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

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| **In re:**<br><br>**HIGHLAND CAPITAL MANAGEMENT, L.P.,**<br><br>**Debtor.** | §<br>§<br>§<br>§<br>§<br>§ | **Chapter 11**<br><br>**Case No. 19-34054-sgj11** |
| **HIGHLAND CAPITAL MANAGEMENT, L.P.,**<br><br>**Plaintiff,**<br><br>**v.**<br><br>**HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., et al.**<br><br>**Defendants.** | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | **Civ. Act. No. 3:21-cv-00881-X**<br><br>**(Consolidated with 3:21-cv-00880-X, 3:21-cv-01010-X, 3:21-cv-01378-X, 3:21-cv-01379-X)** |

**DEFENDANTS' MOTION TO STRIKE PORTIONS OF HIGHLAND CAPITAL MANAGEMENT, L.P.'S REPLY TO OBJECTIONS TO MOTION TO DEEM THE DONDERO ENTITIES VEXATIOUS LITIGANTS AND FOR RELATED RELIEF [DKT. 189], OR FOR ALTERNATIVE RELIEF, AND BRIEF IN SUPPORT**

## PRELIMINARY STATEMENT

1. Movants James Dondero, Get Good Trust, Highland Capital Management Fund Advisors, L.P., NexPoint Asset Management, L.P., NexPoint Real Estate Partners, LLC, Strand Advisors, Inc., and The Dugaboy Investment Trust ("Movants") move to strike portions of Highland Capital Management, L.P.'s Reply to Objections to Deem the Dondero Entities Vexatious Litigants and for Related Relief [Dkt. 189] ("Reply Brief") because the Reply Brief contains new argument and citations to evidence that cannot fairly be characterized as responsive to any arguments made in Movants' opposition brief. Highland Capital Management, L.P. ("Highland") is seeking a severe and sweeping sanction against Movants, yet Highland waited until its Reply Brief to proffer several brand-new factual arguments and 2,317 pages of new evidence in an effort to bolster its positions. The inclusion of these new arguments and evidence is highly prejudicial to Movants, and that prejudice should be rectified. Movants' motion to strike should be granted.

2. In the alternative, Movants request leave of Court to file a sur-reply not exceeding ten pages to address Highland's new arguments and evidence.

## STATEMENT OF FACTS

3. Highland filed its Motion to Deem the Dondero Entities Vexatious Litigants and for Related Relief ("Vexatious Litigant Motion") [Dkt. 136] on July 14, 2023. In support of the Vexatious Litigant Motion, Highland filed a 35-page memorandum of law in support [Dkt. 137] and a 2,934-page appendix [Dkt. 138]. Exhibit 1 to the Appendix was a dense, 15-page chart purporting to describe the supposedly vexatious actions taken by the Dondero Entities in the context of the Highland chapter 11 bankruptcy case. Dkt. 138 at pp. 2-16. In reality, that chart

contained a litany of mischaracterizations and argument at odds with the evidence of record.[1] In addition to the chart, Highland attached another 79 exhibits comprising approximately 2,916 pages.

4. On December 16, 2023, Movants filed their Memorandum of Law in Opposition to Motion to Deem Various Parties Vexatious Litigants and for Related Relief ("Opposition"). Dkt. 173. Several other entities and individuals (whom Highland also seeks to have deemed "vexatious"), represented by independent outside counsel, filed separate opposition briefs. *See* Dkts. 166 (filed by Highland Income Fund, NexPoint Strategic Opportunities Fund (n/k/a NexPoint Diversified Real Estate Trust), Highland Global Allocation Fund, and NexPoint Capital, Inc.); Dkt. 167 (filed by The Charitable DAF Fund, L.P. and CLO HoldCo, Ltd.); Dkt. 168 (filed by Nancy Dondero); Dkt. 171 (filed by Hunter Mountain Investment Trust). In general, the briefs filed by Movants and the other entities and individuals (the "Targeted Parties"), challenged Highland's characterization of the facts, including in particular Highland's unsupported contention that all Targeted Parties should be treated alike because all are under the control of Mr. Dondero. *See, e.g.*, Dkt. 173 at pp. 23-26, 45. The Targeted Parties also argued that this Court lacks the jurisdiction to order the relief requested and that the sweeping relief sought is unprecedented and inappropriate. Dkts. 166-168, 171, 173.

