Case No. 3:21-cv-01590-N

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

In re: Highland Capital Management, L.P.,
***Debtor*.**

James Dondero,
***Appellant*,**

v.

Highland Capital Management, L.P.,
***Appellee*.**

On Appeal from the United States Bankruptcy Court for
the Northern District of Texas, Adversary No. 20-03190
Hon. Stacey G.C. Jernigan, Presiding

APPENDIX TO APPELLANT JAMES DONDERO'S OPENING BRIEF

Jeffrey S. Levinger
LEVINGER PC
1700 Pacific Avenue
Suite 2390
Dallas, Texas 75201
(214) 855-6817

John T. Wilson IV
Clay M. Taylor
Bryan C. Assink
BONDS ELLIS EPPICH SCHAFER JONES LLP
420 Throckmorton Street, Suite 1000
Fort Worth, Texas 76102
(817) 405-6900

ATTORNEYS FOR APPELLANT JAMES DONDERO

APPENDIX

Tab	ECF No.	Document	Record Citations	App. Pages
A.	Adv. Dkt. 191	Memorandum Opinion and Order Granting in Part Plaintiff's Motion to Hold James Dondero in Civil Contempt of Court for Alleged Violation of TRO	000059 – 000113	001-055
B.	Adv. Dkt. 10	Order Granting Debtor's Motion for a Temporary Restraining Order Against James Dondero	006306 - 006308	056-059
C.	Adv. Dkt. 48	Debtor's Motion for Contempt Against James Dondero	006604 - 006612	060-069
D.	Adv. Dkt. 49	Debtor's Memorandum of Law in Support of Motion for Contempt Against James Dondero	006613 - 006626	070-084
E.	Adv. Dkt. 110	James Dondero's Objection to Debtor's Motion for Contempt	008017 – 008043	085-112
F.	Adv. Dkt. 138	Transcript of hearing conducted on March 22, 2021 in Adv. No. 20-03190	008880 – 009157	113-391
G.	Adv. Dkt. 139	Transcript of hearing conducted on March 24, 2021 in Adv. No. 20-03190	009158 – 009231	392-466

Dated: November 8, 2021

Respectfully submitted,

/s/ Bryan C. Assink

John T. Wilson IV
State Bar I.D. No. 24033344
Clay M. Taylor
State Bar I.D. No. 24033261
Bryan C. Assink
State Bar I.D. No. 24089009
BONDS ELLIS EPPICH SCHAFER JONES LLP
420 Throckmorton Street, Suite 1000
Fort Worth, Texas 76102
(817) 405-6900 telephone
(817) 405-6902 facsimile
Email: john.wilson@bondsellis.com
Email: clay.taylor@bondsellis.com
Email: bryan.assink@bondsellis.com

-and-

Jeffrey S. Levinger
State Bar I.D. No. 12258300
LEVINGER PC
1700 Pacific Avenue, Suite 2390
Dallas, Texas 75201
(214) 855-6817 telephone
(214) 817-4509 facsimile
Email: jlevinger@levingerpc.com

ATTORNEYS FOR APPELLANT JAMES DONDERO

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on November 8, 2021, a true and correct copy of the foregoing document was served via the Court's CM/ECF system on counsel for Appellee and all other parties requesting or consenting to such service in this case.

/s/ Bryan C. Assink
Bryan C. Assink

TAB A

The following constitutes the ruling of the court and has the force and effect therein described.

Signed June 7, 2021

United States Bankruptcy Judge

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

In re: HIGHLAND CAPITAL MANAGEMENT, L.P.,[1] Debtor.	§	Chapter 11 Case No. 19-34054-sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, vs. JAMES D. DONDERO, Defendant.	§	Adversary Proceeding No. Case No. 20-03190-sgj11

MEMORANDUM OPINION AND ORDER GRANTING IN PART PLAINTIFF'S MOTION TO HOLD JAMES DONDERO IN CIVIL CONTEMPT OF COURT FOR ALLEGED VIOLATION OF TRO[2]

[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.

[2] This Order addresses the Motion filed at DE # 48 in above-referenced Adversary Proceeding.

You know, this is -- I hate to say it, but I feel like I've been in the role of a divorce judge today. We have very much a corporate divorce that has been in the works . . . and I'm a judge having to enter interim orders keeping one spouse away from the other, keeping one spouse out of the house, keeping one spouse away from the kids. It's not pleasant at all.

Transcript from 1/8/21 Hearing at 194:1-9. [DE # 80, Exh. 36].

I. Introduction.

The above quote aptly describes the above-referenced 20-month-old corporate bankruptcy case: it has, at times, become very much like a nasty divorce—in which one spouse (here, the company) is very much at odds with the other spouse (here, the company's former CEO). It is contentious, protracted, and unpleasant.

For a while, things were a bit like a situation where one spouse has filed for divorce, but both spouses remain living under the same roof for a while—rather than physically separating—for the perceived best interests of the family. This co-habitation eventually became untenable.

Next, things developed similarly to a situation in which one spouse wants to keep the family vacation home, boat, or mutual funds (*i.e.*, the husband), but the other spouse (*i.e.,* the one who happens to have custody and control over them) thinks the assets need to be liquidated to pay off the family's expenses or debt.

Also, this corporate divorce, sadly, is similar to a situation in which one spouse criticizes the other's new partner who has moved into the family home and also bears animus towards the spouse's lawyers. He thinks they are, collectively, mismanaging everything and taking actions towards him out of pure spite.

It's also similar to a situation in which one spouse is endeavoring to have members of the other spouse's household assist or cooperate with him in various ways, in his efforts to get what he perceives to be his fair share in the divorce.

And, finally, it is similar to a situation in which one spouse finally decides to seek a TRO against the other—for fear (legitimate or not) that the ex-spouse is about to burn the house down.

There is a bit of irony in all of this because the spouse (*i.e.,* former CEO) who is the alleged antagonist is the one who signed the divorce (*i.e.,* bankruptcy) petition to start the proceedings.

Divorce metaphors aside, this Order relates to a request by Chapter 11 Debtor Highland Capital Management, L.P. (the "Debtor" or "Highland"), made shortly before its Chapter 11 plan was confirmed,[3] that its co-founder, former President, former Chief Executive Officer ("CEO"), and indirect beneficial equity owner—Mr. James Dondero ("Mr. Dondero")—be held in civil contempt of court for allegedly violating a temporary restraining order ("TRO") of this court.[4] The TRO that Mr. Dondero is alleged to have violated arose in the above-referenced adversary proceeding ("Adversary Proceeding") that the Debtor filed December 7, 2020. A brief summary of the circumstances leading up to the Adversary Proceeding and the TRO is set forth below.

---

[3] As of the date of issuance of this Order, the Debtor's confirmed plan has not yet gone effective.

