Docket #0035 Date Filed: 7/10/2024

CIVIL ACTION NO. 3:23-CV-1503-B

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

In re: HIGHLAND CAPITAL MANAGEMENT, L.P.,
Reorganized Debtor.

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, Adversary No. 21-03067-sg, Hon. Stacey G.C. Jernigan, Presiding

APPELLANTS' RESPONSE TO NOTICE OF SUPPLEMENTAL AUTHORITY

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APPELLANT'S RESPONSE TO
NOTICE OF SUPPLEMENTAL AUTHORITY

Appellants Charitable DAF Fund, L.P. and CLO HoldCo. Ltd. ("Appellants") respectfully respond to Appellee *Notice of Supplemental Authority*, Dkt. 23, attaching the decision from *Nat'l Ass'n of Priv. Fund Managers v. SEC*, No. 23-60471, 103 F.4th 1097 (5th Cir. 2024) (*"NAPFM"*). The decision is irrelevant to the specific questions before the Court.

First, *NAPFM* addressed a different rule than the one at issue before this Court. *NAPFM* addressed whether Rule 206(4)-10 [17 C.F.R. § 275.206(4)-10] was properly authorized pursuant to Section 206(4) of the Advisors Act [15 U.S.C. § 80b-6(4)]. However, before this Court is whether a completely different rule – Rule 206(4)-8 [17 C.F.R. § 275.206(4)-8] – was violated and whether that states a claim under Section 215 of the Advisors Act. Rule 206(4)-8 has not been declared invalid by any court, nor was any argument made to invalidate it here. Therefore, the *NAPFM* decision is completely and facially inapposite.

Second, it remains undisputed that Section 206(4) imposes fiduciary duties, and that Rule 206(4)-8, passed under Section 206(4)'s authority, expressly prohibits fraudulent activities against investors in *pooled investment funds*.[1] Pooled

[1] Rule 206(4)-8 specifically states that the specific duties are owed to the investors in "pooled investment vehicles":

> It shall constitute a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of section 206(4) of the Act (15 U.S.C.

investment funds are pass-through entities that don't have to sign up as investment funds under the Investment Company Act of 1940, making them an entirely different beast than what Rule 206(4)-10 was attempting to regulate. *Compare* Rule 206(4)-8 (definition of "pooled investment vehicles") *with* Rule 206(4)-10 (regulation of "any" "private funds" advised by an investment advisor). Neither *NAPFM* nor Rule 206(4)-10 mention pooled investment funds or the unique attributes thereof wherein the investors are essentially deemed the "clients." This was actually *conceded* by the *Goldstein* decision that *NAPFM* expressly relied on as was already discussed in Appellants' Reply brief:

> Defendants cite *Goldstein v. SEC*, 451 F.3d 873 (D.C. Cir. 2006) for the proposition that only direct advisees are owed duties. But *Goldstein* actually holds in Plaintiffs' favor. It addressed a rule identical to Rule 206(4)-8 that was promulgated pursuant to § 206(2). *Id.* The D.C. Circuit explained that because § 206(2) was limited to "clients," the rule could not be applied to investors in investment funds since those investors are not "clients." *Goldstein*, however, **observed that the "anti-fraud provision [§ 206(4)] applies…to persons other than clients" and cited cases wherein**

80b-6(4)) for any investment adviser to a pooled investment vehicle to:

> (1) Make any untrue statement of a material fact or to omit to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, to any investor or prospective investor in the pooled investment vehicle; or
>
> (2) Otherwise engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in the pooled investment vehicle.

There is no dispute that the fund at issue was a "pooled investment vehicle" as in Rule 206(4)-8 and not a "private fund" as defined in Rule 206(4)-10.

> **liability under § 206(4) had been found against advisors for acts committed against non-clients.** *Id.* n.6. Critically, the SEC expressly promulgated Rule 206(4)-8 *in response to Goldstein*. *See* SEC Rule Release No. IA-2626 at 44756-57 and n.3-5.

See Dkt. 32 at p.4 n.6 (bolding added). The fact that *NAPFM* cited *Goldstein v. SEC*, 451 F.3d 873 (D.C. Cir. 2006) without noting the critical distinction therein between Section 206(2) and 206(4)'s omission of the term "clients" is telling. The fact that the Fifth Circuit glossed over the actual holding in *Goldstein* and the fact, as *Goldstein* noted, that the term "client" does not exist anywhere in the text of Rule 206(4) strongly supports the position that the language Appellee cited from *NAPFM* was simply dictum and is not relevant to the question before this Court.

Third, the language in *NAPFM* that Appellee cites is dictum that appears in the opinion's general description of the Advisers Act. Dkt. 123-1, p.4. It is not even material to the outcome. In discussing why Section 206(4) did not authorize Rule 206(4)-10, *NAPFM* observed that the question is whether Rule 206(4), as an anti-fraud provision, required the SEC to show a sufficient connection with fraud:

> The central focus is thus on whether the Dodd-Frank Act expanded the Commission's rulemaking authority to cover private fund advisers and investors under section 211(h) of the Advisers Act, *see* Part III.B.1., **and whether section 206(4) authorizes the Commission to adopt the Final Rule**, *see* Part III.B.2.

NAPFM, Dkt. 123-1, p.17 (bolding added). In Part III.B.2 of the opinion, the Fifth Circuit specifically found that "[t]he Commission fails to explain how the Final Rule

would prevent fraud" and that "Section 206(4) further fails to authorize the Commission to require disclosure and reporting." *Id.* at 23. Highland makes no argument that Rule 206(4)-8 lacks the required nexus to "fraud."

Finally, the decision plainly does not affect Appellants' arguments that (a) Highland owed a direct fiduciary duty to the DAF as its investment advisor, which is reinforced by the cited holding (see Dkt. 22 at pp. 22-24), and (b) that Holdco has derivative standing at worst and direct standing under state law for breach of fiduciary duty (see Dkt. 22 at pp. 23-28).

Dated: July 9, 2024

Respectfully submitted,

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