No. 3:21-cv-01974-X

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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

Debtor.

THE CHARITABLE DAF FUND L.P.; CLO HOLDCO LTD.; MARK PATRICK; SBAITI & COMPANY PLLC; MAZIN A. SBAITI; JONATHAN BRIDGES; and JAMES DONDERO,
APPELLANTS

v.

HIGHLAND CAPITAL MANAGEMENT, L.P.,
APPELLEE.

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF TEXAS
BANKRUPTCY CASE NO. 19-34054 (SGJ)

MOTION TO STRIKE DAF APPELLANTS' NOTICE OF SUPPLEMENTAL AUTHORITY OR, IN THE ALTERNATIVE, FOR LEAVE TO RESPOND

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Appellee Highland Capital Management, L.P. ("Highland") moves to strike the 1,287-word notice of supplemental authority (Dkt. No. 33) filed by the Charitable DAF Fund, L.P., CLO Holdco, Ltd., Mark Patrick, Sbaiti & Company, PLLC, Mazin A. Sbaiti, and Jonathan Bridges (together, the "DAF Appellants") because it ignores the 350-word limit set by the applicable Federal Rule of Bankruptcy Procedure. In the alternative, Highland moves for leave to file the 1,367-word response, attached hereto as **Exhibit A**, to the DAF Appellants' overlength notice.

This bankruptcy appeal is governed by the appellate rules in Part VIII of the Federal Rules of Bankruptcy Procedure. Fed. R. Bankr. P. 8001(a). Rule 8014(f) in that section provides that a party may advise the district court clerk of a pertinent and significant authority after that party's brief has been filed in a submission the body of which "must not exceed 350 words." Fed. R. Bankr. P. 8014(f).

Ignoring Rule 8014(f)'s clear requirement—and failing to even acknowledge the applicable rule—the DAF Appellants submitted a notice totaling 1,287 words. That is almost *four times* the maximum length of a notice of supplemental authority permitted by Rule 8014(f). The DAF Appellants did not seek, and so did not obtain, leave to file an overlength notice. Accordingly, the DAF Appellants' notice violates the applicable rule, and the Court should strike the DAF Appellants' filing. *See In re Sawtelle Partners, LLC*, No. 2:16-BK-21234-BR, 2019 WL 2855786, at *5 n.4

(B.A.P. 9th Cir. July 1, 2019) (striking a filing for exceeding Rule 8014(f)'s 350-word limit).

In the alternative, if the Court chooses to consider the DAF Appellants' impermissibly overlength submission, then Highland respectfully requests leave to file a response of similar length. Rule 8014(f) limits responses to notices of supplemental authority to 350 words. The DAF Appellants' overlength notice brazenly mischaracterizes the Fifth Circuit's recent decision—which, in fact, squarely supports Highland's arguments for affirmance in this appeal. A response of similar length, Highland respectfully submits, would assist the Court in identifying and addressing the DAF Appellants' many errors. Accordingly, Highland moves for leave to file the 1,367-word response, attached hereto as **Exhibit A**, to the DAF Appellants' notice.

For the foregoing reasons, Highland respectfully requests that the Court strike the DAF Appellants' notice of supplemental authority or, in the alternative, allow Highland leave to file the attached response.

Dated: August 26, 2022

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CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. Bankr. P. 8013(f)(3)(A) because this document contains 389 words.

2. This document complies with the typeface requirements of Fed. R. Bankr. P. 8015(a)(5) and the type-style requirements of Fed. R. Bankr. P. 8015(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word, typeface Times New Roman, 14-point type (12-point for footnotes).

/s/ Zachery Z. Annable
Attorney for Appellee
Dated: August 26, 2022

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2022, the foregoing Motion to Strike DAF Appellants' Notice of Supplemental Authority or, in the Alternative, for Leave to Respond was electronically filed using the Court's CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

/s/ Zachery Z. Annable
Attorney for Appellee

EXHIBIT A

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APPELLEE'S RESPONSE TO DAF APPELLANTS' NOTICE OF SUPPLEMENTAL AUTHORITY

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In *NexPoint Advisors, L.P. v. Highland Capital Management, L.P. (In re Highland Capital Management, L.P.)*, No. 21-10449, 2022 WL 3571094 (Aug. 19, 2022), the Fifth Circuit held that the gatekeeper provision in Highland's confirmed plan of reorganization is "**perfectly lawful**" in all respects. *Id.* at *13 (emphasis added). Appellants' violation of related and similar gatekeeper provisions led to the contempt finding at issue in this appeal. The Fifth Circuit's decision straightforwardly **forecloses** Appellants' asserted challenges to the legality of the gatekeeper provisions they violated.