[4] In addition to being the former CEO, Mr. Dondero represents that he is a "creditor, indirect equity security holder, and party in interest" in the Debtor's bankruptcy. This court has stated on various occasions that this assertion is ostensibly true, but somewhat tenuous. Mr. Dondero filed five proofs of claim in the Debtor's bankruptcy case. Two of those proofs of claim were withdrawn with prejudice on November 23, 2020 [DE # 1460 in main bankruptcy case]. The other three are unliquidated, contingent claims, each of which stated that Mr. Dondero would "update his claim in the next ninety days." Ninety days has long-since passed since those proofs of claim were filed and Mr. Dondero has not updated those claims to this court's knowledge. With regard to Mr. Dondero's assertion that he is an "indirect equity security holder," the details have been represented to the court many times to be as follows (undisputed): Mr. Dondero holds no direct equity interest in the Debtor. Mr. Dondero instead owns 100% of Strand Advisors, Inc. ("Strand"), the Debtor's general partner. Strand, however, holds only 0.25% of the total limited partnership interests in the Debtor through its ownership of Class A limited partnership interests. The Class A limited partnership interests are junior in priority of distribution to the Debtor's Class B and Class C limited partnership interests. The Class A interests are also junior to all other claims filed against the Debtor. Finally, Mr. Dondero's recovery on his indirect equity interest is junior to any claims against Strand itself. Consequently, before Mr. Dondero can recover on his indirect equity interest, the Debtor's estate must be solvent, priority distributions to Class B and Class C creditors must be satisfied, and all claims against Strand must be paid.

II. Background: The Chapter 11 Case.

On October 16, 2019 (the "Petition Date"), Highland filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. Highland is a registered investment advisor that is in the business of buying, selling, and managing assets on behalf of its managed investment vehicles. It manages billions of dollars of assets—to be clear, the assets are spread out in numerous, separate fund vehicles. While the Debtor has continued to operate and manage its business as a debtor-in-possession, the role of Mr. Dondero *vis-à-vis* the Debtor was significantly limited early in the bankruptcy case and ultimately terminated. The Debtor's current CEO is an individual selected by the creditors named James P. Seery.

Specifically, early in the case, the Official Unsecured Creditors Committee ("UCC") and the U.S. Trustee ("UST") desired to have a Chapter 11 Trustee appointed—absent some major change in corporate governance[5]—due to conflicts of interest and the alleged self-serving, improper acts of Mr. Dondero and possibly other officers (for example, allegedly engaging, for years, in fraudulent schemes to put Highland's assets out of the reach of creditors). Under this pressure, the Debtor negotiated a term sheet and settlement with the UCC (the "January 2020 Corporate Governance Settlement"), which was executed by Mr. Dondero and approved by a court order on January 9, 2020 (the "January 2020 Corporate Governance Order").[6] The settlement and term sheet contemplated a complete overhaul of the corporate governance structure of the Debtor. Mr. Dondero resigned from his role as an officer and director of the Debtor and of its general partner. Three new independent directors (the "Independent Board") were appointed to govern the Debtor's general partner Strand Advisors, Inc.—which, in turn, managed the Debtor. All of the new

[5] The UST was steadfast in wanting a Trustee.

[6] *See* DE ## 281 & 339 in main bankruptcy case. *See also* Dondero Exh. 8 (DE # 106 in the Adversary Proceeding).

Independent Board members were selected by the UCC and are very experienced within either the industry in which the Debtor operates, restructuring, or both (Retired Bankruptcy Judge Russell Nelms, John Dubel, and James P. Seery). As noted above, one of the Independent Board members, James P. Seery ("Mr. Seery"), was ultimately appointed as the Debtor's new CEO and CRO.[7] As for Mr. Dondero, while not originally contemplated as part of the January 2020 Corporate Governance Settlement, the Debtor proposed at the hearing on the January 2020 Corporate Governance Settlement that Mr. Dondero remain on as an unpaid employee of the Debtor and also continue to serve as and retain the title of a portfolio manager for certain separate ***non-Debtor*** investment vehicles/entities whose funds are managed by the Debtor.[8] The court approved this arrangement when the UCC ultimately did not oppose it. Mr. Dondero's authority with the Debtor was subject to oversight by the Independent Board.[9] Mr. Seery was given authority to oversee the day-to-day management of the Debtor, including the purchase and sale of assets held by the Debtor and its subsidiaries, as well as the purchase and sale of assets that the Debtor manages for various separate non-Debtor investment vehicles/entities. Significant to the court and the UCC was a provision in the order, at paragraph 9, stating that "Mr. Dondero shall not cause any Related Entity to terminate any agreements with the Debtor."

To be sure, this was a complex arrangement. Apparently, there were well-meaning professionals in the case that thought that having the founder and "face" behind the Highland brand

[7] "CRO" means Chief Restructuring Officer. *See* DE # 854 in main bankruptcy case, entered July 16, 2020.

[8] Although not discussed at the time, the court has become aware that Mr. Dondero has been a paid employee of the Non-Debtor Highland-Related Entities known as NexPoint and/or NexBank postpetition. *See* 1/8/21 Hearing Transcript, Debtor Exh. 36 (DE # 80) at 107:20-23.

[9] "Mr. Dondero's responsibilities in such capacities shall in all cases be as determined by the Independent Directors . . . [and] will be subject at all times to the supervision, direction and authority of the Independent Directors. In the event the Independent Directors determine for any reason that the Debtor shall no longer retain Mr. Dondero as an employee, Mr. Dondero agrees to resign immediately upon such determination." *See* Debtor's Exh. 2, at Exh. 1 thereto, at 3 of 62 (DE # 80).

still involved with the business might be value-enhancing for the Debtor and its creditors (even though Mr. Dondero was perceived as not being the type of fiduciary needed to steer the ship through bankruptcy). For sake of clarity, it should be understood that there are at least hundreds of entities—the lawyers have sometimes said 2,000 entities—within the Highland byzantine organizational structure (sometimes referred to as the "Highland complex"), most of which are ***not*** subsidiaries of the Debtor, nor otherwise owned by Highland. And only Highland itself is in bankruptcy. However, these entities are very much intertwined with Highland—in that they have shared services agreements, sub-advisory agreements, payroll reimbursement agreements, or perhaps, in some cases, less formal arrangements with Highland. Through these agreements Highland (***through its own employees***) has historically provided resources such as fund managers, legal and accounting services, IT support, office space, and other overhead. Many of these non-Debtor entities appear to be under the *de facto* control of Mr. Dondero—as he is the president and portfolio manager for many or most of them—although Mr. Dondero and certain of these entities stress that these entities have board members with independent decision-making power and are not the mere "puppets" of Mr. Dondero (for ease of reference, these numerous entities will be referred to as the "Non-Debtor Dondero-Related Entities"). This court has never been provided a complete organizational chart that shows ownership and affiliations of all 2,000 Non-Debtor Dondero-Related Entities (such a chart would, no doubt, be the size of a football field), but the court has, on occasion, been shown information about some of them and is aware that a great many of them were formed in non-U.S. jurisdictions, such as the Cayman Islands.

Eventually, the Debtor's new Independent Board and management concluded that it was untenable for Mr. Dondero to continue to be employed by the Debtor in any capacity. Various events occurred that led to the termination of his employment with the Debtor. For one thing, Mr.

Dondero prominently opposed certain actions taken by the Debtor through its CEO and Independent Board including: (a) objecting to a significant settlement that the Debtor had reached in court-ordered mediation[10] with creditors Acis Capital Management and Josh and Jennifer Terry (the "Acis Settlement")—which settlement helped pave the way toward a consensual Chapter 11 plan, and (b) pursuing, through one of his family trusts (the Dugaboy Investment Trust), a proof of claim alleging that the Debtor (including Mr. Seery) had mismanaged one of the Debtor's subsidiaries, Highland Multi Strategy Credit Fund, L.P. ("MSCF"), with respect to the sale of certain of its assets during the bankruptcy case (in May of 2020).[11] The Debtor's Independent Board and management considered these two actions to create a conflict of interest—if Mr. Dondero was going to litigate significant issues against the Debtor in court, that was his right, but he could not continue to work for the Debtor (among other things, having access to its computers and office space) while litigating these issues with the Debtor in court.

