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

	)	**Case No. 19-34054-sgj-11**
In Re:	)	Chapter 11
	)	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	Dallas, Texas
	)	May 16, 2024
	)	9:30 a.m. Docket
Reorganized Debtor.	)	
	)	MOTION FOR RELIEF FROM ORDER
	)	FILED BY CREDITOR NEXPOINT
	)	REAL ESTATE PARTNERS, LLC
	)	[4040]
	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

APPEARANCES:

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DALLAS, TEXAS - MAY 16, 2024 - 9:41 A.M.

THE CLERK: All rise. The United States Bankruptcy Court for the Northern District of Texas, Dallas Division, is now in session, The Honorable Stacey Jernigan presiding.

THE COURT: Good morning. Please be seated. All right. We have a setting in Highland Capital, Case No. 19-34054. It's on a motion for reconsideration on the Court's order regarding HCRE/NexPoint Real Estate Partners' proof of claim, that whole matter.

All right. I'll start by getting lawyer appearances. Who will be appearing for the Movant?

MS. RUHLAND: Your Honor, it's Amy Ruhland from Reichman Jorgensen of behalf of NexPoint Real Estate Partners, LLC, formerly known as HCRE Partners. And with me today is Wade Carvell of Hoge & Gameros.

THE COURT: All right. Good morning.

Who do we have appearing for the Reorganized Debtor?

MR. MORRIS: Good morning, Your Honor. John Morris; Pachulski Stang Ziehl & Jones; for the Reorganized Debtor.

THE COURT: All right. I presume those are all the appearances.

All right. Well, I've read your pleadings and I'm ready to hear arguments. Are there any housekeeping or scheduling matters anyone wants to address first?

MS. RUHLAND: Not from me, Your Honor.

MR. MORRIS: Not from the Reorganized Debtor, Your Honor.

THE COURT: All right. Then I will hear your arguments.

MS. RUHLAND: Thank you, Your Honor. I want to start by saying that the relief that HCRE is seeking in its motion before the Court is very, very narrow. What I want to focus on for purposes-of-today arguments are two core mistakes that we believe the Court made in issuing its sanctions order. Those are that HCRE refused to withdraw its claim with prejudice and attempted to preserve that claim for another day in another court. And two, that but for HCRE's refusal to withdraw that claim, Highland would not have incurred another $375,000 in fees and expenses continuing to fight the proof of claim.

And I'll address both of those points in detail, but before I get there I want to briefly just address the standard for relief under Bankruptcy Rule 9024 because Highland, in its opposition, criticized HCRE for failing to go into detail about the standards under that rule.

HCRE, in its motion, sought relief from the Court's order awarding sanctions under both Rule 60(b)(1) and Rule 60(b)(6). Under Rule 60(b)(1), among the reasons the Court may grant relief from an order is for mistake. Now, Highland argued in its opposition that mistake in Rule 60(b)(1) only refers to an

obvious error of law. We address this in our reply brief, but there is a Supreme Court opinion from 2022, *Kemp v. United States*, which is 596 U.S. 528, that squarely rejects that interpretation of Rule 60(b)(1).

In *Kemp*, the Supreme Court was asked whether a party could seek reconsideration of a court order under Rule 60(b)(1) because of a judge's mistake of law. And the Supreme Court said a couple of things about that.

First, it said that Rule 60(b)(1) is not limited to obvious errors of law made by a judge. Rather, the rule allows reexamination of a court order for any judicial legal error, whether it's obvious or not.

And the second thing the Court made clear was that the term "mistake" under Rule 60(b)(1) is not limited in any way. Even though the rule's drafters could have limited that term to just party errors or just mistakes of fact, the rule's drafters did neither. And as a result, the Supreme Court concluded that the word "mistake" includes both errors of fact and law.

And so it's our view that HCRE did properly invoke Rule 60(b)(1) as a basis for reconsideration of the Court's order.

But in addition, as we pointed out in our opening brief, HCRE also invoked Rule 60(b)(6), which permits reconsideration of an order for any other reason that justifies relief. So if for some reason the Court concludes that Rule 60(b)(1) is

inapplicable, HCRE invoked another basis of the rule to justify the relief sought, and Highland's opposition doesn't say anything about that secondary basis for relief.

So, against that legal backdrop, I want to turn to the two core arguments that --

THE COURT: Well, can I drill down on that a moment before you move on?

MS. RUHLAND: Sure.

THE COURT: There's an expression with these motions that you hear a lot, and that is these should not be used to take a "second bite at the apple." Okay. So are you saying this 2022 Supreme Court case sort of nullifies that very common notion, that, in fact, you can take a second bite at the apple and urge the Court to find the error of its ways with regard to any fact or any law, big or small?

MS. RUHLAND: (no audible response)

THE COURT: I'm sorry, we lost your sound.

Is she on mute?

MS. RUHLAND: Somehow, I accidentally pressed mute. I don't even know how it happened.

THE COURT: Okay.

MS. RUHLAND: So, to answer Your Honor's question, I don't think that the Supreme Court went as far as nullifying a second bite at the apple. There is a case that Highland cited in its opposition brief that talks about this and where a

party uses the rule simply to essentially unravel a bad legal ruling that could otherwise be addressed on an ordinary appeal. That's not a proper invocation of the rule.

Instead, this rule is invoked for purposes of correcting a fact or legal error that appears in the face of the court's order that is, you know, narrow in scope and is obvious based on the record.

And I will say, Your Honor, I don't think what HCRE is doing here is taking a second bite at the apple. We're not rearguing -- and by the way, Highland spent a lot of time in its opposition brief arguing about all of the other bases for the Court's finding of bad faith. We are not taking issue with those findings in this motion. We agree that the main issues and whether the order should have been issued at all is a matter for later appeal, and we've actually filed a notice of appeal to talk to an appellate court about the Court's core finding of bad faith.

All we want to do in this particular motion is address what we believe is a finding of fact that's fundamentally contrary to the record, which is that HCRE refused to withdraw its claim with prejudice. And that's the sole narrow ground on which we're invoking the rule, and I think that is an appropriate ground under the Supreme Court's guidance.

THE COURT: Okay.

MS. RUHLAND: So, turning to the two core arguments.

And Your Honor, I will acknowledge there are more arguments made in our motion. I think the big-ticket items are the two arguments I'm going to address today. If you would like me to address the others, I'm happy to do that, but I was going to focus today on just the two big-ticket items that we raised in our motion.

THE COURT: Okay.

MS. RUHLAND: And so the first is whether HCRE refused to withdraw its claim with prejudice and instead tried to preserve that claim for another day. And this is language that the Court cited several times in its order. There is this -- the language of "with prejudice," and then the Court has said in its order that HCRE repeatedly attempted to preserve its claims for another day.

But if you look at the transcript from the hearing on HCRE's motion to withdraw, which we've cited, obviously, extensively in our motion, one of the very first things that Mr. Gameros told the Court about the proof of claim at that motion to withdraw hearing, and I'm going to quote it here, this is from the hearing transcript on the motion to withdraw at Page 7, Line 13 through 21. This was in Mr. Gameros' opening statement to the Court. He said, "We know we're not going to be able to amend the claim. We're not going to be able to reassert it because it's after the bar date. That's why the Court should allow the withdrawal, and to the extent

the Court wishes to condition it, condition it with prejudice."

