Calypso"—there was never any rhyme or reason to them. At least "Operation Hedge Hog" had a meaningful tie to Cade Graham's profession.

"Why do people fake their own deaths, Mom?"

"Well, it happens often enough that there is even an official term for it: 'pseudocide.'"

"I have never heard of that word."

"I hadn't either until your dad started this. Anyway, why, you ask, would a person execute such a hoax? Honey, I could spend all day answering that question. There have been plenty of reasons people have orchestrated their own deaths throughout history. **People who engage in this come from all walks of life—from ordinary, everyday people, to egomaniacs, eccentrics, to well-known authors, to women escaping domestic abuse (a donna fugata, as they say in Italian), to corporate titans, to hedge fund managers, to former Nazis. Most often, though, they are middle class, middle aged, heterosexual white males with families.**"

"You've just described Dad!"

"Yes, I suppose I have."

"But why, Mom? Why do people do something so weird?"

"It's usually about escaping some undesirable situation, sweetie. But I would say it is most often about money—such as someone falling into financial distress and trying to escape the consequences. Conversely, sometimes someone has had the good fortune of coming into a lot of money—like an inheritance or winning the lot-

tery—and is trying to escape a spouse or family or friends seeking a share. This is sad, but I have even heard of young people with significant amounts of student loan debt faking their deaths to get out of the burden of having to pay it."

"You mean like if Heath did it, because he chose to attend such an expensive private college and has such huge student loans now, Mom?"

"Not funny, Julia!"

"Can you get arrested for faking your own death?"

"Well, faking your death—just basically going missing off the gridis not by itself a crime. Technically, a person can go missing if he or she chooses. You know, just check out of life, so to speak. But most of the time, a fraud is going to be committed somehow in the process, or the person is going to end up committing some other crime as part of faking his death."

"Like how?"

"Well, a 'pseudocide' usually starts with a person leaving random evidence to mislead people into thinking that he or she is dead, but there is usually no corpse (for obvious reasons). Sometimes, the evidence that they leave to mislead people ends up being fraudulently created and so that fraudulent evidence can be a crime. Sometimes, the death-faker will next assume the identity of an actual dead person with similar vital statistics and age. That would also be a crime."

"Oh yeah, I've seen that in a TV show before."

"Ha! I bet you have. And insurance fraud is very high on the list of reasons that people are known to fake their deaths—that is, as part of an attempt to fraudulently collect life insurance policy proceeds. And that's why

your father is getting involved in the alleged death of this fellow, Cade Graham."

"I'm not sure I get what you mean, Mom."

"Let's see. I assume you know what life insurance is, or no?"

Julia raised her right eyebrow and shrugged her shoulders. Julia had never been very childlike—always an old soul—so much so that sometimes Avery forgot that she was a child and didn't already know some basic things that adults know.

"Okay, I'll explain. I pay premiums every month for a life insurance policy, so that if I die before you are grown up, a pot of money will be paid out by the insurance company that will support you, since if I am dead, I am not around making money anymore to support you. Just like car insurance is for the situation when you are in a car wreck, life insurance is for when someone dies—there will be money to pay out to people who depended upon that person."

"You're being so morbid, Mom."

"No, not really. The concept of life insurance came into existence a couple of hundred years ago. It's generally quite a good thing that can give parents peace of mind for their families. But, like any other commercial enterprise in life, there are always going to be dishonest people who figure out a way to exploit the system. There are many documented cases, from the very beginning of the industry, of schemes where people have faked their deaths, or the deaths of friends and loved ones, to receive life insurance money."

"How do people do it usually?"

"Well people are sometimes good at it and people are often terrible at it. According to your father, people most

often fake a water accidenta drowning or falling off a boat far out in the ocean from the shore. Presumably, the perpetrators believe that drowning out at sea provides a plausible reason for the absence of a body. These cases are almost always suspicious, especially if the person has been in legal or financial trouble. In a drowning, a body will typically wash up, usually in the first few days. So, if there's a drowning and no corpse ever appears, it's very suspicious in the eyes of law enforcement. Of course, sometimes people just leave a suicide note and disappear—causing suspicion about whether foul play was involved."

"The character Juliet from Romeo and Juliet faked her death, Mom!"

"Yes, Julia. At least, initially. That didn't work out very well, did it? And some people think Elvis and Michael Jackson might have faked their own deaths."