But the termination of his employment was not the end of the friction between the Debtor and Mr. Dondero. In fact, a week after his termination, litigation posturing and disputes began erupting between Mr. Dondero and certain Non-Debtor Dondero-Related Entities, on the one hand, and the Debtor on the other (as further described below).

III. **The Impetus for the Adversary Proceeding**.

The Adversary Proceeding centers significantly around two Non-Debtor Dondero-Related Entities known as NexPoint Advisors, L.P. ("NexPoint") and Highland Capital Management Fund Advisors, L.P. ("HCMFA," and together with NexPoint, the "Advisors")—both of which, like

[10] The court appointed Retired Bankruptcy Judge Allan Gropper, S.D.N.Y., and Attorney Sylvia Mayer, Houston, Texas (both with the American Arbitration Association), to be co-mediators over multiple disputes in the Bankruptcy Case, including the Acis dispute. The co-mediators, among other things, attempted to mediate disputes/issues with Mr. Dondero.

[11] *See, e.g.,* Proof of Claim No. 177 and DE # 1154 in main bankruptcy case.

Highland, are registered investment advisors. Mr. Dondero is President of NexPoint and has an ownership interest in it.[12] Mr. Dondero is President of HCMFA and has an ownership interest in it as well.[13]

A. Alleged Interference with the Debtor's Management of the Highland CLOs.

The Advisors separately manage three funds ("NexPoint/HCMFA Funds"). The Advisors and these NexPoint/HCMFA Funds own, among other things, equity interests in certain pooled ***collateralized loan obligation*** ("CLO") vehicles that are managed by the Debtor (hereinafter the "Highland CLOs"). A key fact here to remember is that the CLO vehicles are managed by the Debtor (pursuant to contracts and neither the Advisors nor the NexPoint/HCMFA Funds are parties to such contracts).

Generally speaking, the term/acronym "CLO" is loosely used in the investment world to refer to a special purpose entity ("CLO SPE"), in which a manager (here, Highland) purchases a basket of loans to be held in the CLO SPE. The loans in the basket would typically be obligations of large well-known public companies and, collectively, provide a variable rate of interest. The CLO manager typically has discretion to buy and sell different loans to go into the pool of assets, with certain restrictions. There are, meanwhile, tranches of investors who invest funds into the CLO SPE, pursuant to an indenture (with an independent, third-party indenture trustee in place) so that the CLO SPE can purchase the loans, and those investors receive fixed interest from the CLO SPE (with the CLO SPE earning income on the "spread" between: (a) the variable interest being earned on the pool of loans in the CLO SPE's portfolio and (b) the amount of fixed interest the CLO SPE must pay out to its tranches of investors). This description, again, is a bit of a generalization. In

[12] 1/8/21 Hearing Transcript, Debtor's Exh. 36 at 35:9-25 (DE # 80).

[13] 1/8/21 Hearing Transcript, Debtor's Exh. 36 at 36:10-14 (DE # 80).

the case of the Highland CLOs (there are approximately 16 of them), many of them are quite old and do not have the typical diverse portfolio of loans that CLOs commonly have. Many of the CLOs are structured as closed-end investment funds and, in fact, own equity in post-reorganization companies (that are publicly traded and quite liquid) and some even own real estate.[14] In any event, as mentioned, the Debtor serves as portfolio manager on the numerous Highland CLOs (there more than a dozen), pursuant to ***separate portfolio management agreements*** that Highland has with the CLO SPEs. There are about $1 billion of assets in these CLO SPEs that Highland manages.[15] And, to be clear, the Advisors and NexPoint/HCMFA Funds own ***equity*** (*i.e.,* the bottom tranche) in most if not all of these Highland CLOs.

The Debtor has alleged in this Adversary Proceeding that the Advisors, acting under the direction of their President Mr. Dondero, have interfered multiple times with Mr. Seery's attempts to sell various assets in the CLO SPEs, by, among other things, exerting pressure on certain of the Debtor's employees to halt trades that were ordered by Mr. Seery. To be clear, the Advisors have no contractual right to do that—they are not party to the portfolio management agreements that Highland has with the CLO SPEs. The Advisors simply purport to speak for various investors (*i.e.,* the investors in the NexPoint/HCMFA Funds) who have invested in (*i.e.,* own the equity) in the Highland CLOs. However, it appears that the majority of these investors are yet ***other Non-Debtor Dondero-Related Entities***, including but not limited to the entities known as Charitable DAF HoldCo, Ltd. and CLO Holdco, Ltd.[16] In any event, various examples of communications that

[14] *See* 1/26/21 Hearing Transcript, Debtor's Exh. 37 at 155:9-18 (DE # 80).

[15] *See id.* at 202: 3-7.

[16] *See* Debtor's Exh. 2, Exh. 7 thereto (DE # 80). There may be some "mom and pop" or unrelated institutional investors in certain of these Highland CLOs (indirectly through the NexPoint/HCMFA Funds), *see* 1/26/21 Hearing Transcript, Debtor Exh. 37 (DE # 80), at 201:14-22, but ***none*** have ever come forward during the Highland bankruptcy. Moreover, the Debtor aptly notes that there is nothing preventing unhappy investors from simply selling their investments in the Highland CLOs if they are not happy with management decisions of the portfolio manager.

allegedly constituted interference were described in the Adversary Proceeding.[17] The court notes, anecdotally, that Mr. Dondero was continuing, well after his October 9, 2020 termination with the Debtor, to use an email address showing he was an employee of Highland in many of the communications introduced into evidence.[18]

B. Alleged Threats When Debtor Attempted to Collect Demand Notes from Mr. Dondero.

Additionally, the Adversary Proceeding describes that there are certain demand notes on which Mr. Dondero, personally, and certain Non-Debtor Dondero-Related Entities owe significant money to the Debtor. The Debtor made demand upon Mr. Dondero for payment on these demand notes on December 3, 2020, demanding payment by December 11, 2020, so that the Debtor could have these funds to use in its Chapter 11 plan that was set for confirmation in January 2021. Mr. Dondero is alleged to have sent a threatening text to Mr. Seery, just a few hours after the demand letters were sent to him.

After describing Mr. Dondero's alleged conduct, the complaint in the Adversary Proceeding sought injunctive relief preventing Mr. Dondero from interfering with the Debtor's operations, management of assets, and pursuit of a plan of reorganization, to the detriment of the Debtor, its estate, and its creditors, relying on 11 U.S.C. § 105 and Fed. R. Bankr. Pro. 7065. The Debtor has argued that Mr. Dondero's actions have jeopardized the Debtor's ability to effectively wind down its business in the Chapter 11 proceedings—to the detriment of its creditors.

[17] Debtor's Exh. 3, DE # 80 (10/16/20 letter from counsel for Advisors expressing "concerns" about the Debtor's management of the Highland CLOs and a desire that management be transitioned over to the Advisors); Debtor's Exh. 4, DE # 80 (11/24/20 letter from counsel for the Advisors further expressing "concerns" about the Debtor's management of Highland CLOs, especially the selling of assets therein); Debtor's Exh. 5, DE # 80 (11/24/20-11/27/20 emails of Mr. Dondero instructing Highland employee Hunter Covitz not to trade SKY equity as he had been instructed by James Seery); Debtor's Exh. 14, DE # 80 (12/24/20 letter of Debtor's counsel to counsel for the Advisors addressing some of their clients' actions).

