

Case No. 3:21-cv-01585-S

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**THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS**

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In re: HIGHLAND CAPITAL MANAGEMENT, L.P.

Debtor,

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THE CHARITABLE DAF FUND, L.P., and  
CLO HOLDCO, LTD.,

Appellants,

v.

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Appellee.

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On Appeal from the United States Bankruptcy Court  
for the Northern District of Texas, Case No. 19-34054-sgj11  
Hon. Stacey G. C. Jernigan

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**APPELLEE'S RESPONSE TO APPELLANTS'  
PARTIALLY OPPOSED MOTION FOR EXTENSION OF TIME TO FILE  
APPELLANTS' OPENING BRIEF**

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Highland Capital Management, L.P., the reorganized debtor and appellee in the above-captioned case (“Highland”), submits this response (the “Response”) to *Appellants’ Partially Opposed Motion for Extension of Time to File Appellants’ Opening Brief* (the “Motion”)<sup>1</sup> filed by The Charitable DAF Fund, L.P. (the “DAF”), and CLO Holdco, Ltd. (“CLOH” and together with the DAF, “Appellants”). In support of its Response, Highland states as follows.

### **PRELIMINARY STATEMENT**<sup>2</sup>

Appellants ask this Court for a thirty-day extension<sup>3</sup> to file their opening brief in this Appeal. This is Appellants’ second request for a delay in this nascent action. They also filed the Abatement Motion<sup>4</sup> seeking a stay of their own Appeal.

Highland understands the Court may be surprised over litigation regarding a briefing extension. However, the relief sought in the Motion is not an isolated request but part of a broader, substantive litigation strategy. Like the Abatement Motion, the Motion is an example of coordinated efforts to waste Reorganized Debtor resources, delay adjudication of pending disputes, and impede the wind-

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<sup>1</sup> Concurrently herewith, Highland is filing the *Appendix in Support of Appellee’s Response to Appellant’s Partially Opposed Motion for Extension of Time to File Appellant’s Opening Brief* (the “Appendix”). Citations to the Appendix are notated as follows: Ex. #, Appx. #. The Motion is Ex. 1, Appx. 1-7.

<sup>2</sup> All capitalized terms used but not defined in this Preliminary Statement have the meanings given to them below.

<sup>3</sup> Appellants asked Highland to consent to a sixty, not thirty, day extension. Appellants never informed Highland they were amending their request to thirty days.

<sup>4</sup> Because of the overlap in the relief requested in the Motion and Abatement Motion, Highland incorporates the entirety of the Abatement Motion herein by reference.

down of Highland's estate. This strategy has been engineered by James Dondero and his controlled affiliates, like Appellants, and includes approximately twenty stay, abatement, or continuance motions. All told, Highland is involved in countless litigations because of Mr. Dondero's actions in the Bankruptcy Court, the District Court, the Fifth Circuit, and Texas state court.

The Court should deny the Motion because there is no reason why Appellants need an additional thirty days to file their opening brief. As discussed in the Abatement Response, the issues in this Appeal are neither novel nor complex. They involve the application of *res judicata* and a determination whether the Bankruptcy Court properly ruled that Appellants did not meet the standards for reconsideration under Federal Rule of Civil Procedure ("FRCP") 60(b). Yet Appellants conflate the issues in the Fifth Circuit appeal with this Appeal. The Fifth Circuit appeal will not affect the Appeal before this Court. Moreover, Appellants' request for relief because of Sbaiti's competing demands does not justify an extension. Sbaiti conveniently failed to mention that its workload consists of five other actions against Highland or affecting Highland (not counting appeals). Any inconvenience to Sbaiti caused by their existing briefing schedule is of their own making.

## RESPONSE

### **A. Background to the Motion and Appeal**

On July 16, 2020, the Bankruptcy Court entered the *Order Approving Debtor’s Motion under Bankruptcy Code Sections 105(a) and 363(b) Authorizing Retention of James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative Nunc Pro Tunc to March 15, 2020* (Ex. 2, Appx. 8-20) (the “Appointment Order”).<sup>5</sup>

On February 22, 2021, the Bankruptcy Court<sup>6</sup> entered the *Order Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (ii) Granting Related Relief* (Ex. 3, Appx. 21-182) (the “Confirmation Order”).<sup>7</sup> The Plan<sup>8</sup> became effective on August 11, 2021 (Ex. 5, Appx. 250-254).

During Highland’s bankruptcy, Mr. Dondero told Mr. Seery he would “burn down” Highland if he did not get his way and thereafter began a litigation crusade intended to delay or prevent implementation and consummation of the Plan and to

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<sup>5</sup> No party objected to the Appointment Order or the underlying motion or appealed the Appointment Order.