[1] For example, in the very first entry of the chart, Highland contends that the Bankruptcy Court denied a motion by HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC) ("HCRE") to withdraw its proof of claim (disputing Highland's ownership in a company called SE Multifamily) because "Dondero would not agree to refrain from filing the same claim in a different forum." Dkt. 138-1, Appx. 00002. But Mr. Dondero testified that "HCRE [would] not challenge the estate's ownership or equity interest in SE Multifamily subject to the company agreement," and "HCRE [was] waiving any appeal right to that determination as a condition to withdrawing the proof of claim." Dkt. 138-64, Appx. 01447 at 40:9-17. When Highland's counsel complained that these representations were too "conditional," *see id.* at Appx. 01447-48 at 40:22-41:14, Mr. Dondero expressly agreed to "an order denying the proof of claim with prejudice" and that "HCRE [would] not challenge the equity ownership" of Highland in SE Multifamily. *Id.*, Appx. 01451 at 44:1-6. Inexplicably, the Bankruptcy Court refused to accept these unequivocal representations and acceded to Highland's demand for a full evidentiary hearing on the merits of the proof of claim that HCRE sought to abandon.

5. After receiving the Targeted Parties' opposition briefs, Highland sought (with the Targeted Parties' acquiescence) this Court's approval of an extension of time to file a reply brief and also asked the Court's permission to file an 89-page reply. *See* Dkt. 181. On January 17, 2024, the Court granted Highland's request in part, allowing the extension of time but confining Highland to a 25-page reply brief. *See* Dkt. 182.

6. On February 9, 2024, Highland filed its Reply Brief. Dkt. 189. Rather than simply responding to the arguments made by the Targeted Parties in their opposition briefs, Highland took the opportunity to flood the record with new factual arguments and thousands of pages of new evidence. In particular, Highland now highlights various "recent developments that it argues "demonstrate that the Dondero Entities will never voluntarily curb their wasteful and bitter litigation crusade." Dkt. 189 at ¶ 2. In addition, seemingly aware that it failed to offer any argument or support for its claim that all Targeted Parties are Dondero-controlled, Highland now includes pages of argument about why this Court should deem them so. *Id.* at ¶¶ 5-17.[2] Highland even goes so far as to accuse various outside counsel of participating in the conspiracy, simply because some of those firms have represented one or more Targeted Parties in disputes relating to the Highland bankruptcy over many years. *Id.* at ¶ 7.

7. Worse still, in a "Supplemental Appendix" filed simultaneously with its Reply Brief, Highland has taken yet another bite at the apple by revising its misleading 15-page chart, editing numerous entries to add new characterizations of procedure and argument, and dumping 25 new exhibits comprising a whopping 2,317 pages into the record. *See* Supplemental Appendix, Dkt. 190. Eleven of those exhibits *pre-date* the filing of Highland's Vexatious Litigant Motion,

[2] For example, Highland misleadingly contends that Dondero "admits he controls . . . Dugaboy" (Reply Brief, Dkt. 189 at ¶ 8 & n.7), but the referenced material actually is a compilation of entities ***owned or*** controlled by Dondero and clearly states that Dondero is the ***beneficiary***, ***not the trustee*** of Dugaboy. Opposition, Dkt. 173, at 23-24. Nonetheless, Highland is banking on having the last word to mislead the Court.

several of them are complex filings with United States and its Canadian regulatory authorities, several are voluminous transcripts of court proceedings, and one contains a never-filed sanctions motion threatened against outside counsel. By filing the Supplemental Appendix, Highland has roughly doubled the evidence it is asking this Court to consider in connection with the Vexatious Litigant Motion, all without seeking leave of Court or giving Movants (or the other Targeted Parties) the opportunity to address the new arguments and evidence.