[18] *See, e.g.,* Debtor's Exh. 5 (DE # 80).

IV. Motion for TRO [DE # 6].

Almost immediately after filing the Adversary Proceeding, the Debtor sought entry of a TRO enjoining Mr. Dondero from: (a) communicating (whether orally, in writing, or otherwise), directly or indirectly, with any Independent Board member ***unless*** Mr. Dondero's counsel and counsel for the Debtor were 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 related to shared services currently provided by the Debtor 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; and (e) otherwise violating section 362(a) of the Bankruptcy Code (collectively, the "Prohibited Conduct"). It was supported by a Memorandum of Law[19] and a Declaration of Mr. Seery.[20]

The court held a hearing on December 10, 2020 on the Motion for TRO.

A. The Evidence at the TRO Hearing.

At the hearing on the Motion for TRO, the Debtor relied upon the Declaration of Mr. Seery and all exhibits that had been attached thereto (which the court admitted with no objection).[21] The court also heard a small amount of additional live testimony from Mr. Seery. Mr. Dondero's

[19] *See* DE # 6.

[20] *See* DE # 4 (with 29 exhibits attached, 177 pages in total length).

[21] *Id.*

counsel appeared and made some statements but did not file a responsive pleading or put on any evidence.

Mr. Seery credibly testified that, pursuant to the January 2020 Corporate Governance Settlement, Mr. Dondero surrendered control of the Debtor to the Independent Board. After that January 2020 Corporate Governance Settlement, Mr. Dondero's responsibilities with the Debtor were to be, in all cases, as determined by the Independent Board and subject at all times to the supervision, direction and authority of the Independent Board. In the event the Independent Board was to determine for any reason that the Debtor should no longer retain Mr. Dondero as an employee, Mr. Dondero agreed to resign immediately upon such determination.[22] By resolution passed on January 9, 2020, the Independent Board authorized Mr. Seery to work with the Debtor's traders and approve trades of certain of the Debtor's and funds' assets.[23] However, up until mid-March 2020, Mr. Dondero controlled certain of the Debtor's managed funds and accounts (as he still maintained the title of portfolio manager). Mr. Seery credibly testified that "[w]e took them away after they lost considerable amounts of money, about ninety million bucks. Real money. So we took over control of those accounts since then, and we've been managing to sell them down to create cash where we think the market opportunity is correct."[24]

Later, however, during the summer of 2020, the Independent Board determined that it was in the best interests of the Debtor's estate to formally appoint Mr. Seery as the Debtor's CEO and CRO (*i.e.,* not just an Independent Board member with trading authority). The bankruptcy court approved Mr. Seery's appointment as CEO and CRO on July 16, 2020.[25] Mr. Seery's appointment

[22] Debtor's Exh. 1, at pp. 2-3 (DE # 80).

[23] Debtor's Exh. 3, at p. 2 (DE # 80).

[24] 12/10/20 Transcript from TRO Hearing, at p. 51:21-25 (DE # 19).

[25] DE # 854 in main bankruptcy case.

as CEO and CRO formalized his role and his authority to oversee the day-to-day management of the Debtor, including the purchase and sale of assets held by the Debtor and its managed investment vehicles, funds, and subsidiaries. Mr. Seery credibly represented that he has routinely carried out such responsibilities during the case.

On August 12, 2020, the Debtor filed its Plan of Reorganization with the court[26] (as subsequently amended, the "Plan"). The Plan provided for, among other things, the gradual monetization of the Debtor's assets for the benefit of the Debtor's creditors. Also in August 2020, the Debtor entered into court-ordered mediation with certain of its creditors which resulted in, among other things, the Acis Settlement (mentioned earlier). After the Acis Settlement was publicly announced, Mr. Dondero voiced his displeasure with not just the terms of the Acis Settlement, but that a settlement had been reached at all. On October 5, 2020, Mr. Dondero objected to the Debtor's motion seeking approval of the Acis Settlement, which the Debtor believed created an actual conflict with the Independent Board and the Debtor.[27] Additionally, one of Mr. Dondero's family trusts also filed a proof of claim alleging the Debtor and Mr. Seery were mismanaging the assets of a subsidiary of the Debtor.[28] Concluding that this situation was untenable, Mr. Dondero was asked to resign from the Debtor, and he did on October 9, 2020.[29]

Subsequent to Mr. Dondero's termination from the Debtor, he began engaging in activities that the Debtor perceived to be interference with its business judgment and management of the Highland CLOs. Approximately one week after Mr. Dondero resigned, the Advisors began writing letters to Mr. Seery requesting, among other things, that "no [Highland] CLO assets be sold without

[26] DE # 944 in main bankruptcy case.

[27] DE # 1121 in main bankruptcy case; Debtor's Exh. 2 (Mr. Seery's Decl.) at ¶ 11; DE # 80.

[28] *Id.* at ¶ 12.

[29] Debtor's Exhs. 4-5 (DE # 80).

prior notice and consent from the Advisors."[30] Not only is the Advisors' consent for Highland CLO assets sales not contractually required, but the Debtor's Chapter 11 plan (then on file, now confirmed) contemplates the gradual wind down of Highland's business over time so that it will have funds to pay its creditors. In fact, Mr. Seery credibly testified that the business model of Highland in recent years (under the direction of Mr. Dondero—and with its web and layers of entities) has not allowed Highland itself to operate at a profit.[31] Thus, interference with assets sales in the Highland CLOs seemed equivalent to interference with, not just the Debtor's efforts to manage the business in ways that allowed it to pay its expenses, but also interference with the Debtor's Chapter 11 plan.

In the November 24-27, 2020 time period (again, just a few weeks after Mr. Dondero's termination from the Debtor), Mr. Dondero sent various emails to both Debtor and Advisor employees (*e.g.,* Matt Pearson, Hunter Covitz, Joe Sowin, and Tom Surgent) telling them he had instructed the Debtor not to engage in trades of Highland CLO assets and that they should not engage in certain trades of Highland CLO assets that Mr. Seery had instructed them to make.[32] A review of this correspondence makes apparent the underlying conflicts of interest present—Highland was attempting to gradually wind down its business and monetize its managed assets for the benefit of its creditors (and this court believes—all the while—balancing its fiduciary duties to investors in such funds) and, meanwhile, Mr. Dondero (wearing his hat as a portfolio manager for, and indirect equity owner in, certain of the Non-Debtor Dondero-Related Entities—*i.e.,* the

[30] Debtor's Exh. 6, p.2 (DE # 80); *see also* Debtor's Exh. 7 (DE # 80).

[31] Apparently, the Debtor even ***offered to assign Highland's CLO management agreements to Mr. Dondero's affiliate, NexPoint (in early December 2020)***, but Mr. Dondero thought the proposed terms were untenable. *See* DE # 50, John Morris Decl., Exh. Z thereto (January 5, 2021 Deposition Transcript of Mr. Dondero, at 101:11-25).

[32] Debtor's Exh. 8 (DE # 80).