<sup>6</sup> “Bankruptcy Court” refers to the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, which is overseeing Highland’s chapter 11 bankruptcy proceedings.

<sup>7</sup> Appellants did not object to the Confirmation Order and are not parties to the Fifth Circuit appeal.

<sup>8</sup> “Plan” refers to *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* (Ex. 4, Appx. 183-249).

harass Highland and Mr. Seery. Ex. 3, Appx. 74-77.<sup>9</sup> As part of this strategy, Appellants filed the *Original Complaint* (the “Complaint”) (Ex. 7, Appx. 270-296) on April 12, 2021, in the U.S. District Court for the Northern District of Texas, Dallas Division (the “District Court”) seeking to hold Highland, among others, responsible for losses Appellants allegedly incurred as a result of a settlement between Highland and a prepetition creditor.

On April 19, 2021, with no notice to Highland, Appellants moved to amend the Complaint to add Mr. Seery as a defendant in violation of the Appointment Order. Ex. 8, Appx. 297-307. In response, Highland moved to hold Appellants, Mark Patrick (their alleged control person), their law firm (Sbaiti & Company PLLC (“Sbaiti”), and Mr. Dondero (collectively, the “DAF Parties”) in contempt of court for violating the Appointment Order (Ex. 9, Appx. 308-317) (the “Contempt Motion”). The Contempt Motion was granted after an evidentiary hearing. *In re Highland Capital Mgmt., L.P.*, 2021 Bankr. LEXIS 2074 (Bankr. N.D. Tex. Aug. 3, 2021). Appellants’ have appealed the order finding them in contempt (the “Contempt Appeal”).<sup>10</sup>

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<sup>9</sup> Exhibit 6 (Appx. 255-269) to the Appendix lists the substantial litigation involving Mr. Dondero and Highland in furtherance of his strategy of harassment.

<sup>10</sup> *Charitable DAF Fund, L.P., et al v. Highland Capital Management L.P.*, Case No. 3:21-cv-1974-X (N.D. Tex.).

After Highland filed the Contempt Motion, Appellants belatedly filed the *Notice of Motion for Modification of Order Authorizing Retention of James P. Seery, Jr. Due to Lack of Subject Matter Jurisdiction* (Ex. 10, Appx. 318-366) (the “Motion to Reconsider”). Following an evidentiary hearing, the Bankruptcy Court denied the Motion to Reconsider finding (i) Appellants failed to meet their burden under FRCP 60(b); (ii) the Appointment Order was final; and (iii) *res judicata* bound Appellants and barred reconsideration.

Appellants also appealed the denial of the Motion to Reconsider to this Court (the “Appeal”). Yet, instead of prosecuting their Appeal, they filed *Appellants’ Opposed Motion to Stay or Abate Appeal* (Ex. 11, Appx. 367-379) (the “Abatement Motion”)<sup>11</sup> seeking to abate the Appeal until after the appeal of the Confirmation Order. Appellants now seek a further delay, largely repeating the arguments asserted in the Abatement Motion.<sup>12</sup> These requests should be viewed against Mr. Dondero’s broader litigation strategy.<sup>13</sup>

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<sup>11</sup> On October 1, 2021, Highland filed *Appellee’s Response to Appellants’ Opposed Motion to Stay or Abate Appeal* (Ex. 12, Appx. 380-395) (the “Abatement Response”).

<sup>12</sup> And Appellants’ quest for delay continues. Recently, Mr. Dondero requested a forty-five day extension on behalf of all of the DAF Parties to file their opening brief in the Contempt Appeal. The Contempt Appeal is one the three “pressing deadlines” allegedly justifying the relief requested in the Motion.

<sup>13</sup> The Motion is *one of nineteen motions* for a continuance, stay, or abatement (exclusive of the motions to stay the Confirmation Order) filed by Mr. Dondero and his controlled entities, including Appellants, since the entry of the Confirmation Order. Exhibit 13 to the Appendix (Appx. 396-399) lists the motions for continuance, stay, or abatement filed by Mr. Dondero and his controlled entities.

**B. There Is No Overlap Between the Confirmation Order and the Appeal**

As set forth in the Abatement Response, this Court's adjudication of this Appeal will not be affected by the appeal of the Confirmation Order (Ex. 12, Appx. 390-392).