"Huh?"

"Oh, never mind. Before your time, sweetie. Anyway, it is really very hard to get away with faking your death. People think they are geniuses at staying hidden, but they leave breadcrumbs everywhere. Digital footprints. Technology has been an absolute gamechanger when it comes to ferreting out missing people—well, at least missing adults. A person really must completely do away with all technology and go completely off the grid. That's why the U.S. Marshals almost always find their fugitives because people can't stay off their phones or computers or avoid ATMs or credit cards or video cameras."

"I bet I could disappear, Mom."

"Oh please. You can't stay off your phone for five minutes."

In fact, Julia had just put down her vegetable peeler and was doing internet searches on her phone. **She had just Googled Cade Graham's name and saw plenty of pictures of him—mostly standing with beautiful and extremely young women in exotic locations. He looked fifty-something and had slicked back, collar-length, silver hair, a tanned complexion, sparkling green eyes, and fluorescently glowing white teeth.**

"I found pictures of Cade Graham, Mom. He apparently wears nothing but black turtlenecks. And only hangs out with girls who look barely older than me."

"Lovely. Anyway, there is a creepy, underground market out there with resources to help a person orchestrate a fake death. For example, you can obtain a fake death certificate through these underground markets. Mexico is one place where people have been known to easily get a fake death certificate. It's usually accomplished through people who work for the government providing the documents that people need. It might cost you $150 to get a fake death certificate. Then the person just arranges for it to be filed with the U.S. Embassy down there. 'John Doe was killed in a car wreck while vacationing in Mexico.' There are also certain countries where there are corrupt morgues, where the operators take in dead homeless people and keep them on ice until someone comes around and wants to buy a body to pass it off as himself."

"That's so disgusting!"

"Yep, it is all right."

"So, what's the deal with Cade Graham? Why do Dad and the insurance company think that he faked his own death?"

**"Oh, Mr. Graham is, or was, a real piece of work. A real hedonistic, narcissistic playboy.** He has—or had—fashion model or actress girlfriends on almost every continent, it seems. As you noticed from your internet search, they all look disturbingly young. **And he seems, over time, to have developed a reputation as being a hustler working the bottom rungs of Wall Street. A ton of people hate him, don't trust him, and can't figure out how on earth he manages to make so much money in both good times and bad times. Other people think he's magic and will write him a blank check to invest money with him any time he asks.** He supposedly went vacationing in Mexico recently and died in a fiery, single-car crash. But the facts just don't all add up."

"How so?"

"Well, not only is Mexico not Cade Graham's type of vacation hot spot—he is more the French Riviera, Marbella, or Amalfi Coast type—but **there was recently a lot of strange activity in some of his hedge funds—a lot of money disappearing. People were suing him, and the Feds were investigating him for all sorts of things. His world was crumbling around him. All kinds of problems were mounting up."**

Excerpt 2:
Pages 79
(emphasis added in **bold**)

"Baxter Squared" was Max's nickname for the two new Cavalier King Charles Spaniel puppies that Avery recently adopted, Jake and Finley. Sadly, sweet old Baxter, the family's previous Cavalier King Charles Spaniel, died last year of congestive heart failure, close to the same time that Max had his heart attack. Sad coincidence.

Excerpt 3:
Pages 81 to 82
(emphasis added in **bold**)

"Hey, you started this discussion, Max, by saying you wanted me to answer some questions about life insurance. I'm just answering your questions. I think your words were that you wanted me to 'fill in some gaps in your knowledge.'"

"Okay. You're right. Back to AIDS."

**"Anyway, this is really creepy, but the 1980s, when AIDS was a new disease and practically always a death sentence, is really when the practice started up of selling—or settling—life insurance policies. Terminally ill AIDS victims would sell their life insurance policies to get cash to pay for their medicine.** Sadly, these policies were quick payoffs in that situation, because the policy owner would usually die in a couple of years or less, after selling the policy. These are referred to as viatical settlements where the policy holder is terminally ill. But the more common situation is where the policy holder is a senior—over age sixty-five—and not terminally ill."

**"Again, I just can't believe this shit is legal.** Some greedy, tie-wearing weasel lawyer probably invented this."

"Why does everyone keep referring to lawyers as tie-wearing weasels today?"

"What?"