Advisors and the NexPoint/HCMFA Funds) did not want assets sold as part of a wind down. Mr. Dondero, it appears to this court, was putting his own and the Non-Debtor Dondero-Related Entities' interests (as investors in the Highland CLOs) ahead of Highland's creditors and the Highland CLOs, as a whole. But, Highland had duties to its creditors and to the Highland CLOs ***as a whole***, and not to the Advisors or their funds (as investors in or equity owners in the Highland CLOs). Mr. Seery further credibly explained the situation, and the harm the interference caused the bankruptcy estate, as follows: "We intend to continue to manage the CLOs, we intend to assume those contracts [*i.e.,* the portfolio management agreements for the Highland CLOs], we intend to manage them post-confirmation, after exit from bankruptcy. And causing confusion among the employees, preventing the Debtor from consummating trades in the ordinary course, deferring those transactions, we thought put the estate at significant risk, in addition to the cost."[33] The Highland CLOs generate fee income for the Debtor. Not all of them have liquid assets that are able to pay quarterly fees. Some owe deferred fees to Highland.[34]

The Debtor thereafter sent communications instructing the Advisors and Mr. Dondero to cease and desist their interference, indicating that Mr. Dondero's actions interfered with the management of the Debtor's bankruptcy estate and the property of such estate, in violation of the Bankruptcy Code and the January 9, 2020 Order.[35]

Meanwhile, around this same time period, the Debtor sent demand letters[36] to Mr. Dondero and certain Non-Debtor Dondero-Related Entities, each of whom are obligated to the Debtor on various demand notes, pursuant to which approximately $30 million is collectively owed to the

[33] Debtor's Exh. 37 at 166:6-13 (DE # 80).

[34] *Id.* 166-167.

[35] Debtor's Exhs. 9 & 10 (DE # 80).

[36] Debtor's Exhs. 24-27 (DE # 80).

Debtor.[37] Collection on these notes was part of the Debtor's liquidity plan, to help pay creditors under its Chapter 11 plan. Mr. Seery credibly testified that Mr. Dondero's response was a text message that stated: "Be careful what you do, last warning."[38]

The next day, Debtor's counsel sent Mr. Dondero's counsel correspondence demanding that he "cease and desist from (a) communicating directly with any Board member without counsel for the Debtor, (b) making any further threats against HCMLP or any of its directors, officers, employees, professionals, or agents, or (c) communicating with any of HCMLP's employees, except as it specifically relates to shared services currently provided to affiliates owned or controlled by Mr. Dondero." The letter put Mr. Dondero on notice that the above-referenced Adversary Proceeding and Motion for TRO would be filed.

B. Entry of the TRO.

After hearing the evidence at the TRO Hearing, the court determined that the Debtor had met its burden of proving the need for a TRO. The court issued the TRO[39] which temporarily enjoined Mr. Dondero from "(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

[37] Debtor's Exhs. 11-23 (DE # 80).

[38] Debtor's Exh. 28 (DE # 80).

[39] *See* DE # 10; *see also* Debtor's Exh. 11 (DE # 80).

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; and (e) otherwise violating section 362(a) of the Bankruptcy Code (collectively, the 'Prohibited Conduct')." Mr. Dondero was further temporarily enjoined "from 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."

V. The Contempt Motion Now Before the Court.

Less than a month after entry of the TRO, on January 7, 2021, Highland filed *Plaintiff'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 "Contempt Motion"),[40] which was supported by a Memorandum of Law[41] and a Declaration of John Morris with Exhs. G, K, L, M, N, P, Q, R, S, U, W, X, Y, Z attached.[42] Highland alleges Mr. Dondero violated the TRO as follows: (a) he willfully ignored it by not reading the TRO, the underlying pleadings, and allegations that supported it, nor did he listen to the hearing at which it was entered or make any meaningful effort to understand the scope of it; (b) he threw in the garbage his Highland-furnished cell phone, in what the Debtor believes was an attempt to evade discovery; (c) he trespassed on the Debtor's property after the Debtor had evicted him because the Debtor believed he was interfering with the Debtor's business; (d) he interfered with the Debtor's trading of Highland CLO assets; (e) he pushed and encouraged the Advisors and NexPoint/HCMFA Funds to make further demands and threats against the Debtor regarding the trading of Highland CLO assets; (f) he communicated with the Debtor's inhouse

[40] DE # 48.

[41] DE # 49.

[42] DE # 50.

counsel, Scott Ellington and Isaac Leventon, before they were terminated from Highland, to coordinate legal his own strategy against the Debtor; and (g) he interfered with the Debtor's obligation to produce certain documents that were requested by the UCC and that were in the Debtor's possession, custody and control.

The court held an evidentiary hearing on the Contempt Motion on March 22, 2021 (with closing arguments March 24, 2021). The court considered dozens of exhibits[43] and testimony from two witnesses (Mr. Dondero and the Debtor's current CEO, James Seery). The Debtor asserted that there were seventeen different violations of the TRO. To be clear, this Contempt Motion ***deals solely with whether Mr. Dondero violated the TRO after its entry on December 10, 2020 at 1:31 pm CST, up through the time of the filing of the Contempt Motion on January 7, 2021***.[44] In fact, the court has subsequently entered a Preliminary Injunction[45] and Agreed Injunction[46] resolving this Adversary Proceeding but reserved jurisdiction to rule on the earlier-filed Contempt Motion.

A. <u>The Evidence Regarding Whether Mr. Dondero Willfully Ignored the TRO by Not Reading It or the Underlying Pleadings and Allegations that Supported It; by Not Attending the Hearing Thereon; and by Not Making Any Meaningful Effort to Understand the Scope of the TRO.</u>

The Debtor argues that Mr. Dondero's willful ignorance of both the TRO, and the underlying evidence presented in connection with the TRO, is in and of itself contemptible.

---

[43] The court admitted Debtor's Exhibits #1, #2, #7, #8, #9, #10, #11, #12, #13, #14, #15, #17, #18, #19, #20, #21, #22, #24, #25, #26, #27, #28, #33, #35, #36, #37, #38, #39, #47 through #57 (found at DE ## 80, 101, & 128), and Mr. Dondero's Exhibits #1 through #20 (found at DE # 106).

[44] The Debtor initially sought an expedited hearing on the Contempt Motion for January 8, 2021—the same day that the Debtor's request for a preliminary injunction was set for hearing. The court denied the request for an expedited hearing on the Contempt Motion—believing this was not enough notice to Mr. Dondero. So, there was a hearing on a request for a preliminary injunction only on January 8, 2021 (which was granted ultimately). To be clear, Mr. Dondero and his counsel had approximately 75 days to prepare for the hearing on this matter.

[45] DE # 59.

[46] DE # 182.

