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

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,¹
Debtor.

HIGHLAND CAPITAL MANAGEMENT, L.P.,
Plaintiff,

vs.

JAMES D. DONDERO,
Defendant.

§
§ Chapter 11
§
§ Case No. 19-34054-sgj11
§
§
§
§ Adversary Proceeding
§
§ No. 20-3190-sgj11
§
§
§
§

¹ The Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.



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DEBTOR’S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR AN ORDER REQUIRING MR. JAMES DONDERO TO SHOW CAUSE WHY HE SHOULD NOT BE HELD IN CIVIL CONTEMPT FOR VIOLATING THE TRO

Highland Capital Management, L.P., the plaintiff in the above-captioned adversary proceeding (the “Adversary Proceeding”), and the debtor and debtor-in-possession (the “Debtor” or “Highland”) in the above-captioned chapter 11 case (“Bankruptcy Case”), submits this memorandum of law (the “Memorandum”) in support of the *Debtor’s Motion for an Order Requiring Mr. James Dondero to Show Cause Why He Should Not Be Held in Civil Contempt for Violating the TRO* (the “Motion”), pursuant to sections 105(a) and 362(a) of title 11 of the United States Code (the “Bankruptcy Code”), and Rules 7001 and 7065 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), for an order requiring Mr. James Dondero (hereinafter “Mr. Dondero”) to show cause why he should not be held in civil contempt for violating the Court’s *Order Granting Debtor’s Motion for a Temporary Restraining Order Against James Dondero* (Adv. Pro. Docket No. 10) (the “TRO”). In support of its Motion, the Debtor states as follows:

PRELIMINARY STATEMENT

1. On December 10, 2020, this Court issued the TRO temporarily restraining Mr. Dondero from, among other things, (a) communicating with any of the Debtor’s employees, (b) interfering with or otherwise impeding the Debtor’s operations and management of its assets, and (c) causing or encouraging any entity owned or controlled by Mr. Dondero from, directly or indirectly, interfering with the Debtor’s operations and disposition of its assets.

2. The evidence (including documents and Mr. Dondero’s brash admissions made during a deposition earlier this week) demonstrates that Mr. Dondero cavalierly violated the TRO a substantial number of times, and in substantial ways; it also shows that he has no

regard for this Court or these proceedings. Indeed, at least as of the time of his deposition, Mr. Dondero had not even bothered to read the TRO or make any attempt to understand its scope.

3. In the four short weeks since the TRO was entered, Mr. Dondero (a) “disposed” of (*i.e.*, threw in the garbage) a cell phone bought and paid for by the Debtor in what the Debtor believes was an attempt to evade discovery; (b) trespassed on the Debtor’s property after the Debtor evicted him from its offices precisely because he was interfering with its business; (c) interfered with the Debtor’s efforts to execute certain transactions in its capacity as portfolio manager of certain CLOs (despite knowing of this Court’s ruling just six days earlier in which it denied as “frivolous” a related motion brought by the K&L Gates Clients (as defined below)); (d) otherwise knew of and supported the K&L Gates Clients when they sent three separate letters to the Debtor making further demands and threats; (e) colluded with Scott Ellington and Isaac Leventon (before they were terminated as Debtor’s in-house counsel) to coordinate legal strategy against the Debtor; and (f) interfered with the Debtor’s obligation to produce certain documents that were requested by the Official Committee of Unsecured Creditors (the “UCC”) and that were in the Debtor’s possession, custody, and control.²

4. There is ample, admissible evidence to support the Motion. Based on that evidence, the Debtor requests that the Court (i) find and hold Mr. Dondero in contempt for violating the TRO; (ii) direct Mr. Dondero to produce to the Debtor and the UCC within three days all financial statements and records of Dugaboy and Get Good for the last five years; (iii) direct Mr. Dondero to pay the Debtor’s estate an amount of money equal to two times the Debtor’s actual expenses incurred in bringing this Motion and addressing Mr. Dondero’s conduct that lead to the imposition of the TRO and this Motion (*e.g.*, responding to the K&L Gates

² The Debtor’s investigation of Mr. Dondero’s conduct, and the roles played by Mr. Ellington and Mr. Leventon, is ongoing and the Debtor reserves the right to identify additional bases to support the Motion and/or to assert claims against anyone who wrongfully acted against the Debtor’s interests.