And then Mr. Gameros reiterated that desire at the start of his rebuttal arguments at the hearing, where he said, and here I'm quoting Page 30, Line 25 to Page 31, Line 2. And he said, "We've already said the Court should allow us to withdraw the claim and condition it with prejudice."

And then as Your Honor is aware because you've read the brief, we cited in Pages 7 to 9 of the brief an extensive exchange between Mr. Gameros, the Court, Mr. Morris, Mr. Sauter, and Mr. Dondero, where, through a variety of representations made on the record, HCRE agreed to withdraw its claim with prejudice, agreed not to challenge the equity interests of Highland in SE Multifamily. There are direct quotes about this that are cited in our brief. And HCRE agreed to waive any appeal of an order denying its proof of claim.

Now, notwithstanding these representations, the Court again in its order sanctioning HCRE found that HCRE repeatedly attempted to preserve its claims for another day. And I will be honest, Your Honor. I struggled to find examples of that from the record.

THE COURT: All right.

MS. RUHLAND: There was nothing --

THE COURT: All right. I went back and looked at the

transcript, particularly at the back. This was all about concern of future litigation in a different court. Are you telling me that's not clear from the transcript?

I understood early on in the hearing that HCRE was agreeing, was proposing it would withdraw the proof of claim with prejudice in the bankruptcy court. And it was agreeing not to appeal. But there was a discussion about, well, wait, what about litigation in future courts? That's what this was all about towards the end. Are you saying that's not HCRE's understanding of that?

And that's why I said, hey, you guys, I'm perfectly happy if you want to go out in the next 24 hours and talk about this and come up with an agreed form of order withdrawing the proof of claim, with language that makes everybody happy. I'll sign off on the order. I didn't want to have a trial on this. But I never got the order, an agreed order. It was all about future litigation in another court.

Are you saying that is not -- that was the Court's mistake, that you -- your client; not you; you weren't even there -- your client was willing to withdraw the proof of claim with prejudice to any future litigation anywhere and I misunderstood that?

MS. RUHLAND: Yes, Your Honor. I think you did. And I, listen, I, again, --

THE COURT: Point in the transcript.

MS. RUHLAND: -- because I was --

THE COURT: Point in the transcript. I mean, there was a whole discussion about this, right?

MS. RUHLAND: And Your Honor, I, because I wasn't there, I did read the transcript in detail multiple times over. And I think my point is a little bit different from yours, but I think we're getting to the same place.

THE COURT: Okay. What is your point?

MS. RUHLAND: My point --

THE COURT: What is your point, then? I'm sorry.

MS. RUHLAND: Okay. There is no place I can point into the transcript where HCRE said the negative. What I am saying is that HCRE has never said, none of its representatives have ever said, there's no motion or briefing before the Court where HCRE has ever said it wanted to preserve these claims for another day. And it certainly didn't make that representation in the motion to withdraw hearing. And I looked for it, Your Honor. And so I think -- I think what the disconnect --

THE COURT: They did -- HCRE did not say we want to preserve these claims for another day, but they wouldn't say --

MS. RUHLAND: Correct.

THE COURT: -- we'll make this withdrawal with prejudice to us doing that.

MS. RUHLAND: They did say that.

THE COURT: Where did they --

MS. RUHLAND: They said that multiple --

THE COURT: Show me --

MS. RUHLAND: -- times over.

THE COURT: -- in the transcript where they said that. Because that is not at all my memory of this. That was the whole -- that was the whole issue. I don't think --

MS. RUHLAND: So, in our --

THE COURT: I know I wasn't worried about them refiling the same proof of claim in the bankruptcy court. I wasn't worried about that because we were beyond the bar date. So the with prejudice, just simply with prejudice didn't mean a heck of a lot unless you were explicit, saying with prejudice to these claims being raised anywhere.

MS. RUHLAND: Well, Your Honor, I --

THE COURT: It only meant something, it only meant something if you went the extra step and said anywhere. Right?

MS. RUHLAND: Well, Your Honor, there was an exchange between Your Honor and Mr. Gameros that we've cited extensively in our brief. You asked the question: --

THE COURT: Where are you?

MS. RUHLAND: -- Your client agrees --

THE COURT: Which page are you --

MS. RUHLAND: I'm sorry. I'm looking at Page 33 to 34 of the withdrawal hearing transcript on September 12th, 2022.

THE COURT: Okay. I don't know if I have --

MS. RUHLAND: And we --

(Court confers with Clerk.)

THE COURT: Okay. Go ahead.

MS. RUHLAND: And for what it's worth, Your Honor, this is attached as Exhibit C to our brief in support of the motion for reconsideration.

THE COURT: Not the whole transcript, but these pages?

MS. RUHLAND: No, but the excerpt that I am referring to.

THE COURT: Okay.

MS. RUHLAND: So, in the first exchange that we cite, the Court asked Mr. Gameros as the representative for HCRE, "Your client agrees that Highland has a 46 point whatever it was percent interest in SE Multifamily Holdings and your client waives any right in the future to challenge that interest?"

And Mr. Gameros says, "I" -- basically, I want to confer with my client on it, but I'm pretty sure that would be agreeable.

You responded, "Today's the day. I'm not going to

continue."

And Mr. Gameros said, "Yes, Your Honor. We'd agree with that."

There are multiple other exchanges where Mr. Gameros, Mr. Sauter, and Mr. Dondero reiterate that point and say they won't challenge the 46.6 --

THE COURT: Okay. You need to --

MS. RUHLAND: -- percent interest.

THE COURT: You need to point out every time they, in your view, were explicit about that, because what you just read me isn't the end of it. Okay? That's 'I'm pretty sure the client would agree to that.'

MS. RUHLAND: Okay. So the next exchange, Your Honor, is at Page 36, Lines 4 through 8 of the transcript. And at that point, Your Honor had asked Mr. Gameros to get a representative of HCRE on the phone to make the same representation. And Mr. Sauter says --

THE COURT: And Mr. Sauter, who had no authority per se for HCRE. Okay? So that was the problem.

MS. RUHLAND: No, but he -- okay. But he again says, Mr. Dondero has authorized me to appear here and agree to the condition that Mr. Gameros just outlined, which is the condition that HCRE would waive any right in the future to challenge Highland's interest in SE Multifamily.

And then because of the issue that Your Honor just raised,

Your Honor insisted that Mr. Dondero get on the phone, which he then did, and there was a direct examination that took place on the record. And here I'm citing to Page 40 of the transcript, Lines 8 through 17. And Mr. Gameros asked Mr. Dondero, "Mr. Dondero, on behalf of HCRE, do you agree, as a condition for withdrawing the proof of claim, that HCRE will not challenge the estate's ownership or equity interest in SE Multifamily, subject to the company agreement?"

THE COURT: Subject to the --

MS. RUHLAND: He says yes.

THE COURT: -- company agreement.

MS. RUHLAND: And Your Honor, this is something we addressed in our brief, and I think this actually was the sticking point, was this language "subject to the company agreement." And I'm sure Mr. Morris will talk about this, too. I can see him on the video, making hand gestures.

