

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

No. 3:21-CV-01585-S

**IN RE: HIGHLAND CAPITAL MANAGEMENT, L.P.,
DEBTOR.**

**THE CHARITABLE DAF FUND, L.P. AND CLO HOLDCO, LTD.,
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)

**APPELLANTS' MOTION TO REOPEN ADMINISTRATIVELY
CLOSED APPEAL, NOTICE OF FIFTH CIRCUIT DECISION,
AND REQUEST FOR BRIEFING SCHEDULE**

Mazin A. Sbaiti
Jonathan Bridges
SBAITI & COMPANY PLLC
2200 Ross Avenue, Suite 4900W
Dallas, TX 75201
T: (214) 432-2899
F: (214) 853-4367
MAS@sbaitilaw.com
JEB@sbaitilaw.com

*Counsel for Appellants
The Charitable DAF Fund, L.P.
and CLO Holdco, Ltd.*



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**APPELLANTS' MOTION TO REOPEN ADMINISTRATIVELY
CLOSED APPEAL, NOTICE OF FIFTH CIRCUIT DECISION,
AND REQUEST FOR BRIEFING SCHEDULE**

Appellants The Charitable DAF Fund, L.P. and CLO Holdco, Ltd. submit this motion, notice, and request following the Fifth Circuit's decision in a related appeal. *NexPoint Advisors, L.P., et al v. Highland Capital Management, L.P.*, No. 21-10449, United States Court of Appeals for the Fifth Circuit. Because this appeal was abated and administratively closed without prejudice pending that appeal [Doc. 21], Appellants move to reopen it and request a briefing schedule for this appeal. In support, Appellants submit as follows:

1. On September 22, 2021, Appellants filed an Opposed Motion to Stay [Doc. 10], asking this Court to stay or abate this appeal until such time as the Fifth Circuit Court of Appeals rules on confirmation of the reorganization plan in the underlying bankruptcy.

2. On August 19, 2022, the Fifth Circuit issued its initial opinion in that appeal. *NexPoint Advisors, L.P. v. Highland Capital Mgmt., L.P., (In Re Highland Capital Mgmt., L.P.)*, No. 21-10449, 2022 WL 3571094 (5th Cir. Aug. 19, 2022).

3. On September 7, 2022, the Fifth Circuit withdrew that opinion, on rehearing, and issued an amended opinion. *NexPoint Advisors, L.P. v. Highland Capital Mgmt., L.P. (In re Highland Capital Mgmt., L.P.)*, No. 21-10449, 2022 WL 4093167 (5th Cir. Sept. 7, 2022).

4. The Fifth Circuit’s amended opinion supports Appellants’ position in this appeal that the bankruptcy court lacked authority below to exculpate and enjoin suits against non-debtors except to the extent that the bankruptcy code explicitly authorizes it to do so. *Id.* at *29-30 (“Our court along with the Tenth Circuit hold § 524(e) categorically bars third-party exculpations absent express authority in another provision of the Bankruptcy Code.”).

5. Thus, the amended opinion instructs the bankruptcy court to strike the exculpation and injunction provisions conferring qualified immunity on non-debtors, other than the creditors committee and the Independent Directors of the debtor’s general partner acting within the scope of their appointment. *Id.* at *32 (“In sum, our precedent and § 524(e) require any exculpation in a Chapter 11 reorganization plan be limited to the debtor, the creditors’ committee and its members for conduct within the scope of their duties, 11 U.S.C. § 1103(c), and the trustees within the scope of their duties. And so, excepting the Independent Directors and the Committee members, the exculpation of non-debtors here was unlawful.”); *id.* at *36 (“In sum, the Plan violates § 524(e) but only insofar as it exculpates and enjoins certain non-debtors. The exculpatory order is therefore vacated as to all parties except Highland Capital, the Committee and its members, and the Independent Directors for conduct within the scope of their duties.”).

6. The Fifth Circuit did not reach the precise issue presented here, determining that it did not have jurisdiction in that appeal to address the underlying order that Appellants challenge here. *Id.* at *30, n.15 (noting that the order challenged here had res judicata effect there because—“given”—that court’s lack of jurisdiction to review that order in that appeal).

7. But the amended opinion makes clear that the bankruptcy court exceeded its authority in exculpating non-debtors other than those acting within the scope of the roles described above. *Id.* at *4 (“[T]he Plan exculpates certain non-debtors beyond the bankruptcy court’s authority . . .”).

8. On September 26, 2022, Appellee filed its Motion for Summary Affirmance [Doc. 23] in this Court. Oddly, in that motion, Appellee declared victory at the Fifth Circuit despite that court’s having held the bankruptcy court lacked authority to exculpate non-debtors such as the exculpation at issue in this appeal. Appellants oppose that motion and will respond separately.

9. For all these reasons, Appellants respectfully request, in the interests of justice, that the appeal be reopened and a briefing schedule for this appeal be set.

Dated: October 5, 2022

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Jonathan Bridges

Mazin A. Sbaiti

Texas Bar No. 24058096

Jonathan Bridges

Texas Bar No. 24028835

2200 Ross Avenue – Suite 4900W

Dallas, TX 75201

T: (214) 432-2899

F: (214) 853-4367

E: mas@sbaitilaw.com

jeb@sbaitilaw.com

Counsel for Appellants

The Charitable DAF Fund, L.P.

and CLO Holdco, Ltd.

CERTIFICATE OF CONFERENCE

I hereby certify that on October 4, 2022, counsel for Appellants conferred with counsel for Appellee, who stated that they were unable to determine whether they oppose Appellants' motion.

/s/ Jonathan Bridges

Jonathan Bridges

CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. Bankr. P. 8013(f)(3)(A) because, excluding the portions excluded by Fed. R. Bankr. P. 8015(g), this document contains 639 words.
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/s/ Jonathan Bridges

Jonathan Bridges

CERTIFICATE OF SERVICE

I certify that on October 5, 2022, I caused a copy of the foregoing document to be served by Electronic Case Filing System for the United States District Court for the Northern District of Texas.

/s/ Jonathan Bridges

Jonathan Bridges.

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

In re:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Case No. 19-34054-sgj11
	§	
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

Having considered *Appellants’ Motion to Reopen Administratively Closed Appeal, Notice of Fifth Circuit Decision, and Request for Briefing Schedule*, the Court finds and concludes that the relief requested by Appellants in the Motion is warranted.

IT IS THEREFORE ORDERED that Appellants’ Motion is **GRANTED**.

IT IS FURTHER ORDERED that the appeal is reopened. Appellants’ opening brief shall be filed by _____ . Appellee’s

responsive brief shall be filed by _____. Appellants'
reply brief shall be filed by _____.

SO ORDERED this _____ day of _____, 2022.

The Honorable Karen Gren Scholer
United States District Judge