**C. The Appeal Does Not Implicate "Very Complex Issues"**

Appellants argue the Appeal involves "very complex issues implicating application of 100-year-old doctrines with bankruptcy jurisdiction and federal securities law" (Ex. 1, Appx. 5) but do not specify what those "very complex issues" are. The reason for that is simple. The resolution of this Appeal requires a ruling on just *two* issues. Are Appellants barred by *res judicata* from challenging the Appointment Order and did Appellants demonstrate sufficient grounds for reconsideration of the Appointment Order under FRCP 60(b)?<sup>14</sup> These are not novel questions. Even if they were, complexity is not grounds for an extension. Complex issues are routinely heard on appeal without additional time provided.

**D. The Motion is Part of a Larger Strategy**

As discussed above, Mr. Dondero has engaged in a coordinated effort to harass Highland and Mr. Seery. Sbaiti has been integral to this scheme having filed four actions on behalf of Mr. Dondero and his affiliated entities ostensibly to hold

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<sup>14</sup> The Bankruptcy Court also ruled that, as a substantive matter, it had the authority to enter the Appointment Order. Even if this Court addresses the merits of the ruling, the issues, as discussed in the Abatement Response, will be different from those currently on appeal to the Fifth Circuit. Ex. 12, Appx. 390-392.

Highland (and ultimately Mr. Seery) “responsible” for damages allegedly caused during Highland’s bankruptcy. Sbaiti also filed a complaint against another of Mr. Dondero’s long-time nemeses, Acis Capital Management, L.P. (“Acis”),<sup>15</sup> for alleged mismanagement of certain CLOs in which funds managed by Mr. Dondero have invested.<sup>16</sup> Each of these actions is adversely impacting Highland, consummation of the Plan, and distributions to Highland’s creditors. Sbaiti being overwhelmed by the sheer volume of its own complaints and resulting appeals against Highland does not justify further delay of Highland’s right to be heard on the merits.

### **CONCLUSION**

WHEREFORE, Highland respectfully requests that the Court (i) deny the Motion in its entirety and (ii) grant such other and further relief as the Court deems just and proper.

*[Remainder of Page Intentionally Blank]*

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<sup>15</sup> Mr. Dondero has a contentious history with Acis’s principal officer, Joshua Terry. Mr. Terry is a former Highland employee who sought damages for his wrongful termination and ultimately secured an \$8 million judgment against Acis – then a Highland subsidiary. In response, Mr. Dondero purportedly stripped Acis of its assets and left it judgment-proof, resulting in Mr. Terry filing an involuntary chapter 11 petition against Acis; ultimately, Mr. Terry acquired Acis pursuant to the terms of Acis’s confirmed plan.

<sup>16</sup> Exhibit 14 to the Appendix (Appx. 400-402) includes a summary of each of the Sbaiti litigations.

Dated: October 5, 2021.

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**CERTIFICATE OF COMPLIANCE WITH RULE 8013**

The undersigned hereby certifies that this Response complies with the type-volume limitation set by Rule 8013(f)(3) of the Federal Rules of Bankruptcy Procedure. This Response contains 1,688 words.

*/s/ Zachery Z. Annable*

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Zachery Z. Annable

**CERTIFICATE OF SERVICE**

I hereby certify that, on October 5, 2021, a true and correct copy of the foregoing Response was served electronically upon all parties registered to receive electronic notice in this case via the Court's CM/ECF system.

*/s/ Zachery Z. Annable*

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Zachery Z. Annable

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

In re:	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Case No. 19-34054-sgj11
Reorganized Debtor.	§	
THE CHARITABLE DAF FUND, L.P., and CLO HOLDCO, LTD.,	§	
Appellants,	§	
v.	§	Case No. 3:21-cv-01585-S
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Appellee.	§	
	§	

**ORDER DENYING APPELLANTS’ PARTIALLY OPPOSED MOTION FOR  
EXTENSION OF TIME TO FILE APPELLANTS’ OPENING BRIEF**

Having considered (i) the *Partially Opposed Motion for Extension of Time to File Appellants’ Opening Brief* (the “Motion”) filed by appellants The Charitable DAF Fund, L.P. and CLO Holdco, Ltd. (together, the “Appellants”), and (ii) the *Response to Appellants’ Partially Opposed Motion for Extension of Time to File Appellants’ Opening Brief* (the “Response”) filed by appellee Highland Capital Management, L.P. (“Appellee”), the Court finds and concludes that the relief requested by the Appellants in the Motion is unwarranted. Accordingly, **IT IS THEREFORE ORDERED** that:

1. The Motion is **DENIED** in its entirety.

**It is so ordered** this \_\_\_\_\_ day of \_\_\_\_\_, 2021.

\_\_\_\_\_  
The Honorable Karen Gren Scholer  
United States District Judge