And the issue there was that, as everyone agrees, the rights and obligations of the parties to the SE Multifamily operating agreement and LLC agreement are subject to that agreement. And I think the main sticking point in these proceedings, Your Honor -- and, again, I went through and read these -- the transcripts extensively and in detail. And I think the main sticking point was that everyone wanted HCRE to represent on the record at that hearing that Highland would have a 46.6 percent interest in SE Multifamily in perpetuity,

no matter what happens.

THE COURT: That is not --

MS. RUHLAND: No matter what --

THE COURT: That's not it. That's not it. I mean, I'm trying to focus on the mistake of fact. If something happened 12 days after an order withdrawing the proof of claim with prejudice, some new event among the parties, no one was saying that, in perpetuity, nobody could ever sue anybody over a future event and how that might affect ownership. It was at this point in time, when the proof of claim is being withdrawn, no one is going to challenge this 46 percent interest based on anything that's happened heretofore. And that's --

MS. RUHLAND: Okay. Well, --

THE COURT: That was the sticking point. And it seemed like an easy enough thing for language to be crafted in an order if everyone was okay with that concept. But everyone --

MS. RUHLAND: Well, --

THE COURT: -- couldn't get okay with that concept, apparently.

MS. RUHLAND: Well, so, Your Honor, after the exchange I just read you, and because there was some pushback from Mr. Morris on this qualification that the equity interest was subject to the company agreement, there was another

question-and-answer session on the record between Mr. Gameros and Mr. Dondero. And here I'm citing to Page 43, Lines 23 through Page 44, Line 6. Mr. Gameros says:

Q "Mr. Dondero, you desire to withdraw the proof of claim, correct?

A "Yes.

Q "And you agree to an order denying the proof of claim with prejudice, correct?

A "Yes.

Q "And you agree that HCRE will not challenge the equity interests of its member in SE Multifamily?

A "Yes."

So, on that day, Mr. Dondero made a representation, an unqualified representation on the record that HCRE would not challenge, on that day, in the context of its proof of claim, the equity interest of Highland in SE Multifamily. I'm not sure how much clearer it could have been. And so that's the issue.

And I want to address another point that Your Honor made, which is you never got a proposed order that resolved all these issues after the motion to withdraw hearing. That's something we addressed in our reply brief. The bottom line is HCRE did attempt to negotiate an order that would be acceptable to Highland. These parties, as you know and as I think most people who have been observers of this bankruptcy

case know, have had a contentious history. It is much easier said than done to negotiate a proposed order that's acceptable to all parties. And despite its efforts, and despite the engagement of Highland, frankly, there was no order that the parties could reach that would be acceptable to everyone.

And that was not necessarily because of HCRE's refusal to withdraw the claim with prejudice or refusal to say it wouldn't fight the claim in another forum in another day. It was mostly because Highland attached other conditions that had nothing to do with the withdrawal with prejudice --

THE COURT: Okay. I don't know --

MS. RUHLAND: -- proposal.

THE COURT: I don't know if it's really appropriate in this Rule 60 context for me to consider evidence, but I don't have evidence.

What you submitted, by the way, what you attached is an email exchange from eight days after I signed an order. And it could have been trying to settle the big-picture litigation. It wasn't an email about, in the next 24 hours, as the Court directed, here's attached a form of order we'd like.

So, again, I don't know if it would really be appropriate for me to hear evidence on this, but I'll just make a point that the email that HCRE did attach, I think to hope to show the Court that they in good faith worked on an agreed form of

order, it was like ten days after I signed the order or eight days after I signed the order.

MS. RUHLAND: And Your Honor, what I will say about that -- and I'll respond in two ways. Number one, the only reason we even addressed this is because Highland suggested in its opposition that there was just zero effort on HCRE's part to do what the Court invited it to do, which is just not true.

And secondly, I do think that there was an ongoing effort after the hearing and, you know, beyond to resolve this on a more global basis. And so that's probably why the email reflects that.

In any event, Your Honor, I do think that the mistake that we're trying to see addressed with this motion is simply that there was a representation made on the record at the motion to withdraw hearing that HCRE was willing to withdraw its claim with prejudice and would agree not to fight the equity interests of Highland in SE Multifamily.

And my reading of the record -- and, again, I read it a lot -- is that that representation or those representations were unequivocal. And I think that the order's conclusion to the contrary is wrong in the face of that record.

THE COURT: Okay. I'm looking at the transcript, at Page 54 of, again, the September 12th hearing where I denied withdrawal of the proof of claim.

Well, I'm going to start at the bottom of Page 53, where I

had been addressing the *Manchester* factors, and on the factor Duplication of Expense of Relitigation, here's why we got Mr. Dondero on the phone or wanted to have a witness with authority:

(reading) Highland is saying we are concerned about relitigation of this ownership interest issue. And as part of its argument, Highland has said, we've got claims, we've got our own claims for breach of agreement and different things that are going to cause us to have to drill down on terms of the LLC agreement. And we can't -- we don't want to face exposure on this issue of, well, you don't have the ownership interest or the rights you say you do, Highland. So, you know, if we could get ironclad language here of, you know, we waive the right, we agree that Highland has the 46.06 interest and we waive the right to challenge that, then I don't think we'd have to worry about relitigation of the issues in the proof of claim. But it feels like we had a little bit of reluctance to say it as forcefully as we would need to have it said to avoid relitigation.

So what I have tried to understand in preparing for this hearing, wouldn't that have been the signal to HCRE's lawyers, look, we're not all understanding each other. We absolutely will agree in unequivocal terms we will never challenge the 46.06 interest of Highland in Multifamily in any forum anywhere in the future based on any events that have happened

up to the day we signed the order?

And then if someone was shy -- I don't think Mr. Gameros is shy -- but if he was shy about interrupting or standing up and saying that at that point, then there was this opportunity over the next 24 hours that the Court gave -- it ended up being 48 hours -- for HCRE to submit its own form of order. You know? I mean, it happens all the time when I say, parties, go out and see if you can agree to an order, that then we get the contest of the orders.

Here's what we -- my courtroom deputy gets caught in the middle of it. Party #1: Here's what we're willing to sign off on, but they won't. The other party: Here's what we're willing to sign off on, but they won't. And sometimes I may reconvene a hearing, or sometimes I may pick and tell them I'm going to pick.

I got none of that. I mean, I am trying to understand the mistake of fact that I didn't understand HCRE was willing to withdraw that proof of claim with prejudice and absolutely say in an order, we will never bring any future litigation in any court regarding Highland's 46.06 membership interest in SE Multifamily based on any event that's occurred up to this moment. I just don't see it.

MS. RUHLAND: So, --

THE COURT: I just don't see it. I'm begging for you to point out where it was crystal clear and I missed it.

MS. RUHLAND: Well, Your Honor, I want to respond in a couple of ways, Your Honor, if I can.

Number one, I can't speak for Mr. Gameros or whether he thought it was appropriate at the end of that hearing to interrupt Your Honor when you were giving your reasoning for your denial of the motion to withdraw. But your statements that you just cited come right in advance of you saying the motion is denied, and I think at that point, if it were me -- and, again, I wasn't at the hearing -- I probably would accept the Court's ruling, because, in deference to the Court, that's what lawyers tend to do.

So I don't know that it was appropriate for Mr. Gameros to relaunch into everything that had been represented on the record at that point.