Excerpt 4:
Pages 82 to 86
(emphasis added in **bold**)

"Oh nothing. Max, I doubt a lawyer invented the life insurance settlement business. Actually, I have no idea. Maybe a lawyer did create the whole idea. But I do know that law makers, both in Washington and at the state level, have certainly investigated this industry on occasion. And truthfully, the insurance policy holders typically end up getting a lot more cash than they otherwise would from the cash surrender value that the insurance company itself would pay. So, again, I guess it's not unreasonable to think of this as a win-win type of transaction. And there is some regulation of the industry. I am by no means an expert at all, but I recall that there are some restrictions on what you can and can't do."

"Okay, stop there. I want to hear about the restrictions."

"Well, let's see. There's a concept that you must have an 'insurable interest' in the subject matter of any insurance policy. So, for example, you cannot be the original purchaser of a life insurance policy on a stranger or some other random person with whom you don't have any kind of a relationship."

'Like, I could not go out and take out an original life insurance policy on my next-door neighbor."

"Exactly. Also, you cannot enter one of these life settlement transactions at the very same time that a policy is issued. In other words, you can generally only purchase another person's life insurance policy after it has legitimately been in place for several years."

"Aha! So, there is a line you can cross where it's not legal! Told you, Dave."

"Sure. But, again Max, I am not an expert on this. Max, what in the world is going on with Cade Graham and life insurance settlements? Why all these odd ques-

tions? I thought you were going down to Mexico just to investigate his apparent pseudocide."

**"Well, as I understand it, Cade Graham, Mr. Hedge Fund Genius, created a specific hedge fund at his company, Ranger Capital, that was purchasing life insurance policies.** He drummed up dozens of investors to contribute money for his 'life settlements hedge fund,' and, through a broker, the fund acquired more than 5,000 policies having over one billion dollars of face value."

"Okay. I understand. I have certainly heard of hedge funds getting involved in the life insurance settlements business. It is not in and of itself problematic, Max."

"Well, as it turns out, Graham, in connection with buying up these life insurance policies, was using a supposed 'expert' who was inputting life expectancy data that suggested that the people selling the policies would die much sooner than they were, based on actuarial tables. The result was the hedge fund was not collecting funds on the policies as expected. It was a frigging disaster. The Wall Street Journal wrote an expose on it and reported policy holders were living two and three times beyond projections."

"Oh, how terrible. People were living longer than expected," Avery said sarcastically.

"I'm telling you. I don't know how in the world this is legal. It certainly doesn't feel legal—or at least not moral or ethical."

"Okay. Well, go on. I've got to hear the rest of this."

"Anyway, for a couple of years, the hedge fund was paying about $1 million per month just on the premiums on these 5,000 life insurance policies and collecting nothing, zippo, because basically no one was dying. **The hedge fund eventually ran out of cash. Graham was**

**losing his shirt on this business—or rather his investors were. People were getting really pissed off at Graham. The SEC was investigating him. The situation was becoming untenable. Cade was having to cover the cost of maintaining this fund from other resources. He was robbing from Peter to pay Paul in his hedge fund empire—by borrowing from unrelated hedge funds in the Ranger Capital empire, he managed to pay the premiums on the life insurance policies."**

"Okay. Well, you and everyone else in Dallas knew that Graham was on the financial precipice. This was just one of many reasons that he was, I guess. Right? Oh, wait, don't tell me. Do you think Cade Graham started putting hits out on people that had the life insurance policies owned by his hedge fund, so that some of these policies would start paying off? He's hiding out in Mexico and playing dead while ordering hits on people? Good God, I feel guilty just suggesting something so terrible. I'm going to be struck by lightning any moment."

"It's actually not a bad guess, Avery. But no. For some reason, Premier—which was the issuer on a lot of these policies—started noticing that Graham's hedge fund had recently started buying up a lot of policies on people who were American citizens now living in Mexico. These were middle class folks who had retired in Mexico. Mostly on the Yucatan Peninsula near Cancun, Cozumel, and Playa del Carmen. Nice weather. Low cost of living. And there is a nice senior living community down there called *Isla Valladolid* where many of these ex-pats retired. *Isla Valladolid* has extremely nice, posh independent living condos, assisted living facilities, and a nursing home for the residents when they start to eventually

need that type of care. All high-rises overlooking the ocean."

"Sounds like a place I might like to live someday."