Clients' frivolous motion and related demands and threats and taking Mr. Dondero's deposition), payable within three calendar days of presentment of an itemized list of expenses, (iv) impose a penalty of three times the Debtor's actual expenses incurred in connection with any future violation of any order of this Court, and (v) grant the Debtor such other and further relief as the Court deems just and proper under the circumstances.

FACTUAL BACKGROUND

A. The TRO is Entered but Mr. Dondero Does Not Read It or Understand its Terms

5. On December 10, 2020, the Court issued the TRO prohibiting Mr. Dondero from engaging in certain conduct with respect to the Debtor's operations in order to prevent irreparable harm to the Debtor pending the hearing on the *Debtor's Motion for a Temporary Restraining Order and Preliminary Injunction against James Dondero* [Docket No. 6], scheduled for January 8, 2021 (the "Hearing"). Specifically, the TRO temporarily enjoined and restrained Mr. Dondero from:

(2)(a) communicating (whether orally, in writing, or otherwise), directly or indirectly, with any Board member unless Mr. Dondero's counsel and counsel for the Debtor are included in any such communication;

(b) making any express or implied threats of any nature against the Debtor or any of its directors, officers, employees, professionals, or agents;

(c) communicating with any of the Debtor's employees, except as it specifically relates to shared services currently provided to affiliates owned or controlled by Mr. Dondero;

(d) interfering with or otherwise impeding, directly or indirectly, the Debtor's business, including but not limited to the Debtor's decisions concerning its operations, management, treatment of claims, disposition of assets owned or controlled by the Debtor, and pursuit of the Plan or any alternative to the Plan;

(e) otherwise violating section 362(a) of the Bankruptcy Code (collectively, (a)-(e) constitutes the "Prohibited Conduct"); and

(3) causing, encouraging, or conspiring with (a) any entity owned or controlled by him, and/or (b) any person or entity acting on his behalf, from, directly or indirectly, engaging in any Prohibited Conduct.

*See Morris Dec. Exhibit J.*³

6. Mr. Dondero could not care less about the Debtor's request for a temporary restraining order against him, or the Court's issuance of the TRO. Among other things, Mr. Dondero never (at least as of the time of his deposition on January 4, 2021):

- * reviewed the Declaration of James P. Seery, Jr., the Debtor's Chief Executive Officer, in support of the Debtor's motion for the temporary restraining order;
- * attempted to learn of the allegations made against him;
- * thought about the fact that the Debtor was seeking a restraining order against him;
- * listened to the hearing where the Court admitted evidence and heard argument on the Debtor's motion;
- * read the transcript of the hearing where the Court granted the Debtor's motion for the TROR;
- * read the TRO after it was entered; or
- * made any meaningful effort to understand the scope of the TRO.

Morris Dec. Ex. Z at 12:17-15:14.

7. Mr. Dondero's willful ignorance of the TRO, and the evidence supporting the entry of the TRO, is itself contemptible.

B. Mr. Dondero Violated the TRO by Throwing Away his Cell Phone after the TRO was entered

8. Mr. Dondero had a cell phone that was bought and paid for by the Debtor (the "Debtor's Phone"). The cell phone ATT account to which the phone and number were attached is also the Debtor's property. In early December, Mr. Dondero had the telephone number associated with the Debtor's Phone transferred to his personal account and – after the TRO was entered – “disposed” of the phone, likely by throwing it in the garbage. Incredibly, Mr. Dondero could not recall at his deposition (a) who decided to throw the Debtor's Phone

³ "Morris Dec." refers to the Declaration of John A. Morris, duly executed on January 7, 2021, and submitted contemporaneously herewith in support of the Debtor's Motion.

away, (b) who actually threw it away; or (c) when, after the TRO was entered, the Debtor's Phone was "disposed" of.

