Docket #0037 Date Filed: 7/12/2024

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' CORRECTED RESPONSE TO NOTICE OF SUPPLEMENTAL AUTHORITY

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Charitable DAF Fund, L.P. and CLO HoldCo. Ltd. ("Appellants") respectfully respond to Appellee's *Notice of Supplemental Authority*, Dkt. 23, attaching *Nat'l Ass'n of Priv. Fund Managers v. SEC*, 103 F.4th 1097 (5th Cir. 2024) (*"NAPFM"*).

First, *NAPFM* addressed whether Rule 206(4)-10 [17 C.F.R. § 275.206(4)-10] was properly authorized under Section 206(4) of the Advisors Act [15 U.S.C. § 80b-6(4)]. Part.III.B.2. *NAPFM* held it was not because Section 206(4) is an anti-fraud statute, and "[t]he Commission fails to explain how the [Rule 206(4)-10] would prevent fraud…[and § 206(4)] fails to authorize the Commission to require disclosure and reporting[.]" Thus, the quoted language from *NAPFM* is dictum; whether Rule 206(4)-10 reflects a direct fiduciary duty was inapposite. On the other hand, the quoted language relies exclusively on *Goldstein v. SEC*, 451 F.3d 873 (D.C. Cir. 2006), which itself confirmed that Section 206 *does* impose fiduciary duties but § 206(4) *is not* limited to just direct "clients", *id.* at n.6, which was discussed in Appellants' briefing, Dkt. 32 at p.4 n.6.

Second, one issue before this Court is whether a completely different rule—Rule 206(4)-8 [17 C.F.R. § 275.206(4)-8]—was violated. It remains undisputed that Rule 206(4)-8 was properly enacted under Section 206(4), which imposes a fiduciary duty and expressly prohibits fraud against investors in "pooled investment

vehicles." No one disputes that the fund at issue here, HCLOF, is a pooled investment vehicle. Notably, Rule 206(4)-10 was invalidated in *NAPFM* for attempting to regulate "investment funds." Pooled investment vehicles are specific pass-through entities that, by definition, don't have to sign up as investment funds [Rule 206(4)-8], making them entirely different animals. Neither *NAPFM* nor Rule 206(4)-10 mentions pooled investment vehicles or the direct duty to investors imposed under Rule 406(4)-8.

Finally, *NAPFM* does not affect Appellants' arguments that (a) if Rule 206(4)-8 was violated, it states a claim under Section 215 of the Advisors Act even absent a fiduciary duty, (b) that Highland owed a direct fiduciary duty to the DAF as its direct investment advisor, and (c) that Appellants have derivative and direct standing under state law (Dkt. 22 at pp. 22-28).

Dated: July 12, 2024

Respectfully submitted,

/s/ Mazin A. Sbaiti

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CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2024, a true and correct copy of the foregoing document was served electronically upon all parties via the Court's CM/ECF system.

/s/ Mazin A. Sbaiti
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