"Uh, better hold that thought. I don't think you'll feel that way when I'm finished with my story."

Dave Carrillo chimed in from across the table. "Tell her the part about the REIT. Ask her what the hell a REIT is." Dave had now abandoned any reservations he might have had about eavesdropping. Realizing this, Max put his phone on speaker.

"Oh yeah, Dave wants me to tell you that a REIT—which I understand means a 'real estate investment trust'—happens to own this bougie *Isla Valladolid* property, and the REIT is minority-owned by Graham and majority-owned by some Mexican nationals who have close ties to one of the big drug cartels. The *Oscuro* Cartel. And then this Mexican-cartel controlled REIT leases the property to another entity—an operator/tenant—that Graham mostly owns and controls through offshore companies."

**"Welcome to the world of structured corporate finance, Max—well except for the drug cartel part. Lots of interconnecting relationships and frequently offshore companies.** That's interesting, but let's get to the really good stuff, Max. I feel you're building to a punch line here."

Excerpt 5:
Pages 105 to 106
(emphasis added in **bold**)

Despite its history of standing its ground and keeping people out, **Malta is now a place where a person can rather easily worm himself in and disappear forever.** Malta is part of the Schengen Treaty of countries and, thus, if one flies there from anywhere in the European Union or other Schengen Treaty countries (which one nearly must), no one checks for a passport upon one's arrival. It is also an easy, short boat ride from the porous borders of places such as Tunisia and Libya.

**Malta, while beautiful, exotic, and an all-around lovely place, is a haven for a variety of criminal financial activity and other at least questionable practices (the government has considered officially backing Bitcoin in recent times). Gambling (there are casinos there) and the mafia are now ubiquitous.**

Richard Braden (n.k.a. Rasmus Aavik) had arrived in Malta before Matthew and Marcus Braden had ever stepped foot in Texas. He had read books, as a child living in a Catholic orphanage, about the Knights of St. John and the Great Siege at Malta, and the place had captivated his imagination. He moved to a spot called St. Julian's Bay, overlooking the tranquil blue Mediterranean. He moved there shortly after the State of New Jersey reported him as having died, in the year 2002, from a Staph infection—this had been a report fictitiously created by the young Richard Braden, who very early became a skillful cyber-criminal. Still somewhat young when he arrived, Richard managed to endear himself to the staff at a beautiful gothic style church facing the bay there—The Parish Church of Our Lady of Mount Carmel—with an imposing bell tower that chimed portions of Nearer My God to Thee every fifteen minutes. There was a feral cat colony right by the church along the pro-

menade on the beach which Richard helped maintain for many years. There was an easily accessible ferry in St. Julian's Bay that could take one to the historic capital of Malta, Valletta.

Valletta fascinated the young Richard Braden when he first arrived, with its narrow, cobblestone streets and amazing high views of the island's cities and fortresses. He eventually bought a Vespa so that he could ride around the island and explore. As a young man, he eventually left the Church that had taken him in and took on the identity of Rasmus Aavik. He was able to get a job at the Bank of Valletta, rising from clerk to teller to account manager in time. He managed to pose well as an Estonian ex-pat and learned the Maltese way of life quite well.

Everyone speaks both English and Maltese in Malta. Maltese is difficult (it is a Semitic language written in Latin script, derived from an Arabic dialect that first appeared during the Ninth Century Muslim conquest of Sicily), but Richard, like his two brothers, was highly intelligent so he had no problem mastering the language. Eventually, Richard purchased a quaint small sidewalk café which he named Deheb Qumar, serving mostly Italian and Sicilian cuisine, but also a few local specialties like rabbit and garlic octopus. He adorned the walls of his café with posters and memorabilia from movies like The Godfather, Good Fellas, and Scarface. Frank Sinatra tunes were always playing softly in the background. There were cigarette vending machines and a small bar in the front of the café, and several video cameras hidden in random spots around the café. Richard (Rasmus) drove a cobalt blue Land Rover Defender that, every day, he parked in front of the cafe. Most days, Richard (Rasmus) sat at the bar, taking notes, with a pencil in an

old-style ledger pad with carbon paper, seemingly adding up figures and occasionally handing pieces of paper to men who would randomly walk in. He led a discreet but interesting life. Restauranteur. Bookie. Money launderer. Financier. Investor. And, of course, former Estonian sailor.