In arguing the exact opposite, the notice of supplemental authority (Dkt. No. 43) filed by the Charitable DAF Fund, L.P., CLO Holdco, Ltd., Mark Patrick, Sbaiti & Company, PLLC, Mazin A. Sbaiti, and Jonathan Bridges (together, the "DAF Appellants") brazenly misstates the Fifth Circuit's decision. The Fifth Circuit affirmed the bulk of the bankruptcy court's order confirming Highland's reorganization plan, including its gatekeeper provision. That provision requires Appellants and others to obtain the bankruptcy court's authorization before commencing or pursuing claims against (among others) Highland's CEO and independent director, James P. Seery, Jr. 2022 WL 3571094, at *14.

The *only* portion of Highland's plan the court did not affirm in full was its *separate* exculpation provision. The court excised certain non-debtors from that exculpation provision. But the decision could hardly state any more clearly that it

did *not* likewise excise those same non-debtors from the ambit of the "perfectly lawful" gatekeeper provision.

The Fifth Circuit's decision expressly states—in passages that the DAF Appellants simply ignore—that "[w]e reverse only insofar as the plan exculpates certain non-debtors in violation of 11 U.S.C. § 524(e), strike those few parties from the plan's exculpation, **and affirm on all remaining grounds**." *Id.* at *1 (emphasis added). "Though the injunction and gatekeeping provisions are sound," the Fifth Circuit added, "the exculpation of certain non-debtors exceeds the bankruptcy court's authority." *Id.* at *10.[1]

Accordingly, the bankruptcy court also had the discretion and legal authority to issue its two prior orders containing substantially similar gatekeeper provisions covering Seery. The Fifth Circuit's decision on that score is dispositive on most of Appellants' misguided arguments in this appeal.

In an attempt to avoid that obvious consequence of the Fifth Circuit's ruling, the DAF Appellants try to muddy the waters with several plain mischaracterizations of the Fifth Circuit's analysis. *First*, the DAF Appellants conflate two separate issues—exculpation and gatekeeping. They argue (at Notice 2) that the Fifth

[1] Even were that not the case—and it demonstrably is—a decision that a confirmation order cannot exculpate certain non-debtors after a reorganization plan's effective date because section 524, which authorizes discharge of only the Debtor, the Committee, its members and the Independent Directors, has no bearing on and would not resolve whether a bankruptcy court can set estate professionals' standard of care during the bankruptcy proceedings in retention orders entered during the case.

Circuit's modification of the confirmed plan's exculpation provision somehow establishes that the bankruptcy court "likewise lacked authority to extend any gatekeeping orders to such non-exculpable persons." Not so. That contention plainly contradicts the Fifth Circuit's affirmance of the Highland plan's gatekeeper provision in full and without removing *any* parties from its protection. *See* 2022 WL 3571094, at *1, 10, 13, 14.

Exculpation and gatekeeper provisions serve distinct purposes; exculpation concerns a limitation of liability whereas gatekeeper provisions protect estates and professionals from bad-faith litigation without exculpating them from any liability. *See id.* at *10. The Fifth Circuit thus appropriately analyzed these distinct provisions in separate sections of its opinion. The DAF Appellants conspicuously neglect even to address the Fifth Circuit's actual analysis of the plan's gatekeeper provision, and focus entirely on its *separate* discussion of exculpation.