The evidence on this point is that Mr. Dondero testified multiple times in connection with this Adversary Proceeding[47] that he had not: (a) reviewed the Declaration of James P. Seery, Jr., the Debtor's Chief Executive Officer, in support of the TRO Motion; (b) attempted to learn of the allegations made against him; (c) thought about the fact that the Debtor was seeking a restraining order against him; (d) listened to the hearing where the court admitted evidence and heard argument on the Debtor's motion; (e) read the transcript of the hearing at which the court granted the Debtor's motion for the TRO; (f) read the TRO after it was entered; or (g) made any meaningful effort to understand the scope of the TRO.[48]

But on later examination by his counsel at the Hearing on the Contempt Motion itself, Mr. Dondero testified as follows:

> Q Did you have an opportunity to ask your counsel questions about the TRO?
>
> A Yes.
>
> Q And did you rely on your counsel to explain to you what the TRO meant?
>
> A Yes.
>
> Q And in the weeks that followed the entry of the TRO, did you continue to seek advice from your counsel regarding what you could and could not do under the TRO?
>
> A Yes.
>
> Q And why did you do that?
>
> A Again, to stay compliant, not -- to stay compliant any specific tripwires or any trickery that might have been in the agreement.[49]

---

[47] The court will refer frequently herein to three Transcripts and hereinafter use the following defined terms for ease of reference: (a) the January 5, 2021 Transcript from Mr. Dondero's deposition in connection with this matter, found as an attachment to the John Morris Declaration, DE # 50, at Exh. Z ("1/5/21 Transcript"); (b) the January 8, 2021 Transcript from the hearing on the Motion for Preliminary Injunction, which was admitted as Debtor's Exh. 36 at the Hearing on the Contempt Motion ("1/8/21 Transcript"); and (c) the March 22, 2021 Transcript from the Hearing on the Contempt Motion, which is found at DE # 138 ("3/22/21 Transcript").

[48] *See* 1/5/21 Transcript at 12:17-15:14; 1/8/21 Transcript at 23:10-12 and 101:13-14; 3/22/21 Transcript at 30:20-22; 35:6-16. *See also* 1/5/21 Transcript at 84:8-16; 3/22/21 Transcript at 35:20-36:1.

[49] 3/22/21 Transcript at 130:6-19.

Mr. Dondero went on to testify: "Yeah, I -- again, I take seriously anything that comes from the Court, and I did adjust my behavior, but the overall theme, that somehow I was doing something to hurt the creditor or hurt the Debtor or hurt investors I viewed as incongruent with any of my behavior. So I didn't think it was going to require much adjustment."[50]

The court concludes that Mr. Dondero's testimony was very inconsistent on when and how carefully he read the TRO. Whether this amounted to contempt of the TRO will be addressed in the Conclusions of Law section below.

B. The Evidence Regarding Whether Mr. Dondero Disposed of His Highland-Furnished Cell Phone to Evade Discovery.

First, the Highland Cell Phone Policy.

The evidence is undisputed that Highland had a cell phone policy for all of its employees dated March 27, 2012 that still remained in place at all relevant times during this bankruptcy case.[51] Employees could, among other things, have their cell phone expenses reimbursed by Highland. Mr. Dondero participated in this program. To be clear, Highland actually purchased and paid for Mr. Dondero's cell phone (in contrast, some employees used their own cell phones and obtained expense reimbursement). The policy stated as follows:

> Your obligations under this policy shall terminate upon the termination of your employment, ***provided that you will remain obligated to furnish historical call records covering the period through the date of your termination***, as requested following the termination of your employment. Employees participating in this policy should have no expectation of privacy regarding e-mail, voice mail, ***text messages***, graphics, and other electronic data composed, sent, and/or received on their cell phones. Notwithstanding the foregoing, Highland agrees not to review any call records on an employee's bill other than those associated with the phone number of employee. Further, regardless of whether employees choose to participate in this policy, ***all e-mail, voice mail, text messages, graphics, and other***

[50] 3/22/21 Transcript at 129:6-11; *see more generally, id.* at 130-136.

[51] Debtor's Exh. 54 (DE # 101).

> ***electronic data composed, sent, and/or received related to company business remain the property of Highland.***"[52]

Mr. Dondero certified in January 2020 and again on October 7, 2020, that he had read the Employee Handbook.[53] Mr. Dondero testified that he reviewed it and the company's Compliance Manual once a year in connection with required compliance training.[54]

It is undisputed that as of the day that the TRO was entered (December 10, 2020), Mr. Dondero had a cell phone that was bought and paid for by the Debtor.[55] Mr. Dondero testified that he would sometimes use it for business texts.[56]

From this evidence, the court finds that the cell phone that Mr. Dondero used for the majority of the Chapter 11 case (and as of the date of the TRO, December 10, 2020) was property of the bankruptcy estate, as was the data thereon related to company business.

Mr. Dondero's Cell Phone Goes Missing Immediately After Entry of the December 10, 2020 TRO. Coincidence or Not?

Soon after the entry of the December 10, 2020 TRO, on December 23, 2020, Debtor's counsel sent Mr. Dondero's counsel a letter informing him that Highland would:

> terminate Mr. Dondero's cell phone plan and those cell phone plans associated with parties providing personal services to Mr. Dondero (collectively, the 'Cell Phones'). [Highland] demands that Mr. Dondero immediately turn over the Cell Phones to [Highland] by delivering them to [Mr. Dondero's counsel]; we can make arrangements to recover the phones from [Mr. Dondero's counsel] at a later date. The Cell Phones and the accounts are property of [Highland]. [Highland] further demands that Mr. Dondero refrain from deleting or "wiping" any information or messages on the Cell Phone. [Highland], as the owner of the account

[52] *Id.* (emphasis added). *See also* Debtor's Exh. 55, at 12-13 (DE # 101).

[53] Debtor's Exhs. 56 & 57 (DE # 101).

[54] 3/22/21 Transcript at 37:1-23; 42:1-25. *See also* Debtor's Exh. 55 (Employee Handbook); Debtor's Exhs. 56 & 57 (Compliance Certificates) (DE # 80).

[55] 3/22/21 Transcript at 51:17-21

[56] *Id.* at 51:22-25.

> and the Cell Phones, intends to recover all information related to the Cell Phones and the accounts and reserves the right to use the business-related information.[57]

On December 29, 2020, Mr. Dondero's counsel sent a letter replying to the December 23, 2020 letter, stating that Mr. Dondero had recently acquired a new phone and they were not sure where Mr. Dondero's old Highland-provided phone was at the moment.[58] Mr. Dondero was copied on that letter. Nothing was ever mentioned in that letter about the disposal or wiping of the old cell phone. And yet, in discovery that soon unfolded, as well as the hearing on the Contempt Motion, Mr. Dondero testified that his old company cell phone had been wiped of data and disposed.

When Mr. Dondero was asked specifically about what happened to the cell phone he had that was "bought and paid for by the debtor," he testified that it "was disposed of as part of getting a replacement phone in anticipation of potentially a transition."[59] He testified that there was a historical practice at Highland of destroying old phones when he obtained a new one.[60] He testified that "[a]s far as I know, it was disposed of in the garbage, but I don't know if it was recycled or whatever."[61] He said he did not know specifically who threw it away.[62] When asked if he was aware that the UCC had asked for his phone messages, he testified no and that no one had ever told him.[63] He further testified that maybe an employee named Jason Rothstein (an employee in Highland's technology group) was involved with getting him a new phone and disposing of his old phone, but he was equivocal.[64] Mr. Dondero was insistent that disposing of old phones was always

---

[57] Debtor's Exh. 12, at pp. 2-3 (DE # 80).

[58] Debtor's Exh. 22 (DE # 80).

[59] 1/5/21 Transcript at 72:5-7.

[60] *Id.* at 72:9-13.

[61] *Id*. at 72:18-20.

[62] *Id*. at 73: 4-18.

[63] *Id.* at 74:19-25.

