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**ATTORNEYS FOR NEXPOINT REAL ESTATE PARTNERS, LLC,  
f/k/a HCRE PARTNERS, LLC**

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

<b>In re:</b>	§	
	§	<b>Chapter 11</b>
<b>HIGHLAND CAPITAL</b>	§	
<b>MANAGEMENT, L.P.,</b>	§	<b>Case No. 19-34054-SGJ-11</b>
	§	
<b>Debtor.</b>	§	
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<b>HIGHLAND CAPITAL</b>	§	
<b>MANAGEMENT, L.P.,</b>	§	
	§	
<b>Movant,</b>	§	
	§	<b>Contested Matter</b>
<b>v.</b>	§	
	§	
<b>NEXPOINT REAL ESTATE</b>	§	
<b>PARTNERS, LLC, F/K/A HCRE</b>	§	
<b>PARTNERS, LLC,</b>	§	
	§	
<b>Respondent.</b>	§	

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**RESPONSE TO DEBTOR'S POST-HEARING BRIEF**

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NexPoint Real Estate Partners, LLC f/k/a HCRE Partners, LLC ("NREP" or "Claimant") files this, its Response to the Debtor's Post-Hearing Brief [Dkt. No. 3635] (the "Brief"), and respectfully states as follows:

### **PROCEDURAL HISTORY**

On October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Court”). The Delaware Court thereafter entered an order transferring venue of the Debtor’s bankruptcy case (the “Bankruptcy Case”) to this Court.

On March 2, 2020, the Court entered its Order (I) Establishing Bar Dates for Filing Claims and (II) Approving the Form and Manner of Notice Thereof [Docket No. 488] (the “Bar Date Order”), which, among other things, established April 8, 2020 as the deadline for all entities holding claims against the Debtor that arose before the Petition Date to file proofs of claim.

On April 8, 2020, NREP timely filed a proof of claim (the “Proof of Claim”) regarding its and the Debtor’s interest in a limited liability company, SE Multifamily Holdings, LLC (the “Company”), pursuant to an amended limited liability company agreement (the “LLC Agreement”). There is no other pending proceeding, lawsuit, or matter regarding the Proof of Claim or the claim made in the Proof of Claim.

On July 30, 2020, the Debtor objected to the Proof of Claim in its First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No-Liability Claims; and (F) Insufficient-Documentation Claims [Docket No. 906] (the “Objection”) on the ground that it had no liability. NREP responded the objection on October 19, 2020 (the “Response”).

The Debtor’s Fifth Amended Plan of Reorganization (the “Plan”) [Docket. No. 1808] was confirmed by Order entered by the Bankruptcy Court on February 22, 2021 [Docket No. 1943], and the effective date of the Plan as August 11, 2021 [Docket No. 2700].

A year after NREP filed the Proof of Claim, and eight months after it filed the Objection, the Debtor sought to disqualify NREP's then-counsel Wick Phillips Gould & Martin LLP [Docket Nos. 2196 and 2893]. Following notice and hearing, the Court entered an Order granting in part and denying in part the Debtor's motion (denying Debtor's request for fees),<sup>1</sup> and NREP thereafter secured new counsel.

Thereafter in June 2022, Debtor and NREP (via new counsel) entered a Scheduling Order regarding the Proof of Claim [Docket No. 3356] and the parties have since engaged in document and third-party deposition discovery.

Given the uninterrupted operation of the Company, the Debtor's lack of interference with the operation of the Company, and in order to put a stop to the anticipated future time and effort expended on pursuit of the Proof of Claim and the Debtor's objection to it, NREP moved to withdraw the Proof of Claim.<sup>2</sup> The Debtor objected to the withdrawal of a claim to which it had objected, and the Proof of Claim was tried as an evidentiary matter before the Court.

Following the hearing, the Debtor requested that it be permitted "to file a letter brief, not to exceed three pages" to address an additional argument. Upon the Court's instruction that the Debtor file a motion seeking leave, it did so, including a proposed (later filed) brief which (i) was reviewed and signed by 6 lawyers, (ii) was 12 pages long, and (iii) included 206 pages of attachments.<sup>3</sup>

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<sup>1</sup> See Order Granting in Part and Denying in Part Highland's Supplemental Motion to Disqualify Wick Phillips Gould & Martin, LLP as Counsel to HCRE Partners, LLC and for Related Relief [Docket No. 3106].

<sup>2</sup> None of which alters the fact of Debtor's minimal investment and even lessor contribution to SE Multifamily.