9. Mr. Dondero was apparently not candid with his own lawyers concerning the whereabouts of the Debtor's Phone. On December 23, 2020, the Debtor demanded, among other things, the return of the Debtor's Phone for the express purpose of obtaining the text messages on it. Mr. Dondero's counsel responded six days later to report that the Debtor's Phone could not be located; no mention was made of it having been "disposed" of. **Morris Dec. Exs. G, K, U, and Z at 71:24-76:2; 86:4-87:15.**

10. Mr. Dondero obviously communicates by text message. Based on his conduct, the Court should find that Mr. Dondero has attempted to spoil evidence and draw a negative inference.

C. Mr. Dondero Violated the TRO by Trespassing on the Debtor's Property

11. On December 23, 2020, the Debtor informed Mr. Dondero that he was being evicted from the Debtor's offices and would not be permitted entry as of December 30, 2020, precisely because the Debtor believed he was interfering with the Debtor's business.

12. Despite the unambiguous nature of the Debtor's eviction notice, on January 5, 2021, Mr. Dondero walked right into the Debtor's offices and sat down in the Debtor's conference room to give his deposition; he even had the audacity to keep over 20 lawyers waiting while he spent 35 minutes making phone calls from the Debtor's offices.

13. Mr. Dondero did not seek or obtain the Debtor's permission to enter their premises. **Morris Dec. Exs. K, Z at 9:3-19.** And the Debtor has no knowledge as to when he left that day, whether he met with any of the Debtor's employees, and whether he has been in the Debtor's offices at other times.

D. Mr. Dondero Violated the TRO by Interfering with the Debtor’s Trading as Portfolio Manager of Certain CLOs

14. As this Court may recall from recent hearings, Mr. Dondero owns and/or controls certain financial advisory firms and investment funds that are represented by the law firm K&L Gates (those entities are collectively referred to as the “K&L Gates Clients”). The financial advisory firms owned by Mr. Dondero caused the investment funds controlled by Mr. Dondero to invest in certain CLOs that are managed by the Debtor pursuant to written agreements. In a repeat of his performance around Thanksgiving, and notwithstanding his knowledge of this Court’s dismissal of the “frivolous” motion brought by the K&L Gates Clients, on December 22, 2020, Mr. Dondero personally intervened to prevent the Debtor from executing certain securities transactions authorized by Mr. Dondero. **Morris Dec. Exs. K, L, Z at 89:21-93:20.**

E. Mr. Dondero Violated the TRO by “Pushing and Encouraging” the K&L Gates Clients to Make Further Demands and Threats Against the Debtor

15. On December 22, 23, and 30, 2020, the K&L Gates Clients sent letters in which they made various demands and threats including, among other things, threats to take steps to terminate the Debtor’s CLO management agreement and to hold the Debtor liable for purported damages arising from the Debtor’s decision to evict Mr. Dondero from its offices. As the court will recall from the testimony of Dustin Norris, Mr. Dondero owns and/or controls each of the K&L Gates Client.

16. Mr. Dondero knew these letters were being sent and he “pushed” and “encouraged” the K&L Gates Clients to send them, with knowledge of the Court’s December 16, 2020, ruling denying as “frivolous” the K&L Gates Clients’ related motion. **Morris Dec. Exs. M, N, X, and Z at 94:19-106:16.** Indeed, the evidence will show that Mr. Dondero believes that

a class action lawsuit against Mr. Seery or a referral to market regulators are among the options available to the K&L Gates Clients. *See, e.g., Morris Dec. Ex. Z at 62:19-63:22.*

F. Mr. Dondero Violated the TRO by Communicating with the Debtor's Employees to Coordinate Their Legal Strategy Against the Debtor