Second, the DAF Appellants (at Notice 3) get exactly backwards the Fifth Circuit's discussion of the *res judicata* effect of the two prior bankruptcy court orders at issue in this appeal. The Fifth Circuit held that the *res judicata* effect of those prior orders did not affect its analysis of the confirmation order's *new* exculpation provision. 2022 WL 3571094, at *12 n.15. But the court of appeals *agreed* with the bankruptcy court and Highland that those two orders have "ongoing *res judicata* effects" in Highland's bankruptcy proceedings. *Id.* It rejected any

attempt "to roll back the protections" in those two orders because "such a collateral attack is precluded." *Id.* It also precluded Appellants' attempt to argue those orders are not *res judicata* because they were not final. *See* DAF Reply Br. 10. The Fifth Circuit expressly recognized that these prior orders were final and are binding.

That is an *independent* reason why Appellants cannot attack the gatekeeper provisions in this appeal: Appellants may not attack the prior orders collaterally, by appealing from a contempt finding for violating them, after having failed to object or appeal from those orders when they were issued. *See* Appellee's Br. 25-26.

Third, the DAF Appellants (at Notice 4) mischaracterize the Fifth Circuit's analysis to argue that the *Barton* doctrine authorizing gatekeeper provisions is limited "to the debtor in possession, trustees, and independent directors," and so does not cover Seery in his role as Highland's court-approved CEO (as opposed to in his role as a court-approved independent director). Once again, that is not what the Fifth Circuit said.

Rather, the court explained that the *Barton* doctrine allows gatekeeper protections of a "trustee or *other bankruptcy-court-appointed officer*." 2022 WL 3571094, at *13 (quoting *Villegas v. Schmidt*, 788 F.3d 156, 159 (5th Cir. 2015)) (emphasis added). Seery's appointments as independent director and CEO were both approved by the bankruptcy court in the two orders containing the gatekeeper provisions at issue here. *See id.* at n.17 (explaining that there is no difference

between a court "approved" and "appointed" officer). The Fifth Circuit also squarely rejected the argument that *Barton* does not apply to Highland's bankruptcy, because neither a receiver nor a trustee had been appointed, and held that Highland was "for all practical purposes . . . a debtor in possession entitled to the rights of a trustee." *Id.* In short, the Fifth Circuit's decision leaves no daylight for Appellants' arguments in this appeal that the relevant orders' gatekeeper provisions did not lawfully apply to the filing and pursuit of claims against Seery.

Finally, the DAF Appellants correctly note (at Notice 5) that the Fifth Circuit left the determination of whether a claim falls under the *Barton* doctrine's statutory exception (28 U.S.C. § 959(a)) to the bankruptcy and district courts in the first instance. *See* 2022 WL 3571094, at *13 n.18. But they err in implying that, in doing so, the Fifth Circuit undermined the bankruptcy court's discretion to order gatekeeping provisions. To the contrary, the Fifth Circuit underscored the propriety of leaving questions about the bankruptcy court's jurisdiction, including with respect to the applicability of § 959(a), to the bankruptcy court in the first instance in fulfilling its role as gatekeeper. 2022 WL 3571094, at *13 & n.18. Indeed, the Fifth Circuit's emphasis that the bankruptcy court must determine the propriety of claims in the first instance contradicts Appellants' argument in this appeal that they

complied with the bankruptcy court's gatekeeper provisions by seeking *the district court's* authorization to sue Seery. *See* DAF Br. 19 & n.5; DAF Reply Br. 12.[2]

For all of these reasons, the Fifth Circuit's decision in several ways, each independently sufficient, demonstrates the *lawfulness* of gatekeeper provisions ordered by the bankruptcy court and at issue in this appeal. It thus provides further support for the bankruptcy court's contempt finding and sanction after Appellants ignored and failed to comply with those provisions. For the reasons in the Fifth Circuit's opinion and those discussed in Highland's brief, this Court should affirm.

[2] The Fifth Circuit noted, in a footnote, that Section 959(a)'s application would be left to "the bankruptcy *and district courts* in the first instance." 2022 WL 3571094, at *13 n.18 (emphasis added). That acknowledgment that the district court might ultimately pass on this question does not undermine the court's clear statement that the bankruptcy court must be afforded the initial opportunity to address jurisdictional issues raised by the gatekeeper provision. *Id.* at *13 (leaving questions about the bankruptcy court's jurisdiction "to the bankruptcy court in the first instance").

Dated: August 26, 2022

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