<sup>3</sup> Seen in that light, the brief can be seen for what it is: a *sub rosa* motion to reconsider the Court's Order denying Debtor's request for fees in this claim objection [Docket No. 3106], and another effort at prolonging the case and increasing fees billed to the Debtor.

## **RESPONSE**

The Debtor's over-long and over-lawyered supplemental brief is a not inaccurate microcosm of its handling of the entire claim objection.

Debtor's chief complaint appears to be that it was somehow "surprised" when before the hearing, Claimant identified documents regarding the Debtor's assumption and rejection of executory contracts (Claimant's Exhibits 7-16). To be clear, each of the exhibits of which Debtor complains are documents which were prepared and filed into the record of the case by the Debtor, were designated as exhibits by Claimant prior to the hearing, and were entered into the evidence at the conclusion of the hearing when Debtor *agreed* to their admission.<sup>4</sup> There is no surprise or prejudice.

Perhaps more importantly, the issue of whether or not the LLC Agreement is an executory contract — and if it was rejected — is not before the Court, if for no other reason than because the Debtor chose not to assume it. As it was not assumed in any of the five notices it filed regarding assumption of contracts,<sup>5</sup> by operation of the Plan and Disclosure Statement,<sup>6</sup> Order confirming the Plan,<sup>7</sup> Notice of Confirmation Date and deadlines to file objections,<sup>8</sup> and Notice of Effective Date,<sup>9</sup> the LLC Agreement – if it is an executory contract – was rejected.<sup>10</sup>

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<sup>4</sup> It should be noted that, at the same time, Debtor designated and offered into evidence documents which it did *not* produce in discovery in the contested matter, and read into the record a document not only not produced, but which was never designated, and was so egregious that Debtor did not attempt to have the document admitted. Debtor's complaints about surprise are as disingenuous as they are unavailing.

<sup>5</sup> See Claimant's Exhibits 8–13.

<sup>6</sup> See Claimant's Exhibit 7.

<sup>7</sup> See Claimant's Exhibit 14.

<sup>8</sup> See Claimant's Exhibit 15.

<sup>9</sup> See Claimant's Exhibit 16.

<sup>10</sup> As described at the hearing, the LLC Agreement may be executory as there are continuing obligations on the Debtor to, *inter alia*, re-allocate equity to avoid consolidation per Article 1.8. See Claimant's Exhibit 2 at p. 4. Whether or not that makes it an executory contract is not *sub judice*; what matters is that the issue was likewise unresolved when Claimant filed its Proof of Claim.

What *is* before the Court is the Proof of Claim. As described at hearing, at the time it filed its Proof of Claim, Claimant was legitimately concerned that the Debtor would interfere with the operations of the Company.<sup>11</sup> In the years between filing the claim and the hearing on Debtor's objection, things changed: notably, the Debtor restrained itself from interfering, and the Debtor did not assume the LLC Agreement. Though that was the ultimate outcome, that was in no way a given in the early days of the case when the claim was filed.

*That* is the import of the rejection; not that the LCC Agreement was assumed or rejected,<sup>12</sup> but that there was a legitimate concern at the time the Claim was filed that it *could* be (regardless as to the ultimate outcome). Given the acrimonious nature of the proceedings,<sup>13</sup> that, and the fear of untoward interference, were not without basis at the time the Proof of Claim was filed. The Debtor's restraint and failure to assume do not change that.

### **CONCLUSION**

The Debtor's supplemental brief is an attempt to reopen the evidence, to relitigate issues and Orders already entered (*e.g.*, the Order denying its earlier request for fees), and to add additional time, burden, and attorneys' fees to a matter that could have been resolved before hearing. Debtor's briefing adds nothing and should not be considered or given any weight by the Court.

WHEREFORE, NREP prays that the Court allow its claim and grant such other relief as may be appropriate.

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<sup>11</sup> At the same time, it is inarguable that the Debtor's equity position in the SE Multifamily substantially exceeds its contributions to the entity – contributions which were long completed before and ceased before Debtor's filing for bankruptcy.

<sup>12</sup> Or that it was an executory contract, neither of which are matters to be decided in this claim objection.

<sup>13</sup> Indeed, a microcosm of which may be seen in this contested matter, where even after agreeing to admission of exhibits, Debtor sought leave to file an additional 219 pages objecting to their agreed admission.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify parties which have so registered with the Court, including counsel for the Debtor, the United States Trustee, and all persons or parties requesting notice and service shall receive notification of the foregoing via the Court's ECF system, and are considered served pursuant to the Administrative Procedures incorporated into the Order Adopting Administrative Procedures for Electronic Case Filing, General Order 2003-01.2.

/s/ Charles W. Gameros, Jr., P.C.  
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