Excerpt 6:
Pages 107 to 111
(emphasis added in **bold**)

Cade Graham had led a rather charmed life for his fifty-plus years, until his troubles of the past two years. He grew up in the exclusive Highland Park enclave in Dallas, Texas. He was the only child of a workaholic heart surgeon and an alcoholic mother, and the grandson of a storied East Texas oil wildcatter—the latter of whom had mostly raised him. He was tall, well-built, and handsome, with a confident Texas swagger. He still looked rather boyish in middle age. He went to Princeton for undergraduate studies, played football for the Tigers, and was president of the exclusive Cottage Eating Club, as had been his father and grandfather before him. After graduation, he worked several years at the New York Stock Exchange, then earned an MBA from Wharton, and went from there to Bear Stearns on Madison Avenue. **He eventually came home to his native Dallas after the Bear Stearns implosion. Once back in Dallas, he started working in private equity and, ultimately, the largely unregulated hedge fund industry. Both private equity and hedge funds thrived in the freewheeling business culture of Big D—a perfect fit for Graham. He also liked that it was still a male dominated world. He liked the gambling and risk-taking that are inherent with hedging and distressed investing. Perhaps it was something in his DNA or a learned trait from his wildcatter grandfather.**

**After a few years of feeling like he was working round-the-clock, making other people fabulously wealthy (Graham was a mere millionaire while his bosses were billionaires), he decided to form his own company—Ranger Capital. Graham had weathered the capital markets crash of 2008 quite well, despite losing big in mortgage securitization at Bear Stearns.**

**He almost always came out on top in his life. It astounded everyone who knew him. Even as his colleagues were licking their wounds in 2008 and ratcheting themselves down to a more pedestrian lifestyle, Graham had acquired a mansion on Strait Lane in Dallas with a sixteen-car garage full of Lamborghinis, Ferraris, McLarens, and Aston Martins.** He also owned a villa overlooking Lake Como in Italy, an apartment in Paris in the Eight District, on the Right Bank (a.k.a. "VIII arrondissement" or huitieme), and a small, moated Norman country home near Lisieux, where he enjoyed boar hunting. **He played golf with celebrities and politicians. He gave to all the right charities.** He had young girlfriends everywhere and allegedly had a couple of illegitimate children whose existence and identity were closely guarded secrets. But he was mostly a loner. A prosperous and hedonistic—and hardworking—loner. Tabloids and internet gossip blogs described him as a Gatsby-like enigma. He had sensibly and cannily never given an interview to any of the usual high-finance media outlets. Among other things, it was impossible to accurately approximate the fortune he had amassed.

**But times had, for once, finally turned hard for the ordinarily Teflon-coated Cade Graham a few years back. His boyish brown hair had turned silver, and his sun-kissed smooth skin had grown weathered. In recent years, Graham's Ranger Capital had specialized in the "SPAC" and "de-SPACing" segment of the capital markets, where investors essentially give an investment manager a blank check to create a special purpose acquisition company ("SPAC"), that will then go out and find a company with which to merge**

**("de-SPAC").** Among the vehicles that Ranger Capital ended up using these blank checks for were: (1) a fund that invested in life insurance policy settlements; (2) REITs that owned real estate on which hospitals, medical buildings, senior living communities, and rehab facilities were built—which were then leased at lucrative prices to tenant operators; (3) funds that lent money for medical research and development projects; and (4) funds that invested in pharmaceutical companies. In other words, Graham essentially just used the SPAC blank checks for whatever he wanted and whenever he wanted, until he found good companies with which to de-SPAC. In any event, the REITS and the pharmaceutical companies had performed fabulously well. But the life insurance settlement fund was an unmitigated disaster, as was the fund that had been investing in medical R&D.

The medical R&D fund was especially bothersome to Graham. One of Graham's illegitimate sons had gone to Emory University (on his dime) and majored in Biology before going to Harvard for an MBA to follow in his father's footsteps in the world of high finance. While at Emory, he had worked as a research assistant for a grad student there named Dmitry Basayev. Basayev was supposedly a genius who was now on the verge of coming out with revolutionary break throughs in the areas of infectious diseases and state-of-the-art protocols to destroy super bugs. Graham's son introduced him to Basayev. While Graham had long ago learned that great ideas were a dime a dozen, Basayev's extravagant claims about revolutionizing the medical care world in general seemed to have legs. The young, handsome Chechen immigrant had the kind of hubris and charisma that Graham liked.