17. The Debtor will never be able to count the number of times that Mr. Dondero violated the TRO by communicating with the Debtor's employees, but the evidence currently available shows that he communicated with Mr. Ellington and Mr. Leventon (after the TRO was entered on December 10, 2020), in at least the following ways:

- On December 12, Mr. Ellington was actively involved in identifying a witness to support Mr. Dondero's interests at the December 16 hearing (**Morris Dec. Ex. P**);
- On December 15, Mr. Ellington and Mr. Leventon collaborated with Mr. Dondero's lawyers in preparing a "common interest" agreement (**Morris Dec. Exs. Q, Z at 116:21-120:14**);
- On December 16, Mr. Dondero solicited Mr. Ellington's help in coordinating all of the lawyers representing Mr. Dondero's interests, telling Mr. Ellington that he needed him to "show leadership" (which Mr. Ellington eagerly agreed to do) (**Morris Dec. Ex. W**);
- On December 23, Scott Ellington and Grant Scott communicated in connection with efforts to schedule a call with Mr. Dondero and K&L Gates (**Morris Dec. Ex. Y**);
- And in late December, Mr. Dondero communicated with Mr. Leventon to obtain the contact information for Mr. Ellington's and Mr. Leventon's new lawyers at Baker & McKenzie for the explicit purpose of advancing the "mutual shared defense agreement." (**Morris Dec. Exs. S, Z at 136:8-139:5**).

G. Mr. Dondero Violated the TRO by Preventing the Debtor from Completing its Document Production

18. Mr. Dondero knew that several times in the last year "several entities" had requested the Dugaboy financial statements. The documents (and those of Get Good) are on the Debtor's system, apparently in a place few people know about. In keeping with the Debtor's policies, those documents on the Debtor's system are the Debtor's property. After the TRO was

entered, Mr. Dondero personally interfered with the Debtor’s search for these documents and told one of the Debtor’s employees that the records could not be produced without a subpoena. Notably, Mr. Dondero was instructed not to answer questions about whether he had discussed the production of these documents with Mr. Ellington or Mr. Leventon, and he followed his counsel’s instructions. **Morris Dec. Exs. R, Z at 124:25-135:11.**⁴

ARGUMENT

19. “The power to impose sanctions for contempt of an order is an inherent and well-settled power of all federal courts—including bankruptcy courts.” *In re SkyPort Global Comm’s, Inc.*, No. 08-36737-H4-11, 2013 WL 4046397, at *1 (Bankr. S.D.Tex. Aug. 7, 2013), *aff’d.*, 661 Fed. Appx. 835 (5th Cir. 2016); *see also In re Bradley*, 588 F.3d 254, 255 (5th Cir. 2009) (noting that “civil contempt remains a creature of inherent power[,]” to “prevent insults, oppression, and experimentation with disobedience of the law[,]” and it is “widely recognized” that contempt power extends to bankruptcy) (quoting 11 U.S.C. § 105(a), which states, in pertinent part, that “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”); *Placid Refining Co. v. Terrebonne Fuel & Lube, Inc. (In re Terrebonne Fuel & Lube, Inc.)*, 108 F.3d 609, 613 (5th Cir.1997) (“[W]e assent with the majority of the circuits ... and find that a bankruptcy court's power to conduct civil contempt proceedings and issue orders in accordance with the outcome of those proceedings lies in 11 U.S.C. § 105.”). A bankruptcy court’s power to sanction those who “flout [its] authority is both necessary and integral” to the court’s performance of its duties. *SkyPort Global*, 2013 WL 4046397, at *1. Indeed, without such power, the court would be a “mere board[] of arbitration, whose judgments and decrees would be only advisory.” *Id.* (internal quotations omitted); *see*

⁴ As the Court may recall, on August 12, 2020, the Court entered an *Order Resolving Discovery Motions and Objections Thereto* [Docket No., 942] that supposedly addressed issues of shared services and “ownership” arguments made by related parties.

also *Bradley*, 588 F.3d at 266 (noting that contempt orders are both necessary and appropriate where a party violates an order for injunctive relief, noting such orders “are important to the management of bankruptcy cases, but have little effect if parties can irremediably defy them before they formally go into effect.”).

