
No. 22-11036

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

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

Debtor

**THE CHARITABLE DAF FUND, L.P.; CLO HOLDCO, LIMITED; MARK
PATRICK; SBAITI & COMPANY, P.L.L.C.; MAZIN A. SBAITI; JONATHAN
BRIDGES,**

APPELLANTS

v.

HIGHLAND CAPITAL MANAGEMENT, L.P.,

APPELLEE.

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

Debtor.

JAMES DONDERO,

APPELLANT,

v.

HIGHLAND CAPITAL MANAGEMENT, L.P.,

APPELLEE.



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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
CASE NO. 3:21-CV-01974-X

**APPELLEE'S UNOPPOSED MOTION FOR LEAVE TO FILE
POST-ARGUMENT LETTER**

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that:

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

- (b) That the following listed persons and entities, as described in the fourth sentence of Rule 28.2.1, have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

- 1. Defendants - Appellants:**
 - The Charitable DAF Fund, L.P.**
 - CLO Holdco, Limited**
 - Mark Patrick**
 - Sbaiti & Company PLLC**
 - Mazin Sbaiti**
 - Jonathan Bridges**
 - James Dondero**

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2. Appellee (Debtor):
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Counsel for Appellee

Pursuant to Federal Rule of Appellate Procedure 27, Appellee Highland respectfully requests leave to file the attached 350-word letter. The DAF Appellants and Mr. Dondero do not oppose this motion so long as they are given an equal opportunity to respond. Highland does not oppose that request.

1. On September 5, 2023, a panel of this Court consisting of Circuit Judges Dennis, Engelhardt, and Oldham, heard oral argument in the above-captioned appeal.

2. The panel raised the question of whether *Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. 101 (2017), affected this Court's case law about awarding fees for sanctioned conduct. Though the parties' briefs cited *Goodyear*, no party suggested that pre-*Goodyear* decisions of this Court lack binding effect after *Goodyear*.

3. Highland filed a post-argument letter with the Court addressing this new issue on September 6.

4. On September 7, the Clerk's Office informed Highland that leave of Court was required to file its letter.

5. Accordingly, Highland respectfully requests leave to file the attached 350-word letter addressing the new issue raised by the Court at oral argument.

Dated: September 8, 2023

Respectfully submitted,

**KRAMER LEVIN NAFTALIS &
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/s/ Roy T. Englert, Jr.

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume, typeface, and type-style requirements of Federal Rules of Appellate Procedure 27(d) and 32(c)(1), and Fifth Circuit Rules 27.4, 32.1, and 32.2. The motion contains 158 words and was prepared using Microsoft Word in Times New Roman 14-point font.

/s/ Roy T. Englert, Jr.
Counsel for Appellee
September 8, 2023

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2023 the foregoing motion was electronically filed using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

/s/ Roy T. Englert, Jr.
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September 6, 2023

BY ECF

Lyle W. Cayce, Clerk
United States Court of Appeals for the Fifth Circuit
Office of the Clerk
F. Edward Hebert Building
600 S. Maestri Place
New Orleans, LA 70130

Re: No. 22-11036, *The Charitable DAF Fund, et al. v. Highland Capital Management*, (heard September 5, 2023, before Circuit Judges Dennis, Engelhardt, and Oldham)

Dear Mr. Cayce:

I write on behalf of Appellee Highland regarding the impact of *Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. 101 (2017), on this Court’s case law awarding fees for sanctioned conduct. The parties’ briefs cited *Goodyear*, but no party suggested that pre-*Goodyear* decisions of this Court lack binding effect after *Goodyear*. A Member of this Court suggested that possibility for the first time at oral argument.

In *Goodyear*, the Court held that a compensatory civil sanction may award only fees that “would not have [been] paid but for the [other party’s] misconduct.” 581 U.S. at 109. The Ninth Circuit’s holding below, which the Court reversed, allowed fees to be awarded “without any need to find a causal link between [fees incurred and] the sanctionable conduct.” *Id.* at 106.

Goodyear is entirely consistent with Fifth Circuit case law. This Court has always required a causal connection between sanctions awarded and the sanctioned conduct. *See, e.g., Cook v. Ochsner Found. Hosp.*, 559 F.2d 270, 272 (5th Cir. 1977) (compensatory award includes “attorneys’ fees necessarily expended in bringing an action to enforce that order violated by the disobedient parties” (cleaned up)). That remains this Court’s approach. *Ravago Americas LLC v. Vinmar International* reiterated that, for a “sanction to be compensatory, it must be measured in some degree by the pecuniary injury caused by the act of disobedience.” 832 F. App’x 249, 255 (5th Cir. 2020) (cited by the district court’s opinion at nn.75, 81). Though unpublished, *Ravago* relied on Supreme Court and Fifth

Lyle W. Cayce, Clerk
September 6, 2023



Circuit precedent that *Goodyear* did not disturb. *See id.* at 254-55 (citing *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 444 (1911); *In re Bradley*, 588 F.3d 254, 263 (5th Cir. 2009)).

The courts below found appropriate causation here and awarded fees for only expenses incurred in pursuing the contempt motion. That included discovery and trial proceedings about who was responsible for violating the bankruptcy court's orders—none of which would have been necessary had Appellants complied with those orders. *Cook*, cited above, is a published and therefore binding opinion supporting that approach, and undisturbed by *Goodyear*.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Roy T. Englert, Jr.", written over a printed name.

Roy T. Englert, Jr.

cc: Counsel of Record (via ECF)