[64] *Id.* at 75:7-11.

the protocol at Highland and, also, employees routinely kept their old phone numbers (as he had done after leaving Highland and getting a new phone).[65] He further testified that he thought that he and all senior executives had to "move their phones in the next 30 days or next 25 days, based on Seery's termination notice."[66] ("Seery's termination notice" presumably was a reference to Highland sending a letter on November 30, 2020 that Highland was terminating the shared services agreements among Highland and the Advisors effective January 30, 2021.[67] Of course, Mr. Dondero had been terminated as a Highland employee back on October 9, 2020).

An exhibit was shown to Mr. Dondero[68] during a January 5, 2021 deposition which was a text from Jason Rothstein (the aforementioned Debtor employee in the technology group) to Mr. Dondero dated December 10, 2020 at 6:25 pm. The TRO had been entered earlier that same day at 1:31 pm (after a 9:30 am hearing). Jason Rothstein's text stated, "I left your old phone in the top drawer of Tara's [Mr. Dondero's assistant's] desk" to which Mr. Dondero replied "[o]k."[69]

When questioned about this text and asked whether Mr. Dondero had told Jason Rothstein to do anything with the phone, he replied, "I don't—all I know is the phone's been disposed of. That's all I know."[70] He then specifically testified that he did not tell either Jason Rothstein or his assistant Tara to throw the phone in the garbage.[71] When later asked if he disposed of the phone "somewhere around December 10, 2020" he replied "I—I don't know. Probably."[72] Later at the

---

[65] *Id.* at 76:8-77:2.

[66] *Id.* at 79:25-80:4.

[67] Dondero's Exhs. 4 & 5 (DE # 106).

[68] Debtor's Exh. 8 (DE # 80).

[69] While this timing seems very coincidental, Mr. Dondero testified that he had ordered his new cell phone a couple of weeks before December 10, 2020. 3/22/21 Transcript at 147:17-148:7.

[70] 1/5/21 Transcript at 80:18-81:8.

[71] *Id.* at 81:9-15.

[72] *Id.* at 85:15-17.

hearing on the Contempt Motion on March 22, 2021, Mr. Dondero answered more ambiguously as to what happened to the cell phone: "I don't know what happened to the phone. I don't know what Jason did or did not do."[73] Nobody called Jason Rothstein to testify at the hearing on the Contempt Motion. In any event, Mr. Dondero was insistent that he did nothing wrong—stating that he turned the cell phone over to the "tech group" for the Debtor (Jason Rothstein) as he was supposed to do and that he wiped it in accordance with company protocol.[74] Mr. Dondero further testified:

> Q Do you have any personal knowledge about what happened to your phone after Jason Rothstein texted you that he left it in Tara's desk?
>
> A No.
>
> Q Did you ever look to see if it was in Tara's desk?
>
> A No.
>
> Q Did you -- you -- you didn't take the phone out of Tara's desk?
>
> A No.
>
> Q So did you ever see the phone again after you turned it over to Jason Rothstein?
>
> A No.
>
> Q Do you know where the phone is today?
>
> A But, again, I don't know why this is relevant. They can get the text messages from the phone company if they think it's that big of a deal.[75]
>
> Q When you previously testified that the phone was disposed of, what did you mean?

[73] 3/22/21 Transcript at 57:3-4.

[74] *Id.* at 58:1-16.

[75] The court did not have any expert evidence of this, but the court believes without much doubt that this is incorrect. While this may have been true long ago (in the days before iPhones and WiFi communications), Mr. Dondero testified that he had an iPhone. Whether he uses the iPhone "Messages" text app or some other messaging app such as "WhatsApp" or "Signal," his phone company (which he testified was AT&T) would not have his text messages since text messages are sent through these apps—not the AT&T phone service.

A I mean, that's -- that's the last step. That's what always happens to the old phones. But to say it was tossed in the garbage, I have no idea. I have no idea what happened to it after it went back to Tara's desk.

Q So do you have any personal knowledge that your phone was actually disposed of?

A I don't know.[76]

Is the Missing Phone Any Big Deal?

Mr. Dondero is rather adamant that this is all much ado about nothing. Is the missing cell phone a big deal? The answer is "maybe or maybe not." It depends on what was on it and whether the data on it was responsive to numerous discovery requests in this bankruptcy case. And in any event, the phone and any data on it related to Highland was "property of the estate," pursuant to section 541 of the Bankruptcy Code.

With regard to discovery requests, there have actually been many discovery requests in the bankruptcy case for which ***any relevant data on Mr. Dondero's phone would have been responsive***, starting from almost the very beginning, when the UCC sought, among other things, electronically stored information ("ESI") from the Debtor and key custodians including Mr. Dondero.

For example, back on November 10, 2019 (when the bankruptcy case was still pending in Delaware), the UCC served its first document request ***while Mr. Dondero was still CEO and during which time all original management and inhouse counsel were still intact***.[77] This first UCC document request, in seeking communications about numerous topics, defined "Communications" as including ***electronic communications such as texts***. And the "Instructions" therein to the Debtor

[76] 3/22/21 Transcript at 150:5-151:4.

[77] Debtor's Exh. 15 (DE # 80).

provided at paragraph 4 that: "You are requested to produce not only those documents in Your physical possession, but also those documents within Your custody and control, including, without limitation, documents in the possession of Your agents, employees, affiliates, advisors, or consultants and any other person or entity acting on Your behalf."[78] To be clear, this was approximately two months before the January 2020 Corporate Governance Settlement was reached, with the subsequent installment of the Independent Board. Mr. Dondero was still in control of the Debtor when this document request would have been served. The UCC served a second document request on February 3, 2020 (with the same definitions and instructions);[79] a third document request on February 24, 2020 (same definitions and instructions),[80] and a fourth document request on July 8, 2020 (same definition and instructions).[81]

At the same time as the UCC's fourth request for document production (on July 8, 2020), the UCC also filed a motion to compel.[82] This motion to compel brought to the court's attention for the first time that problems were brewing with the UCC's efforts to obtain documents that might be relevant to estate causes of action, and in particular, the UCC motion to compel sought assistance from the court in the UCC's efforts to obtain ESI from various custodians of documents of the Debtor.

The UCC's motion to compel reminded the court that the January 2020 Corporate Governance Settlement explicitly granted the UCC standing to pursue bankruptcy estate claims, defined as "any and all estate claims and causes of actions against Mr. Dondero, Mr. Okada, other

[78] *Id.*

[79] Debtor's Exh. 30 (DE # 80).

[80] Debtor's Exh. 31 (DE # 80).

[81] Debtor's Exh. 32 (DE # 80).

[82] Debtor's Exh. 33 (DE # 80).

insiders of the Debtor, and each of the Related Entities, including promissory notes held by any of the foregoing."[83] The parties also agreed in the January 2020 Corporate Governance Settlement that the UCC would receive any privileged documents or communications that relate to the "Estate Claims" so that the UCC could bring those claims. In short, the UCC, pursuant to the January 2020 Corporate Governance Settlement, stands in Debtors' shoes with respect to the "Estate Claims." In fact, the January 2020 Corporate Governance Settlement set forth a "Document Production Protocol," which stated that ESI was included within the documents being sought and stated that "***Debtor acknowledges that they should take reasonable and proportional steps to preserve discoverable information in the party's possession, custody or control. This includes notifying employees possessing relevant information of their obligation to preserve such data***."[84] Thus, whether Mr. Dondero and inhouse counsel paid attention or not, they were on notice very early in this case that they had a duty to preserve ESI.