Graham, at the urging of his illegitimate son, invested several million dollars in early 2015 in a project of Basayev's known as DB Biocontainment, LLC. Graham not only made large loans to DB Biocontainment, LLC, but he also created an offshore company that would buy the aforementioned land in Ellis County, Texas and lease the land to DB Biocontainment, LLC, as tenant. The land would be used as an unconventional, state-of-the-art, underground research facility. Graham made this investment not only at the encouragement of his illegitimate son, but also at the encouragement of another hedge fund, Toro Capital (which had been formed by several of Graham's old buddies from Bear Stearns). Toro Capital had invested heavily in another one of Basayev's companies called BASA, Inc., which was supposedly working on the ultraviolet and air purification disinfectant system that would effectively destroy super germs in medical facilities and public spaces like no other product on the market. Toro Capital had a track record of investing its clients' money extremely well. So, Graham felt optimistic about Dmitry Basayev. Of course, by late March 2017, BASA, Inc. was in a Chapter 11 case and, thereafter, was accused of orchestrating a massive Ponzi scheme. And Toro Capital was later sued for its role in funding the alleged Ponzi scheme.

Luckily, at least for Graham, he did not buy much debt in BASAand what little debt he did purchase he had hedged by buying credit default swaps. A credit default swap, or "CDS," is similar to insurance for people who loan money or invest in debt. A debt holder who buys a CDS is guaranteed by the CDS issuer that if the CDS-covered debt goes into default, the CDS issuer will buy the debt from the debt holder for the full amount (face

value) of the debt. **Thus, the CDS issuer was left "holding the bag," so to speak, on the BASA, Inc. debt that Graham had owned. It had become a very common thing, over the last few years, for Cade Graham to leave others holding the bag.**

Excerpt 7:
Pages 120 to 127
(emphasis added in **bold**)

For a few months, in 2016 and into early 2017, Cade Graham's life generally—and specifically, arrangements at *Isla Valladolid*—seemed to be going quite well. Graham's financial missteps seemed to have been curbed a bit. His beautiful, bougie, Yucatan retirement community was ninety percent occupied with residents who all timely paid their rent. Thus, the tenant-operator of *Isla Valladolid* (which was, of course, a company owned and controlled by Cade Graham) was able to timely pay its monthly rent to the REIT (the landlord/trust that owned the underlying property). Cade Graham's majority coowners in the REIT (the *Oscuro* Mexican crime cartel) were partially pleased. However, it is never good enough to only partially please a Mexican crime cartel.

How in the world did a Dallas, Highland Park-bred, Ivy League educated, white privileged male—with all of his enormous wealth, beautiful girlfriends, and continental panache—ever get entangled with a Mexican crime cartel? How did *Oscuro* become the majority owners of the *Isla Valladolid* REIT?

It started innocently enough. **Cade Graham had become entangled in some nasty litigation with some major players in the credit default swap (CDS) industry. Graham had been accused of misrepresentations, bad faith, and outright fraud in some cases. After a couple of years of this, no one in the CDS industry would deal with Graham or his various hedge funds anymore. He had become persona non grata. Radioactive. Fallen from grace.** None of the usual CDS issuers would touch any of Graham's deals. This was problematic. It is difficult to operate hedge funds without the ability to acquire credit default swaps or have similar

products in place, now and then. Graham's illegitimate son once again entered the picture.

The illegitimate son went by the name of Ethan Alves. Cade Graham had a contractual arrangement with Ethan and his mother, Marisol Alves, such that Graham would provide generous monetary support to Ethan and Ethan's mother, a former Brazilian model, but Ethan could never use Graham's last name. As it turned out, Ethan had a friend from Harvard Business School from an affluent family in Mexico City that had an investment firm that catered to wealthy Mexican nationals. According to Ethan, that friend owed Ethan some favors, as a result of past trading tips that Ethan had sent his way. Ethan bet Cade that he could arrange for some of his friend's cash-rich Mexican clients to enter into a credit default swap transaction with Cade *in connection with buying the BASA debt*. In fact, young Ethan had made it happen. Thus, Cade Graham originally got involved with Dmitry Basayev (and DB Biocontainment, LLC and BASA, Inc.) at the urging of Ethan—first, due to Ethan's connection to Dmitry Basayev from their days at Emory University together and, second, because Ethan sweetened the deal by finding some wealthy Mexican investors to provide credit default swaps in connection with his father's loans to BASA.