## I. THE COURT SHOULD STRIKE THE NEW ARGUMENTS AND EVIDENCE CITED FOR THE FIRST TIME IN HIGHLAND'S REPLY BRIEF

8. It is axiomatic that "the scope of the reply brief must be limited to addressing the arguments raised by the response. The reply brief is not the appropriate vehicle for presenting new arguments or legal theories to the court.'" *Staton Holdings, Inc. v. First Data Corp.*, No. 3:04-cv-2321-P, 2005 WL 2219249, at *4 n.1 (N.D. Tex. Sept. 9, 2005) (quoting *United States v. Feinberg*, 89 F.3d 333, 340-41 (7th Cir. 1996)); *see also In re Reagor-Dykes Motors, LP*, No. 18-50214-RLJ-11, 2022 WL 468065, at *4 (Bankr. N.D. Tex. Feb. 15, 2022) ("A court need not consider late-filed evidence or new facts that are raised for the first time in a reply brief.") (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 894-98 (1990). To rectify the injustice created when a movant raises new arguments or cites new evidence for the first time in a reply brief, a court may strike the new evidence or arguments raised. *See White v. City of Red Oak, Texas*, No. 3:13-cv-4477-P, 2014 WL 11460871, at *1 (N.D. Tex. July 31, 2014) (recognizing that striking newly raised evidence and argument is an appropriate remedy).

9. As set forth above, Highland's Reply Brief is replete with new arguments and citations to evidence not mentioned in the Vexatious Litigant Motion. This is highly prejudicial to Movants, all of whom have not had any opportunity to address the new information and will not have any opportunity to do so prior to the resolution of Highland's motion. The prejudice is

particularly acute where, as here, Highland is asking this Court to deem a litany of entities and individuals "vexatious" and to impose on them a wide-ranging and extraordinary pre-filing injunction that would prohibit the Targeted Parties from acting in any jurisdiction, wherever located, without this Court's prior permission.

10. Highland's decision to sabotage Movants with a whole new body of evidence and arguments in its Reply Brief is highly prejudicial and is a problem that cannot be easily rectified. For example, notwithstanding that Highland bore the burden to demonstrate that *each* Targeted Party has acted in a manner warranting a vexatious litigant sanction, *see Baum v. Blue Moon Ventures, LLC*, 513 F.3d 181, 187 (5th Cir. 2008), Highland chose not to make that affirmative showing in its Vexatious Litigant Motion. Nor did Highland's memorandum of law in support of the Vexatious Litigation Motion remotely suggest that various outside counsel had somehow participated in the "coordinated" actions of the various Targeted Parties. Because Highland saved these arguments for its Reply Brief, Movants have been deprived of the opportunity to provide a counter-narrative. That is unfair, and striking the new arguments and evidence is the appropriate remedy.

11. Similarly, rather than confining itself to responding to arguments made in the Targeted Parties' various opposition briefs, Highland now raises brand new allegations against the Targeted Parties as to why Highland believes they should be deemed vexatious, citing various developments that have arisen in the period since Highland filed its Vexatious Litigant Motion and its supporting documents and attaching a revised, densely-worded 15-page chart that purports to update this Court on those developments. *See* Dkt. 189 at ¶ 2; Dkt. 190, Exs. 1, 12-14, 16, and 25. Movants obviously had no reason or opportunity to address these brand-new allegations when they filed their Opposition. These new arguments and the related evidence (including specifically

Exhibits 1, 4, 6, 12, 13, 14, 16, and 18-23), should be stricken, along with Reply ¶¶ 2, 6-15, 17, 23, and 38.

