

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

In re:	§	
	§	
Highland Capital Management, L.P.,	§	Bankruptcy Case No. 19-34054-sgj-11
	§	
Reorganized Debtor.	§	
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	§	
Highland Capital Management Fund	§	
Advisors, L.P., and NexPoint Advisors, L.P.,	§	
	§	
Appellants,	§	
	§	Civil Case No. 3:22-cv-02170-S
v.	§	
	§	
Highland Capital Management, L.P.,	§	
	§	
Appellee.	§	

**APPELLANTS’ UNOPPOSED MOTION
TO SUPPLEMENT THE RECORD ON APPEAL**

TO THE HONORABLE KAREN GREN SCHOLER,
UNITED STATES DISTRICT COURT JUDGE:

COME NOW NexPoint Advisors, L.P. and Highland Capital Management Fund Advisors, L.P. (the “Appellants”), and file this *Unopposed Motion to Supplement the Record on Appeal* (the “Motion”), respectfully stating as follows:

1. This case is an appeal of a final judgment entered by the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (the “Bankruptcy Court”), awarding a money judgment in favor of appellee Highland Capital Management, L.P. (the “Appellee”) following a trial on the merits.

2. During said trial, the Bankruptcy Court admitted into evidence Exhibit “EE” offered by the Appellants for the sole purpose of attempting to impeach Mr. Seery’s testimony that



he did not recall hearing anything about “alleged overpayments” until January 2021. A true and correct copy of Exhibit “EE” is attached hereto.

3. Even though the Bankruptcy Court admitted Exhibit “EE” into evidence and the docket of the underlying Adversary Proceeding reflects the same, the electronic record on appeal (the “Record”) omitted Exhibit “EE.” The Appellants do not understand why this is and only realized that Exhibit “EE” was missing from the record as they prepared a binder for the Court’s use during the recent oral arguments, they having instead previously had their own set of trial exhibits without any knowledge (or reason to know) that Exhibit “EE” was not included in the Record.

4. Accordingly, in order that the Court may have the complete Record, that any future appellate proceeding have the benefit of the complete Record, and that justice may be done, the Appellants respectfully request that the Court enter an order expressly including the attached Exhibit “EE” in the Record.

5. As evidenced by the Certificate of Conference below, the Appellee is unopposed to the relief sought in this Motion.

WHEREFORE, PREMISES CONSIDERED, the Appellants respectfully request that the Court grant this Motion by entering the proposed order submitted herewith.

RESPECTFULLY SUBMITTED this 13th day of February, 2024.

MUNSCH HARDT KOPF & HARR P.C.

/s/ Davor Rukavina

Davor Rukavina
Texas Bar No. 24030781
Julian P. Vasek
Texas Bar No. 24070790
500 N. Akard St., Ste. 3800
Dallas, TX 75201
214-855-7500
drukavina@munsch.com
jvasek@munsch.com

COUNSEL FOR APPELLANTS

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that he conferred with John Morris, counsel for the Appellee, and the Appellee does not oppose the relief requested herein.

/s/ Davor Rukavina

Davor Rukavina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on February 13, 2024, the foregoing document and all attachments were served via CM/ECF on the following recipients:

Davor Rukavina drukavina@munsch.com

Melissa S Hayward mhayward@haywardfirm.com, mholmes@haywardfirm.com

Zachery Z Annable zannable@haywardfirm.com, zannable@franklinhayward.com

Julian Preston Vasek jvasek@munsch.com

Thomas D. Berghman tberghman@munsch.com, CourtMail@munsch.com, hvalentine@munsch.com

John A Morris jmorris@pszjlaw.com, hwinograd@pszjlaw.com, lsc@pszjlaw.com

Jeffrey N Pomerantz jpomerantz@pszjlaw.com

Gregory V Demo gdemo@pszjlaw.com, hwinograd@pszjlaw.com, jfried@pszjlaw.com,
lsc@pszjlaw.com

Case Admin Sup txnb_appeals@txnb.uscourts.gov

Stacey G Jernigan sgi_settings@txnb.uscourts.gov, anna_saucier@txnb.uscourts.gov

/s/ Davor Rukavina

Davor Rukavina, Esq.