The problem now was that those wealthy Mexican investors—primarily friends and associates of Senor Mateo Guerrero, the leader of the *Oscuro* crime cartel—had lost their shirts on the BASA credit default swaps. And now Senor Mateo Guerrero and all his investing *amigos* from the cartel were out for blood from Graham—literally and figuratively. Under immense pressure, Graham satisfied his blood debt to the *Oscuro* car-

tel by giving them a majority interest in the REIT that owned and served as the landlord of *Isla Valladolid*.

Graham could always trust himself to come up with clever solutions, but, this time, his usually quick mind was barren of ideas. One day, when sitting in an airport bar, he remembered a story he had heard a while back about another hedge fund manager, Sam Israel, who faked his own death, when he was facing criminal fraud charges. Israel did not get away with the hoax. As Graham recalled, Israel had a girlfriend assisting him in the hoax—he figured the girlfriend probably screwed things up for him. **Graham was of the general view that women always screwed things up. Misogyny was among Graham's many qualities.** Graham also vaguely recalled another guy who faked his own death in a plane crash but was later captured. The more bourbon that Graham drank, the more he began to like this macabre idea of faking his own death. He figured he was smarter than those other fools and could successfully pull it off. He had enough money stashed away in Cayman and Isle of Man bank accounts that he could easily start a new life. Maybe it was time to exit stage left and live anonymously in some new place. Perhaps the Cook Islands.

Graham carefully did his research. He learned that there were consultants who would, for about $30,000, make you disappear. These were known as invisibility or disappearance services. One could also essentially buy do-it-yourself death kits, where you could order fake death certificates and make arrangements with black market morgues, and even funeral parlors who would do a fake wake for you if you wanted. The Philippines seemed to be the epicenter for pseudocide services like this. But Graham had no appetite for going to the Philip-

pines. Besides, that would not make any sense. He had no reason to be in the Philippines. On the other hand, people knew he had investments in Mexico—at least the people that he wanted to believe he was dead—and, thus, there would be no reason for folks to be suspicious if he suddenly died in Mexico.

After a few weeks of more research and soul-searching, Graham decided to go with a disappearance service in Mexico. In his research, Graham learned about certain disappearance services that could be found on the Dark Web with all communications occurring through ProtonMail (an encrypted email program). Graham had a personal laptop that was loaded with "TOR" anonymity software and which, thus far, he had dedicated solely to his occasional Dark Web and ProtonMail communications that were necessitated with the *Oscuro* cartel folks. Graham had learned of a site on the Dark Web called Enos.onion. **It looked like whomever was behind Enos.onion was into every black market imaginable: hit men for hire; hackers for hire; blackmail through "deep fakes"; bitcoin exchanges; offshore shell company formation; laundering funds through management of offshore accounts; shady investment opportunities; insider trading tips; sex trafficking; and disappearance services.** Basically, any illicit thing that one could think of could be arranged through Enos.onion. And the site looked surprisingly sophisticated, unlike a lot of the other options out there. No misspellings; no propaganda concerning government-insurrection or end-of-the-world; and none of the other tell-tale signs of so many of the bush-league fraudsters on the Dark Web.

Excerpt 8:
Pages 136
(emphasis added in **bold**)

Marcus returned to his villa outside Rosarito, Mexico and began his nightly trolling of the internet. On this night, he did searches for Cade Graham. He knew that was who "St. Jude" was. He figured it out soon into their long meeting. His internet searches confirmed it. He found countless pictures of him. The paparazzi loved Graham. Moreover, Braden found some articles in the financial press about Graham's forays into the healthcare sector and the recent troubles he was confronting with angry investors, the SEC, and his disputes with rating agencies regarding various comments and positions they had taken regarding companies in Graham's vast business empire. Nowhere could Marcus find any reference to Graham's investments in the DB Biocontainment underground facility or in *Isla Valladolid*—and certainly no hint of an association with *Oscuro*. **Marcus grinned thinking about how Graham had kept all this information secret with his byzantine web of offshore companies.** And now Marcus had insider information, so to speak, about Graham's widespread endeavors. He liked having insider information. That was his *modus operandi* in life. His stock in trade.