12. Finally, to the extent that any of the new evidence cited by Highland can be characterized as directly responsive to arguments made by the various Targeted Parties in their opposition briefs, the Court should still strike the evidence. "It is well established that a party may not file evidence with a reply brief without first obtaining leave of court." *United States v. City of Dallas, Tex.*, No. 3:09-cv-142-0, 2011 WL 4912590, at *4 (N.D. Tex. Sep. 27, 2011); *Racetrac Petroleum, Inc., v. J.J.'s Fast Stop, Inc.*, No. 3:01-CV-1397, 2003 WL 251318, at *19 (N.D. Tex. Feb. 3, 2003) (same). Highland failed to seek this Court's permission to file additional evidence with its Reply Brief, and its failure to do so is fatal. The Court should grant Movants' motion to strike.

## II. IN THE ALTERNATIVE, THE COURT SHOULD GRANT MOVANTS LEAVE TO FILE A SUR-REPLY

13. As the courts of this district recognize, another way to remedy the prejudice occasioned by a movant's raising new arguments and evidence in a reply brief is to permit the non-movant to file a sur-reply. *See Pennsylvania Gen. Ins. Co. v. Story*, No. 3:03-cv-0330-G, 2003 WL 21435511, at *1 (N.D. Tex. June 10, 2003) ("no palpable injustice exists where nonmovants are given a chance to respond") (internal citations and quotations omitted) (denying motion to strike but granting leave to file sur-reply); *see also Blanchard & Co. v. Heritage Cap. Corp.*, No. 3:97-v-0690-H, 1997 WL 757909, at *1 (N.D. Tex. Dec. 1, 1997) (same). Indeed, a non-movant "*must* be afforded the opportunity to address . . . 'new evidence' if it is to be considered." *See Budri v. Firstfleet Inc.*, No. 3:19-CV-0409-N-BH (June 10, 2020 N.D. Tex.) at Dkt. 176 (granting non-movant leave to file sur-reply) (emphasis added).

14. At a minimum, Movants should be afforded the opportunity to respond to Highland's new allegations and evidence, particularly in a proceeding as serious as this one. Accordingly, should the Court deny Movants' motion to strike, Movants respectfully request that the Court grant Movants leave to file a sur-reply not to exceed 10 pages. To minimize the disruption to the schedule occasioned by this requested alternative relief, Movants would commit to filing their sur-reply within ten business days of the Court's order granting leave.

## III. CONCLUSION

As the original movant, it was Highland's responsibility to raise any arguments and cite any evidence it wished to rely upon to support its Vexatious Litigant Motion in its opening brief. Highland's failure to do so substantially prejudices Movants. This Court should grant Movants' motion to strike or, in the alternative, grant Movants leave to file a sur-reply to address the new arguments raised and new evidence raised for the first time in Highland's Reply Brief.

Respectfully submitted,

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**CERTIFICATE OF CONFERENCE**

On February 23,2024 I had several communications with John Morris counsel for Debtor to attempt to reach agreement on the relief sought in this motion. After at least two conversations, Mr. Morris asked that I put the request in writing, listing the offending exhibits and paragraphs and he would respond within an hour. I did so and had no response until this morning (February 26) when he inquired whether we were still seeking to conference given that other parties had already made similar motions, one of which anticipated apparently that we were unlikely to reach agreement with Debtor. I answered at 9:15 am this morning that the clients I represented (along with Ms. Ruhland's) were still serious about trying to at least narrow the issues. It is now 8 pm and having had no response I assume further conferencing would be fruitless.

*/s/Deborah Deitsch-Perez*
Deborah Deitsch-Perez

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on February 26, 2024, a true and correct copy of this document was served electronically via the Court's CM/ECF system to the parties registered or otherwise entitled to receive electronic notices in this case.

*/s/Deborah Deitsch-Perez*
Deborah Deitsch-Perez