20. “A party commits contempt when [they] violate[] a definite and specific order of the court requiring [them] to perform or refrain from performing a particular act or acts with knowledge of the court's order.” *Travelhost*, 68 F.3d at 961. Thus, the party seeking an order of contempt in a civil contempt proceeding need only establish, by clear and convincing evidence: “(1) that a court order was in effect, and (2) that the order required certain conduct by the respondent, and (3) that the respondent failed to comply with the court's order.” *F.D.I.C. v. LeGrand*, 43 F.3d 163, 170 (5th Cir. 1995); see also *Martin v. Trinity Indus., Inc.*, 959 F.2d 45, 47 (5th Cir.1992) (same); *Travelhost*, 68 F.3d at 961 (same). “To support a contempt finding in the context of a TRO, the order must delineate ‘definite and specific’ mandates that the defendants violated.” *Am. Airlines, Inc. v. Allied Pilots Ass'n*, 228 F.3d 574, 578 (5th Cir. 2000) (citing Fed. R. Civ. P. 65). The court need not, however, “anticipate every action to be taken in response to its order, nor spell out in detail the means in which its order must be effectuated.” *Id.* Moreover, “[t]he contemptuous actions need not be willful so long as the contemnor actually failed to comply with the court's order. *Id.* (citing *N.L.R.B. v. Trailways, Inc.*, 729 F.2d 1013, 1017 (5th Cir.1984).

21. To that end, judicial sanctions in civil contempt proceedings may be employed for either or both of two purposes: “to coerce the defendant into compliance with the court’s order, and to compensate the complainant for losses sustained.” *Am. Airlines*, 228 F.3d at 586 (internal quotations omitted). “Compensatory civil contempt reimburses the injured party for the losses and expenses incurred because of [their] adversary's noncompliance.” *Norman*

Bridge Drug Co. v. Banner, 529 F.2d 822, 827 (5th Cir.1976); *see also Travelhost*, 68 F.3d at 961 (noting that “[b]ecause the contempt order in the present case is intended to compensate [plaintiff] for lost profits and attorneys' fees resulting from the contemptuous conduct, it is clearly compensatory in nature.”); *In re Terrebonne Fuel & Lube, Inc.*, 108 F.3d at 613 (affirming court’s decision to impose sanctions for violating injunction and awarding plaintiff costs and fees incurred in connection with prosecuting defendant’s conduct); *F.D.I.C.*, 43 F.3d 168 (affirming court’s imposition of sanctions requiring defendant to pay movant attorneys’ fees). Ultimately, courts have “broad discretion in the assessment of damages in a civil contempt proceeding.” *Am. Airlines*, 228 F.3d at 585; *see also F.D.I.C.*, 43 F.3d 168 (reviewing lower court’s contempt order for “abuse of discretion” under the “clearly erroneous standard.”); *In re Terrebonne Fuel & Lube, Inc.*, 108 F.3d at 613 (“The bankruptcy court's decision to impose sanctions is discretionary[.]”). For the reasons that follow, the Debtor shows—clearly and convincingly—that Mr. Dondero committed contempt.

22. The Debtor easily meets the foregoing standards. Based on the evidence, there can be no dispute that Mr. Dondero has wantonly and intentionally violated the TRO on many occasions, in many ways. Mr. Dondero’s conduct cannot be justified or explained away and there is no basis to oppose this relief requested herein.

CONCLUSION

WHEREFORE, the Debtor respectfully requests that the Court grant its Motion and enter an Order in the form annexed hereto as Exhibit A, and grant any further relief as the Court deems just and proper.

Dated: January 7, 2021.

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