In terms of not presenting the Court with a one-sided proposed order, my understanding is that what happened here is that people other than Mr. Gameros were trying to negotiate behind the scenes to come to a resolution with Highland. And so -- and, again, the Court invited the parties to try to reach a mutual agreed proposed order. I think Mr. Gameros believed at that point that unless he came to the Court with an order that Highland was signed on for, it was going to be a futile effort to get the Court to sign an order that Highland was not in agreement with. And that's in light of all the things that happened at that hearing. And so I think that's

actually what happened.

Again, you know, practicing law is an art, not a science, and decisions were made back before I was involved, Your Honor, that I think everyone thought were reasonable at the time. And my only point in filing this motion for relief from order is that I do think that the representations on the record were clear and were substantial enough to address Highland's concerns.

And to the Court's point that, you know, HCRE wasn't willing to say definitively on the record that it would never challenge Highland's interest in SE Multifamily based on anything that happened up until that point, I think if someone had asked Mr. Gameros or Mr. Sauter or Mr. Dondero at that hearing to make that exact representation, they would have been willing to do that. What they weren't willing to do is say Highland gets a 46.6 percent interest in perpetuity, no matter what happens, because that would have been inappropriate.

And I think that, again, was the sticking point and not the unwillingness of HCRE to say it would withdraw its POC with prejudice and not reassert those claims in any forum going forward. I think it did make those representations. And I understand Your Honor disagrees, but that's the basis for our motion.

THE COURT: All right. Anything else?

MS. RUHLAND: The only other thing I wanted to briefly address, Your Honor, is the Court's conclusion that but for HCRE's refusal to withdraw the claim with prejudice, Highland wouldn't have incurred an additional $375,000 in attorneys' fees. And, again, that's based on the argument you've just heard, which I understand you disagree with. But $375,000 in fees based on a conclusion that HCRE would absolutely would not withdraw its proof of claim with prejudice is astounding to me.

And I certainly don't think, based on the exchanges that I've just read into the record and that we cited in our motion, that the evidence was clear and convincing that HCRE was totally unwilling to do what the Court was requesting of it, what Mr. Morris was requesting of it. I think HCRE was willing to do it, attempted to do that on the record. And so the $375,000 that was incurred after the fact was not incurred but for HCRE's refusal to withdraw its proof of claim and not to assert the claim and the bases for that claim in future litigation with Highland.

And so that's the other basis for our motion. Again, all of this --

(Audio cuts out.)

THE COURT: Oops, we lost your sound. We lost your sound.

MS. RUHLAND: There we go. I don't know why my mute

button is so sensitive, but I'm certainly not trying to press it.

THE COURT: Okay.

MS. RUHLAND: Again, though, the "but for" argument is tethered to the same argument about the Court mistakenly concluding that HCRE was not willing to withdraw its claim and refrain from prosecuting that claim going forward. And so that's the only thing, the only other point I wanted to make.

And again, Your Honor, we have other grounds for reconsideration in our motion, but they're minor by comparison to this $375,000 issue. And so I don't think it's worth, you know, talking about those at length today. We're happy to rely on our briefs in that regard.

THE COURT: Okay. All right. Mr. Morris?

MR. MORRIS: Good morning, Your Honor. John Morris; Pachulski Stang Ziehl & Jones; for the Reorganized Debtor.

NexPoint violates that rule that people are generally aware of that when you dig a hole for yourself, you should stop digging.

I'm going to start very briefly with the legal standard. I disagree with Counsel's characterization of the legal standard, but according to NexPoint now, they had the opportunity to bring any error to the Court's attention through this motion. They had the opportunity to bring any mistake of fact to the Court's attention. They can, in fact,

under the second rule she cited, file a motion to address anything that they want.

And so they've chosen to address the things that are in this motion, so, by definition, under their interpretation of the legal standard, nothing that's been raised in this motion now is an obvious mistake of fact. And I'm going to use that in the future, because I appreciate the concession. I don't think it's right, but if that's their view, they're going to be held to that view.

I want to -- I'll get to the bulk of my presentation in a moment, but I just want to address, really, the core of what was discussed. Ms. Ruhland said she struggles to find examples of where her client tried to preserve its rights. Take a look at Docket No. 3443 at Page 5, Footnote 8. I think this is HCRE's reply in connection with its motion to withdraw. And it expressly attempts to sever. And it attempts -- it expressly attempts to preserve its claims.

And I need to make something really clear --

THE COURT: Wait. Where --

MR. MORRIS: -- here, because this is --

THE COURT: I missed the pinpoint. Where are you referring?

MR. MORRIS: I believe -- and it's cited in our brief.

THE COURT: Okay.

MR. MORRIS: If I have written it incorrectly, go back to our brief. But I think it's Docket 3443.

THE COURT: Okay.

MR. MORRIS: Let me see if I can find it. But it's cited in our brief. And there's absolutely no dispute that in the pleadings on the motion to withdraw the proof of claim they sought to preserve for another day the very claims that they were asserting.

And I want to take a step back, because I think what NexPoint is doing here and what they've done throughout the hearing on the motion to withdraw is try to muddy the waters between their proof of claim and the bases for the proof of claim.

Their proof of claim simply stated that there was a mistake in the documents. And it's the Wick Phillips pleading where they say that the proof of claim is based on legal theories such as rescission and reformation and lack of consideration that is at the heart of this.

There is no dispute that at certain points during that hearing HCRE and its counsel and its principal offered to withdraw the proof of claim with prejudice. That was never the issue. Your Honor put your finger on the heart of the matter, and it was whether or not the withdrawal of the proof of claim wouldn't prevent them from refiling another proof of claim, because, as Your Honor points out, the bar date had

passed and that wasn't going to happen. The question was whether they were going to try to preserve and sever the reformation, the rescission, the lack of consideration arguments and claims for another day and another court. That's really the heart of the matter and that's what was muddy during the hearing.

Your Honor pointed to the transcript where Mr. Dondero said it was going to be subject to this or that or the other thing.

But, again, that's just one example. The briefs that were written in support of it. The other example, of course, is Mr. Gameros, at the closing argument at the hearing on the merits tried to do the exact same thing. And we've cited to that in Footnote 7 of our opposition to this motion. We've cited the Court to the very specific page and line of the transcript of the hearing, where Mr. Gameros again tries to sever the proof of claim from the bases of the proof of claim. He told the Court explicitly, all you can do here is deny the proof of claim. What you can't do is rule on the legal theories that under -- that support it. Reformation, rescission, lack of consideration.

That was always our concern. It was the concern we expressed during the hearing on the motion to withdraw. And Mr. Gameros was still beating the drum during the hearing on the merits in his closing argument.

The notion that the Court, you know, just ignored their good faith representation that they would withdraw the proof of claim without prejudice is belied by their own indisputable, unambiguous statements made before and after the hearing.

And Your Honor has also focused on another fact that is critically important, that notwithstanding everything that occurred at that hearing, HCRE and NexPoint had the opportunity to stand by their words. They could have put their money where their mouth was and they could have drafted an order.