K&L GATES

December 11, 2020

James A. Wright III
James.Wright@klgates.com

T +1 617 261 3193

By Email

Jeffrey Pomerantz
Pachulski Stang Ziehl & Jones LLP
10100 Santa Monica Blvd.
13th Floor
Los Angeles, CA 90067-4003
jpomerantz@pszjlaw.com

Gregory V. Demo
Pachulski Stang Ziehl & Jones LLP
780 Third Avenue
34th Floor
New York, NY 10017-2024
gdemo@pszjlaw.com

Re: In re Highland Capital Management, L.P. (“HCMLP” or the “Debtor”), Case No. 19-34054 (Bankr. N.D. Tex.)

We write as counsel to NexPoint Advisors, L.P. (“NexPoint”) and Highland Capital Management Fund Advisors, L.P. (“HCMFA”) in the above-captioned case.

We reference the following documents and agreements (collectively, the “Documents”):

- The following promissory notes (collectively, the “Notes”) of HCMFA in favor of HCMLP:
 - \$4MM Promissory Note dated Feb. 26, 2014
 - \$2.3MM Promissory Note dated Feb. 26, 2016
 - \$2.4MM Promissory Note dated May 2, 2019
 - \$5MM Promissory Note dated May 3, 2019
- Acknowledgement from HCMLP (the “Acknowledgement”) dated April 15, 2019
- HCMLP Letter to HCMFA dated Dec. 3, 2020, demanding payment on the two 2019 Notes (the “Demand Letter”)
- Second Amended and Restated Shared Services Agreement between HCMLP and HCMFA dated Feb. 8, 2013 (“HCMFA Shared Services Agreement”)
- Amended and Restated Shared Services Agreement between HCMLP and NexPoint dated Jan. 1, 2018 (the “NPA Shared Services Agreement”)

ADVISORS' EXHIBIT "EE"

- Sub-Advisory Agreement between HCMLP and NexPoint dated Jan. 1, 2018 (together with the HCMFA Shared Services Agreement, the NPA Shared Services Agreement, the “Shared Services Agreements”)
- HCMLP’s notices of termination of the Shared Services Agreement, dated Nov. 30, 2020
- Payroll Reimbursement Agreement between HCMLP and HCMFA dated May 1, 2018 (the “HCMFA PRA”)
- Payroll Reimbursement Agreement between HCMLP and NexPoint dated May 1, 2018 (the “NexPoint PRA”, and together with the HCMFA PRA, the “Payroll Reimbursement Agreements”)

Notes

With respect to the Demand Letter, HCMFA believes the 2019 Notes were intended by the parties to be covered by the Acknowledgement, in which HCMLP agreed not to seek payment until May 31, 2021. HCMFA accordingly does not believe HCMLP’s demand for payment of the 2019 Notes by today, December 11, 2020, is enforceable.

HCMFA is in the process of reviewing its files and available evidence on this matter. HCMFA notes that, until the last few months, HCMFA has traditionally relied upon HCMLP, under the HCMFA Shared Services Agreement, to provide substantial services to HCMFA. As a consequence, HCMFA believes documents relevant to this issue are in the custody and control of HCMLP, and that HCMLP employs witnesses relevant to this issue. HCMFA does not have ready access to that information or those witnesses at this time.

Shared Services Agreements

With respect to the Shared Services Agreements, both HCMFA and NexPoint have traditionally relied significantly on services provided by HCMLP to administer their business.

As you are aware, during the course of the Debtor’s chapter 11 case, the Debtor has reduced or, in some instances, stopped providing various services under the Shared Services Agreement. As you are further aware, the Debtor has given notice that the Shared Services Agreements will terminate on January 31, 2021.

The Debtor’s failure to perform under the Shared Services Agreements during its chapter 11 case forced HCMFA and NexPoint to take action to “cover” for the Debtor’s breaches so that HCMFA and NexPoint could continue their operations and satisfy their obligations. For example, NexPoint and HCMFA have retained new employees and/or hired outside services to provide services the Debtor is supposed to provide under the Shared Services Agreements. Further, because the Debtor maintains many of NexPoint and HCMFA’s records, the Debtor’s failure to perform has

created difficulties for NexPoint and HCMFA in accessing that information, impeding their business.

For these reasons, NexPoint and HCMFA assert they have claims against the Debtor under the Shared Services Agreements. NexPoint and HCMFA further assert that these claims, as they relate to failures to perform during the chapter 11 case, are entitled to administrative expense priority status under Bankruptcy Code §§ 503 and 507. NexPoint and HCMFA reserve all rights in this regard.