And, you know, Ms. Ruhland, respectfully, wasn't there, has no personal knowledge of anything, but actually decided that what she would do to address that point was to put in my email. As Your Honor notes, that email is sent days after. That emails says absolutely nothing about the withdrawal of the proof of claim. The email says absolutely nothing about a proposed order. Right? It is a commercial document. It is a commercial communication that is -- you know, the order had already been entered. Like, what does this have to do with anything?

And if they thought that they could put in evidence in support of the reply to address this point, you would think that they would have put in an email from Mr. Gameros that said, following up on the Court's opportunity, you know, the

opportunity that was created by the Court, we'd like to resolve the proof of claim. Here's a proposed order. Right? You'd have a declaration from Mr. Gameros that says, hey, I called, I called Mr. Morris that night and he refused to negotiate.

There was -- there is no evidence in the record, and that's really the point. My email certainly doesn't support the assertion that they're trying to make that, oh, it was Highland who, you know, wouldn't do this. There is zero evidence that at any time after that hearing the issue of an order resolving the motion to withdraw was ever discussed. There will never be any evidence of that because it never happened.

And so, regardless of what was stated at that hearing, HCRE had the opportunity that the Court gave them to put their money where their mouth is and to say, This is what we're prepared to do. They didn't do it.

Instead, consistent with what they said before the hearing, and consistent with what they've said at -- in their briefs, and consistent with what they said at the hearing on the merits, they tried to preserve their claims.

Again, no dispute that you can cherry-pick and say, oh, we said it unambiguously here, or we said it unambiguously there. But you've got to look at the totality of the circumstances and say, well, you told you before you were going to do it, I

know you told me after you were going to do it, I gave you an opportunity to put it in writing, you didn't do it, and now there's some grave mistake of law here that's been done? I don't think so. I don't think that's the way it works. I don't think that that's what this process should be about.

I want to go back to the top, though, and just remind the Court that in your bad-faith decision you incorporated by reference as if fully set forth therein all of the findings from the merits-based decision that was filed at Docket 3767. And that's really important, because those findings are beyond challenge. Right? The Court denied the motion to withdraw. That decision wasn't appealed. And that's very important, because the Court didn't deny the motion to withdraw because HCRE refused to withdraw their proof of claim with prejudice. That is a red herring. And, again, they're kind of -- they're trying to -- they're trying to mix it all together. That's not what happened. Your Honor just read from the transcript. You went through the four *Manchester* factors. Right?

Let me take a step back. The law is that when there is a contested matter, you are not allowed to just simply withdraw your proof of claim. So even if the Court made a mistake, and even if the Court overlooked what Ms. Ruhland contends is some obvious error of fact that they really were willing to do it, even if that happened, that doesn't mean that they're scot-free. That doesn't mean that their motion should have been

granted. That's not the law.

The law says, even if you do that, we still have to go through the *Manchester* factors. And the transcript and the pleadings are replete with the Court's concerns about gamesmanship and the integrity of the process.

The Court did not deny the motion because it did not believe that HCRE was willing to withdraw -- unwilling to withdraw its proof of claim with prejudice. The Court denied the motion to withdraw under the *Manchester* factors. Right? The fact that they filed the motion immediately after taking all of our depositions but immediately before their depositions. They never answered that question at that hearing. They've never answered that question in any pleading. That was prejudicial. Right?

One of the things we talked about at that hearing was would they be able to use those transcripts in a future hearing? Because that's the prejudice, and that's why you have the *Manchester* factors. It's not, oh, is the movant willing to withdraw the claim? It's, is there prejudice here? And they weren't willing to address the fact that they took our depositions and wouldn't let us take their depositions. They never said that they were prepared to put those transcripts in the toilet. They didn't -- right, the whole reason for the motion to withdraw. What was the reason for the motion to withdraw? They came up with some contrived

argument that their fears about Highland interfering never materialized. How could we have done that? HCRE and Jim Dondero were the managing member of SE Multifamily. There is no evidence that Highland ever interfered. There is no evidence the Highland ever threatened to interfere. There is no -- the whole basis for the motion to withdraw was contrived. The timing of the motion was problematic.

And so I just need to be really clear here that I don't really care if the Court made a mistake on this or not. I don't think it did, and I'll get to that in a moment. I don't think the Court did make a mistake. I think the Court looked at everything in context, and that's why at the end you said, look, go work it out.

And HCRE, again, they're blaming the Court. They should blame themselves. Why didn't they do what Your Honor gave them the very opportunity to do? Why didn't they put it in writing and say, here, here's a proposed order, will you agree to it, instead of coming here now and saying, oh, it's been acrimonious and we just didn't think Highland would agree? We've agreed to lots of things in this case, Your Honor. Some you know about and some you don't.

I think it's also important to focus on what's not in dispute on this motion, because it just shows how completely irrelevant the issue is that they're now trying to hang their hat on. There were three actually broad areas that the Court

focused on in its bad-faith finding. The first, and I'm just going to quote it because I can't say it any better, the Court concluded that Dondero's execution and authorization of the filing of the proof of claim, without first having read the document or conducting any due diligence, was in bad faith and a willful abuse of the judicial process.

Extensive factual findings are spread out through Pages 11 through 14. And frankly, they're pretty tough for me to read even now. Mr. Dondero admitted, among other things, that he signed a proof of claim under the penalty of perjury without reading it or conducting any due diligence. There is much more in the Court's four-page analysis of this topic, but the important thing is that these findings were never challenged on appeal or in this motion, even though HCRE now contends that they could have challenged anything. They didn't challenge anything to do with that whole section of the decision.

Nor did they challenge any aspect of the Court's conclusion that NexPoint and HCRE's admissions at trial are further evidence of its bad-faith filing and willful abuse of the judicial process. Pages 20 through 23. The Court goes through extensive analysis of the undisputed testimony by Mr. Dondero and Mr. McGraner that the amended LLC agreement reflected the parties' intent at the time it was signed.

That testimony was corroborated by the testimony of BH

Equities, the other partner in SE Multifamily. That testimony was corroborated by a mountain of documentary evidence that showed that Highland employees, working at the direction of Mr. Dondero, were negotiating with BH Equities and actually drafted the schedule that showed Highland's capital contribution and its equity interest in the enterprise.

In the face of all of that, HCRE has never attempted nor will they ever be able to address the question of how you could have filed this proof of claim with knowledge of those facts. How could this proof of claim ever have been filed when you know that there's no dispute about the parties' intent, when you know and you admit under oath that the document reflects the parties' intent?

That doesn't get challenged here. But they want to focus on this one little thing that's completely contrary to everything they said before, everything they said after, is inconsistent with their delivery of an order that's consistent with what they now contend they should have -- they really meant, they really, really meant.

What is at issue, right? It's just this little thing. I appreciate Ms. Ruhland admitting that this is a very, very narrow issue. But the "but for" test falls right on its face, because the Court did not rule that, but for their unwillingness to withdraw the proof of claim, none of this would have happened. Right?

What happened was the Court denied the motion to withdraw. The Court denied the motion to withdraw under the *Manchester* factors. The *Manchester* factors, the Court went through every one of them. I think it's at Page 50 to 55 of the transcript. Again, none of that is in dispute. None of that was appealed. None of that is even challenged here.

So, at best, Your Honor, harmless error. I don't think there's a harm -- I don't think there's an error at all. I don't think there's an error because Your Honor pointed to the ambiguous nature. They can cherry-pick and point to their quotes. I can point to Mr. Dondero's quotes about being subject to the agreement or what have you. At the end of the day, it doesn't matter. And it doesn't matter because if they really meant what they said, they should have taken the Court up on its offer and tendered a proposed order consistent with it. And it doesn't matter because we know, at the end of the day, that they didn't really mean that. And Your Honor, I think, probably understood that there was a lot going on here. Right? Future litigation. So Your Honor was cautious.

At the end of the day, Mr. Gameros stood up before you and told you you did not have the authority to rule on the legal theories supporting the proof of claim. He told you you did not have the authority to rule on reformation and rescission. Okay?

That's what this whole thing has always been about. It's

the only thing that this case has been about. And when you have somebody like Mr. Dondero who signs a proof of --

THE COURT: Okay. Remind me of that moment --

MR. MORRIS: Uh-huh.

THE COURT: -- in the hearing again.

MR. MORRIS: Which one? Where Mr. Gameros --

THE COURT: Well, that Mr. Gameros said I didn't have authority to rule on reformation or --

MR. MORRIS: Sure. That's -- Your Honor, you can find that. It's cited in our brief. Give me just one moment here. Ah. It's cited in Footnote 7 of our opposition papers. We've got the full quote there. I think it's Footnote 6 and 7 are critically important.

THE COURT: Okay. I'm sorry. Say again?

MR. MORRIS: It's Footnote 7 of our opposition. I'm going to see if I can find it. Just one moment.

THE COURT: Okay. I'm there.

MR. MORRIS: So you'll see Mr. Gameros's quote, right? You only have authority to disallow the proof of claim. You don't have the authority to rule on things like rescission. I'm going off of my memory, but I think substantively it's exactly right.

THE COURT: Okay.

MR. MORRIS: It's what they said in their papers. Right? I mean, I mean, come on. They were still taking

that position at the end of the day, a point that is studiously ignored in their reply brief and, you know, their statements in their briefs preceding the motion, the argument on the motion to withdraw, the statements that are made in there.

They want you to cherry-pick a couple of quotes that they say help them, but they completely ignore everything else that is completely contradictory to that, from their pleadings to their statements at closing arguments to their inability to, you know, even tender a proposed form of order.

And by the way, we pointed this out in our papers: They had an obligation, actually. They violated the rule. Rule 7007-1 requires a movant to attach a proposed form of order to a motion.

Now, I understand that people don't do that every single time. And I'm not saying that they should be held to account for violating a rule, just to be really, really, really clear. But if they wanted to be really, really, really clear about their intent, they would have done it with the motion. Or they would have written in their motion or their reply that they wanted to withdraw the proof of claim with prejudice and make sure that everybody knew they weren't going to challenge Highland's interest.

Instead, they did the opposite. They didn't give a proposed form of order, and they put in their reply brief that -- they did exactly what the Court was concerned that they were trying to do, and that is preserve not necessarily even the proof of claim, but the bases for the proof of claim -- reformation, rescission -- that they would try and assert in a different court.

And so, really, there's no "but for" here. I mean, there's no "but for" at all. If they're not doing a collateral attack on the order denying the motion to withdraw the proof of claim, then this whole issue is completely irrelevant, because they lose "but for." Okay?

The reason that we went to trial, the reason that we incurred all of those expenses, is because the Court denied the motion to withdraw the proof of claim. They don't challenge that. They're specifically representing to the Court that they're not engaging in a collateral attack on that order. So if that order is sacrosanct, that's the order that required the parties to proceed with depositions and trial.

So there, you know, there just is no "but for" here. Okay?

I just, I just, I'm reluctant but I really just need to address this, because this is now the third or fourth

time in different matters where I guess Mr. Dondero and the people working for them believe that maybe the way to get to wherever they think they want to be is by attacking me personally.

And, you know, in the motion, apropos of absolutely nothing, they suggested that I filed a proof of claim for $500,000. We address this in Footnote 2 of our papers, and it's not surprisingly ignored in the reply. But this, this really, I mean, do whatever you want, but I think -- I think -- I just want to say that I've never seen anything like this, you know, and I think it hurts the credibility of anybody who's signing their names to pleadings like that.

Because, as Your Honor knows, if I had filed a proof of claim, I wouldn't be able to work on this case. I mean, forget about not doing due diligence. Right? I would be an interested party. I would have an interest in the outcome of the case.

How do you do this? How do you just willy-nilly throw out there, without doing any due diligence? Why do they think I live in Utah? I bet they didn't even look at the proof of claim. I've been to Utah once, to go skiing in Park City. I don't know anybody in Utah. I don't live in Utah. It's a different person.

But I think, more fundamentally, as anybody who knows

anything about bankruptcy law would know, that that would be a disabling conflict.

And they did it again in their reply. They put in this email from me that has absolutely nothing to do with anything. And they've done it in other matters. And I just -- it's kind of offensive, and I just -- they'll do what they do. You know, I've got thick skin. But I'm going to point it out every time, because it reeks of desperation and reeks of a lack of credibility.

I've got nothing further, Your Honor.

THE COURT: All right. I have a couple of follow-up questions. In preparing yesterday, I think I remember a discussion on the record that showed up in one of the transcripts. And I'm not sure if it was in the sanctions hearing or back in September 2022 on the hearing on the motion to withdraw the proof of claim.

I think there was a discussion on the record that mentioned there was other litigation in the Delaware Chancery Court pending regarding SE Multifamily Holdings. Maybe the Reorganized Debtor was trying to get records or documents.

MR. MORRIS: So, I'm happy to address that, Your Honor.

THE COURT: Okay.

MR. MORRIS: You know, and I actually think this

is in the record from the hearing on the merits, because back in June of '22 -- yeah, June of '22, I think it was -- after Mr. Gameros came in, we asserted on behalf of Highland its contractual right to obtain the books and records of SE Multifamily. And we were kind of stonewalled.

The night before the trial, Ms. Ruhland for the first time wrote to me and said, we're going to get you that stuff. And that's why it didn't become an issue at the hearing, because I actually thought, you know, we're going to get the stuff we want.

Of course, that didn't happen. We spent three or four months writing back, getting stonewalled, being told that our interest in Highland -- in SE Multifamily was still disputed because we hadn't got Your Honor's decision yet.

So we did file a lawsuit in the Chancery Court in Delaware to obtain books and records. That matter didn't really get litigated very far, you know, and ultimately it got resolved. And I'll just leave it at that. I don't -- I don't want to share the background to how it got resolved.

But that was the litigation that I anticipated was going to happen. Right? So when we were at this hearing, I think it was late August, early September, on

the motion to withdraw, and I kept telling the Court that there was going to be future litigation, it's because I knew at that time that my many requests for access to the books and records were being denied. And so I was very concerned that in the future we would be making -- we would have -- we would be forced to enforce our legal rights under the partnership agreement and commence litigation. And lo and behold, that's exactly what happened.

And that's really what drove my client's concern, Mr. Seery's concern that we get finality here, because the last thing we wanted to do was to go into Delaware and be told, well, we withdrew the proof of claim, but you know what, we're now going to assert rescission and reformation and lack of consideration and all the rest of it.