Payroll Reimbursement Agreements

With respect to the Payroll Reimbursement Agreements, they provide a mechanism for HCMLP to seek “reimbursement” from NexPoint and HCMFA for the cost of certain employees (1) “who are dual employees of HCMLP” and (2) who provide advice to investment companies under an investment advisory agreement between NexPoint or HCMFA and such investment company under NexPoint or HCMFA’s direction and supervision. See Payroll Reimbursement Agreements § 2.01 and Recitals.

Section 2.02 of the Payroll Reimbursement Agreements provides for modification of HCMLP’s “reimbursement” to “reflect the then current fair market value of such Dual Employee’s employment.” Section 3.01 provides for determining the reimbursement due based on the actual cost of the employee and a good faith determination of the aggregate hours the employee worked on NexPoint or HCMFA matters. Each Payroll Reimbursement Agreement has an Exhibit A that lists employee allocations, including names and percentages, as of January 1, 2018.

Prior to and during the chapter 11 case, HCMLP has reduced its headcount, including eliminating employees who were dual employees of HCMLP and NexPoint and/or HCMFA and for whom NexPoint and HCMFA have been making payments for “reimbursement” under the Payroll Reimbursement Agreements. HCMLP has also, as noted above, not provided all the services it historically provided to NexPoint and HCMFA, which NexPoint and HCMFA expect resulted in a decrease in the aggregate hours worked on NexPoint and/or HCMFA matters for certain of the employees.

Based on a preliminary analysis, NexPoint and HCMFA believe they have over-reimbursed HCMLP under the Payroll Reimbursement Agreements by approximately \$5 million in aggregate. NexPoint and HCMFA assert claims under the Payroll Reimbursement Agreement for all amounts paid to HCMLP in excess of HCMLP’s true reimbursable expenses under those agreements.

As provided in the Payroll Reimbursement Agreements, NexPoint and HCMFA are prepared to engage in good faith negotiations with HCMLP regarding this issue, including, without limitation, regarding the appropriate reimbursement for HCMLP for the months for which NexPoint and HCMFA have not yet made reimbursement payments. NexPoint and HCMFA recognize that HCMLP is considering the termination of the employment of certain employees as HCMLP approaches its expected chapter 11 plan effective date. To make negotiations productive,

NexPoint and HCMFA request that HCMLP provide data regarding the employees listed on the Exhibits A to the Payroll Reimbursement Agreements for the period during the chapter 11 case, including hours worked, and compensation paid, per month for such employees, as well as a projection by HCMLP for hours and compensation for such employees for December 2020 and January 2021. To the extent HCMLP believes other data is relevant to the parties' good faith discussions, NexPoint and HCMFA request that data as well.

NexPoint and HCMFA reserve all rights with respect to the Documents and the matters discussed in this letter. We look forward to addressing these matters with you.

Best regards,

/s/ James A. Wright III

James A. Wright III

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Appellants,	§	
	§	Civil Case No. 3:22-cv-02170-S
v.	§	
	§	
Highland Capital Management, L.P.,	§	
	§	
Appellee.	§	

ORDER SUPPLEMENTING THE RECORD ON APPEAL

CAME ON FOR CONSIDERATION the *Unopposed Motion to Supplement the Record on Appeal* (the “Motion”), filed by NexPoint Advisors, L.P. and Highland Capital Management Fund Advisors, L.P. (the “Appellants”), the appellants in this bankruptcy appeal. Having considered the Motion, finding the relief requested therein to be appropriate, and with Highland Capital Management, L.P. (the “Appellee”), the appellee herein, being unopposed to the relief requested, it is hereby:

ORDERED that the attached Exhibit “EE” is hereby included in the electronic record on appeal of this proceeding; *provided, however*, that, for the avoidance of doubt, its inclusion in the record shall be subject to the same limitations on which it was admitted as an exhibit below as an impeachment exhibit for the sole purpose of attempting to impeach Mr. Seery’s testimony that he did not recall hearing anything about “alleged overpayments” until January 2021.

SO ORDERED.

Dated: February ____, 2024

KAREN GREN SCHOLER
UNITED STATES DISTRICT JUDGE