I so appreciate your question, Your Honor, because it does put into context what we were concerned about. And I do believe, because if the Court, you know, was interested, I'm pretty darn sure that if you went and looked at our exhibit list from the hearing on the merits that was held on November 1st, you'll find some of those communications. You'll find my letters and my emails to everybody who represents Mr. Dondero. And everybody was saying, well, I don't represent him in this capacity, or

I don't represent him in that capacity, or we'll get back to you, or they ignored me. And it went on for -- from June, I think it began with Mr. Demo's email on or about June 22nd -- right up and through the hearing. And that's what drove me to bring to the Court's attention that there was a real possibility of future litigation about this stuff.

THE COURT: Okay. Thank you.

My second question is really a clarification. There's discussion in the briefing about the Wick Phillips disqualification motion. My understanding was your fee request in the sanction motion subtracted out attorneys' fees related to that whole DQ motion. I mean, there were some attorneys' fees that overlapped with the time period that was going on, but you subtracted those fees out. Did I understand that correctly?

MR. MORRIS: Your Honor did. And I just, you know, briefly want to point out that the request for fees was denied without prejudice. I did not remember that, if I'm being honest here. And so I remembered it as the fees were denied. And based on my memory -- I wish I had come back, and Mr. Seery has suggested that I need a vacation. No. If I had gone back to look, we would have included those fees. But I didn't, you know, based on my memory, there's only so much we're going to do on a

motion like this.

Based on my memory, I had forgotten that the request was denied without prejudice. So we studiously excluded from the calculation the damages or the fees that were incurred in that lengthy six-month disqualification motion.

And, you know, the funny thing is, Your Honor, I made another mistake and I took the deposition of the wrong witness in connection with the disqualification motion. I took the deposition of Mr. Patrick. I wish I had taken the deposition of Mr. McGraner. Because if you go to the transcript from the hearing on the merits on November 1st, at Pages 126 through 129 you'll see his very, very plain admissions that he knew that Wick Phillips represented both Highland and HCRE jointly in these transactions.

And if I had had that admission as part of the disqualification motion, I bet two things would have happened. I would have asked for a bad faith finding, and I bet their expert would have come up with a very different opinion than they did. I bet if you took those four pages of the transcript and said, oh, did they tell you this, and you gave that to their expert, I bet their opinion would have been radically different.

And so we didn't seek damages for it, and it's my

error. But the Court's reliance on -- really, the Court should look at Mr. McGraner's testimony at Pages 126 to 129, and you'll see there was no good-faith basis to retain Wick Phillips, there was no good-faith basis to contest the disqualification motion. Just on those four pages alone. I wish we had had that at the time.

THE COURT: Okay. All right. Thank you.

Ms. Ruhland, you get the last word.

MS. RUHLAND: Thank you, Your Honor. I want to address just a few of the points that Mr. Morris made.

First, on the applicable standard, if I said the standard is that the Court can address obvious mistakes of fact, I misspoke. I was trying -- I was just trying to say that the word "mistake" in Rule 60(b)(1), according to the Supreme Court of the United States, is not limited to obvious errors of law, to errors made only by the parties. Mistake is broader than that, and it can extend to factual mistakes in the order and errors of law, regardless of whether they're obvious. And I would just refer the Court to the Supreme Court's ruling in this regard because I think that's the definitive authority on this standard.

In terms of the efforts by HCRE to preserve its claim -- and, again, I want to be clear about this, because Mr. Morris just accused us of cherry-picking examples from

the record of HCRE's willingness to withdraw its claim with prejudice to asserting it in a different forum at a later date. The only example that Mr. Morris has cited the Court to and the only example I've seen in the record of efforts by HCRE to "preserve its claim" prior to the date of the Court's bad-faith order -- or, sorry, prior to the date of the Court's order denying the claim -- is a passage contained in HCRE's brief in support of the motion to withdraw its claim. That's Docket No. 3443. Mr. Morris just cited the Court to Page 5, Note 8. And this is where, in its motion to withdraw, HCRE cited to some cases interpreting the *Manchester* factors and simply said that a tactical advantage is not a reason to deny a party's motion to withdraw its claim.

Now, nowhere in the passage cited by Mr. Morris does HCRE say, we're hoping to obtain a tactical advantage, we hope to be able to assert this claim in a different forum at a later date, we think we have the right to do that. That has nothing to do with the passage cited by Mr. Morris as the one example prior to the order denying the claim of HCRE's efforts to preserve its claim for another day.

And again, the Court's order, the Court's bad-faith order says there were repeated efforts by HCRE to preserve its claims for another day, and I just don't see

evidence of that in the record.

The only other example that Mr. Morris cited is a snippet of argument from Mr. Gameros's closing argument at the evidentiary hearing on the proof of claim where he said he did not think it was appropriate for the Court to issue extra findings of fact -- or, extra findings regarding the various bases for HCRE's proof of claim, like rescission, reformation, and the like.

But there, Mr. Gameros's only point was that he didn't think those findings were appropriate in the context of resolving Highland's objection to the proof of claim, as opposed to what the Court might do in adversary proceedings where the parties presented claims and affirmative defenses.

Again, nowhere in that passage did Mr. Gameros say to the Court, you know what, I don't think you should issue these findings so that HCRE can go raise these issues in another court on another day and refight the proof of claim. HCRE has never said anything like that, through its counsel or otherwise.

THE COURT: But here's what I don't understand. The whole proof of claim was based on the agreement. Okay? The original proof of claim, claimant contends that all or a portion of Debtors' equity, ownership, economic rights, equitable or beneficial interests in SE

Multifamily does not belong to the Debtor against the Debtor. This process is ongoing.

And then in the HCRE response to the objection to its proof of claim, after reviewing what documentation is available, HCRE, with the Debtor, believes the organizational documents relating to SE Multifamily Holdings improperly allocates the ownership percentages of the members due to mutual mistake, lack of consideration, and/or failure of consideration. As such, HCRE has a claim to reform, rescind, and modify the agreement.

I mean, I'm just trying to comprehend that HCRE put it in issue and then they said the Court can't make findings on the issue that HCRE raised.

MS. RUHLAND: And, again, Your Honor, after that pleading by Wick Phillips was entered into the record, there was a hearing -- there was a subsequent motion to withdraw, there was that hearing on the motion to withdraw, and at that hearing HCRE said repeatedly it was willing to withdraw its proof of claim and the bases for its proof of claim with prejudice.

And I think that that was a sufficient representation for HCRE to make on the record to convince the Court and Highland that it didn't seek to refight the claim at a later date on those bases.

But, that said, Mr. Gameros's closing argument, I think that his only point was to just make a distinction between what is appropriate on an objection to a proof of claim versus in a full-blown adversary proceeding, which this was not. I don't think his point was -- and I just can't read the passage that way -- to preserve these claims for another day.

So, again, if that's the only other example of record that anyone has, I just don't see real evidence of, quote, repeated attempts by HCRE to preserve these claims to fight another day in another court. And, again, we know from history now that HCRE hasn't done that.

So I just don't think the record is sufficient to support the Court's conclusion that there were repeated efforts by HCRE to preserve the bases for its claims for another day.

In addition, Mr. Morris went through, you know, all of the other bases for the Court's bad-faith finding. But, again, as we stated in our reply brief, we disagree with some of the Court's conclusions and we disagree with the Court's overarching finding of bad faith, but those are issues for another day. We filed a notice of appeal, and we'll raise those issues at the appropriate time in front of an appellate court.

The only thing we're focused on in this proceeding is

the issue of whether HCRE refused to withdraw its claim with prejudice. And I heard Mr. Morris concede that HCRE was willing to make that concession at the hearing on the motion to withdraw. His only point is that there were other reasons that the Court refused the motion to withdraw.

My point in filing the motion was just to have the Court look at its conclusion that HCRE refused to withdraw its claim with prejudice, which I think is contrary to record, and see if the record as it stands changes the Court's opinion about bad faith withdrawal of the proof of claim at all. Because I think that's an important piece of the pie here. Again, it led to an additional $375,000 in sanctions.

So I do think that that particular ruling is important for the Court to look carefully at, to look at the record about, and decide whether it's correct or not. And I hear Mr. Morris agreeing with me that it's not.

And then, finally, on the "but for" element, I just want to say this. At the hearing, Mr. Morris said, you know, with prejudice wasn't the issue at the motion to withdraw hearing. Instead, the issue at the motion to withdraw hearing was whether HCRE was going to preserve the bases set forth in Wick Phillips' response to the objection to the proof of claim for another day, those

bases being reformation, rescission, et cetera.

At the hearing, Mr. Morris asked for three concessions. He asked for -- maybe there were four, but let me try to list them. One, he asked for a withdrawal of the proof of claim with prejudice. Two, he asked for a waiver of any right to appeal the denial of the proof of claim. Three, he asked for Mr. Seery's deposition, which had been taken already at the point of the motion to withdraw, never to be used in future litigation against Highland. And four, he asked for the right to take the two remaining depositions that Highland had noticed up before the motion to withdraw was filed. So that's four.

There was no point during that hearing where anyone -- the Court, Mr. Morris, anyone -- said, hey, HCRE, will you represent on the record that you will never ever fight again about the bases set forth in that Wick Phillips response? Meaning, rescission, reformation, et cetera.

By the way, if HCRE had been asked to make those representations, it would have, because with prejudice means with prejudice for all purposes, and the bases of the proof of claim were already laid out in pleadings before the Court. Everyone knew that. So withdrawing the proof of claim with prejudice would have disabled

HCRE from asserting those bases for asserting a proof of claim in the future. So I think that that is an important piece of this.

And then, finally, on the "but for" test, again, HCRE wanted these four concessions as a result -- you know, as a condition to withdrawal of the proof of claim. Mr. Morris, the Court, concluded that the parties couldn't get there at the motion to withdraw hearing, and so the case went forward to the tune of $375,000.

But at the end of the day, the Court's order doesn't go as far as the concessions that Mr. Morris sought to elicit on the record that day. The Court's order doesn't deny the proof of claim with prejudice, it just denies it for all purposes, which maybe is for all intents and purposes the same thing, but it certainly doesn't contain the language "with prejudice." The Court did not order that HCRE would have a 46.6 interest in perpetuity, nor did it say that Highland -- or, that HCRE couldn't fight the 46.6 percent interest in the future based on something not raised in the POC.

The Court's order didn't mandate that HCRE waive its right to appeal.

So, at the end of the day, Highland spent another $375,000 to get an order from the Court that's actually worse that the concessions that HCRE was willing to

supply on the record at the day of the motion to withdraw hearing. That eliminates "but for" causation, and I think that is a reason for the Court to reconsider its order.

THE COURT: All right. The last question I have for you is would you please address the argument that Mr. Morris made that -- I'm paraphrasing -- I mean, HCRE did not appeal the order disallowing withdrawal of the proof of claim and this feels a little bit like a collateral attack on that order.

MS. RUHLAND: Sure, Your Honor. We actually address that in our reply brief, but I can address it here, too. I disagree with that characterization. We did not appeal the denial of the withdrawal because we told the Court on the record we wouldn't do that and HCRE lived up to that promise.

And if you read -- I don't think there's any fair reading of our motion for reconsideration as a collateral attack on the denial of withdrawal. We've only mentioned that order in passing I think one time as a *See also* cite in the brief. And so our motion for reconsideration is limited to whether or not the Court's conclusion in its bad-faith sanctions order is -- the Court was mistaken on HCRE's refusal to withdraw its claim with prejudice.

And so we are very much focused on the bad-faith

order itself, and all of the arguments in our motion are focused on that. And we're not trying to revisit the denial of the motion to withdraw. I don't think we can at this point. We've waived that right because we didn't appeal that order, as we told the Court we wouldn't.

THE COURT: Well, but I think the point of the collateral attack argument is it's all about you made a mistake, Judge. You thought we weren't -- we, HCRE, was not willing to withdraw our proof of claim with prejudice to ever raising these issues again, and we were. And that all boils down to me looking at what happened on September 12, 2022 at that hearing and all the exchanges and whatnot. So, --

MS. RUHLAND: I --

THE COURT: -- again, it feels like the error you are arguing happened back in September '22, really. I mean, I understand what you're saying in the "but for" argument. But, still, it sounds like my error of fact that you are urging happened way back in the order -- the hearing and the order thereon that you did not appeal.

MS. RUHLAND: Well, Your Honor, I had no way of knowing, obviously, and HCRE had no way of knowing what you would rely on in issuing a bad-faith order in this case until your bad-faith order was issued. And when we read it, what stuck out to us immediately was the Court's

conclusion, not only in issuing a finding of bad faith but also in issuing sanctions after that motion to withdraw hearing, was that the Court concluded that HCRE refused to withdraw its claim with prejudice.

And so that is what the Court found in its bad-faith order. That is the mistake we think we've identified in our motion for reconsideration that absolutely requires us to go back and look at the disconnect between the record and the Court's conclusion in its order.

I don't think that's a collateral attack on the Court's order denying withdrawal of the proof of claim. I think it's squarely an attack on the Court's conclusions of fact in its bad-faith order and why those are at odds with the actual record that the Court had in front of it when making that decision.

And I don't, I just don't agree that that's a collateral attack at all. Although I understand the Court's, you know, point that this requires the Court to look at evidence that, you know, and a record that is from September 12, 2022. It does. But that's because that record is inconsistent with the Court's bad-faith ruling.

THE COURT: All right. Well, I will get you all an order on this matter in the next few days. I know, for the bigger picture, there's another Highland matter

that I've had under advisement. I do have an opinion on that that likewise I think is going to get out in the next few days.

Which one is that, Courtney? I can't even remember.

(Court confers with Clerk.)

THE COURT: Okay. Never mind. We have something under advisement that we've had under advisement for a couple of months and we're -- I'm just drawing a blank right now on what it was. But I'll get you a ruling on this one in the next few days.

Hang on a second.

All right. Anything further from anyone?

MR. MORRIS: No, Your Honor. Thank you for your patience.

THE COURT: All right.

MS. RUHLAND: No, Your Honor. Thank you so much.

THE COURT: All right. We're adjourned.

(Proceedings concluded at 11:06 a.m.)

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CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Kathy Rehling **06/08/2024**

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Kathy Rehling, CETD-444 Date

Certified Electronic Court Transcriber

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