The UCC motion to compel (again, filed July 8, 2020) further stated that for approximately eight months, the UCC had attempted to work cooperatively with the Debtor to obtain documents and communications needed to investigate those claims, and, despite the UCC's efforts, the Debtor had not yet provided the UCC with the ESI it had requested. In particular, the UCC alleged that it had spent a considerable amount of time attempting to obtain "***production of emails, chats, texts, or other ESI or communications from the Debtor."*** In summary, the UCC, in July 2020 (some five months before Mr. Dondero's cell phone was disposed) moved to compel production of documents and communications of nine custodians pursuant to a protocol proposed by the UCC and these nine custodians were Patrick Boyce, Jim Dondero, Scott Ellington, David Klos, Isaac

[83] *Id.* at 4.

[84] Debtor's Exh. 2, Exh. 1.C. thereto (DE # 80).

Leventon, Mark Okada, Trey Parker, Tom Surgent, and Frank Waterhouse. The UCC specifically stated that for "avoidance of doubt," it was requesting "all ESI for the nine custodians, including without limitation, email, chat, text, Bloomberg messaging, or any other ESI attributable to the custodians."[85]

Notably, Mr. Dondero filed a responsive pleading to this UCC motion to compel—which would be some indication that he knew about it.[86] In his response, he argued that he did not want Josh Terry (Acis's manager, with whom he had been in long-running litigation) to get any documents that might be produced pursuant to the UCC motion to compel.

Finally, the Debtor also sought document production from Mr. Dondero including ESI in a formal document request it sent to him dated December 23, 2020.[87] More pointedly, on December 23, 2020, Debtor's counsel sent Mr. Dondero's counsel the letter mentioned above, in which the Debtor specifically asked that Mr. Dondero turn over his Highland-purchased cell phone.[88]

With regard to awareness about discovery requests, Mr. Dondero testified at his deposition on January 5, 2021 that he was aware of a document request sent to his lawyers for documents of his and that he delegated to his lawyers and his assistant, Tara Loiben, the task of responding by saying, "she has full access to my email, and I gave her my phone for the better part of a couple of days in the office."[89] He also testified that he understood that the Debtor's document requests called for the production of all text messages that were responsive to the requests.[90] When asked if he

---

[85] *Id.*

[86] Debtor's Exh. 40 (DE # 101).

[87] Debtor's Exh. 7 (DE # 80).

[88] Debtor's Exh. 12 (DE # 80).

[89] *See* 1/5/21 Transcript at 67:20-69:9. *See also* Debtor's Exh. 9 (DE # 80).

[90] *Id.* at 70:1-6.

understood the document request was for the time period of December 10, 2020 to the end of the month, he replied "I didn't need the details of this. I didn't get into it. I didn't do the document production that I believe was completed and responsive. I delegated it."[91]

Mr. Dondero's testimony about awareness as to discovery requests has been inconsistent. Mr. Dondero testified at the hearing on the Contempt Motion that no one ever asked him to preserve his text messages.[92]

The court concludes that Mr. Dondero exercised control over property of the estate (*i.e.,* his Highland-provided cell phone and the company-related data thereon) and potentially spoliated evidence thereon that was responsive to multiple, pending discovery requests. Whether this amounted to contempt of the TRO will be addressed in the Conclusions of Law section below.

The Evidence Regarding Whether Mr. Dondero Trespassed.

In the December 23, 2020 letter that Debtor's counsel sent to Mr. Dondero's counsel mentioned earlier (that demanded turn over of Mr. Dondero's cell phone), it also stated that Highland:

> has concluded that Mr. Dondero's presence at the [Highland] office suite and his access to all telephonic and information services provided by [Highland] are too disruptive to [Highland's] continued management of its bankruptcy case to continue. As a consequence, Mr. Dondero's access to the offices located at 200/300 Crescent Court, Suite 700, Dallas, Texas 75201 (the "Office"), will be revoked effective Wednesday, December 30, 2020 (the "Termination Date"). As of the Termination Date, Mr. Dondero's key card will be de-activated and building staff will be informed that Mr. Dondero will no longer have access to the Office.[93]

[91] *Id.* at 70:17-20.

[92] 3/22/21 Transcript at 152:1-11.

[93] Debtor's Exh. 12 (DE # 80).

The letter went on to warn that: "Any attempt by Mr. Dondero to enter the Office, regardless of whether he is entering on his own or as a guest, will be viewed as an act of trespass. Similarly, any attempts by Mr. Dondero to access his @highlandcapital.com email account or any other service previously provided to Mr. Dondero by [Highland] will be viewed as an act of trespass, theft, and/or an attempted breach of [Highland's] security protocols."[94]

Mr. Dondero testified that he was aware of this and he nevertheless went into the office on January 5, 2021, to give a deposition regarding this Adversary Proceeding:

> I went through my phone, the January 5th deposition that has somehow become important, even though there were no Highland employees in the office other than the receptionist, is memorialized by a calendar invite on my phone -- which will also be in the Highland system -- where it was an invite a week earlier from Sarah Goldsmith, who was one of the Highland employees supporting the legal team that was largely supporting Jim Seery, sent me a calendar invite to the conference room at Highland for the deposition on the 5th. It's right front and center in my calendar. It'll be on the Highland Outlook program. And Sarah Smith -- I mean, Sarah Goldsmith works directly for Jim Seery.[95]

The court concludes that Mr. Dondero was trespassing against the Debtor's wishes and instructions at the Highland offices on January 5, 2020. Whether this amounted to contempt of the TRO will be addressed in the Conclusions of Law section below.

The Evidence Regarding Whether Mr. Dondero Interfered with Trading of Highland CLO Assets.

It is undisputed that Mr. Dondero resigned (at the Debtor's request) completely from Highland on October 9, 2020. About a week later, on October 16, 2020, a law firm representing the Advisors and the NexPoint/HCMFA Funds sent its first of several letters complaining about the Debtor's supposed rush to sell assets in the Highland CLOs at so-called fire sale prices and

[94] *Id.* at 3.

[95] 3/22/21 Transcript at 179:7-18.

expressing a desire that the Debtor not sell the Highland CLO assets without prior notice and consent of the Advisors. The second in this series of letters was sent in November 2020. Mr. Dondero testified that he supported these letters being sent.[96]

What was this about? The Debtor sought during certain times in November and December 2020 to cause the Highland CLOs to sell certain publicly-traded equity securities, including "AVYA" and "SKY' (stock tickers). Mr. Dondero disagreed that these securities should be sold. At issue here, in particular, are the Debtor's attempted sales in late December 2020—after entry of the TRO. Mr. Dondero testified at a deposition on January 5, 2021, that he gave instructions to a Debtor employee, Hunter Covitz, not to sell "SKY" equity after Mr. Covitz had been instructed by Mr. Seery to sell it.[97] He also testified that he communicated with an employee named Matt Pearson, an equity trader, informing him that certain Non-Debtor Highland Related Entities ("HFAM" and "DAF")—who were investors in the NexPoint/HCMFA Funds—had "instructed Highland in writing not to sell any CLO underlying assets. There is potential liability. Don't do it again."[98] Matt Pearson, in response, canceled scheduled sales of SKY as well as AVYA.[99] Mr. Dondero also communicated with an employee of one of the Advisors named Joe Sowin regarding stoppage of trades of CLO assets. Mr. Dondero explained: "My intent was to prevent trades that weren't in the best interests of investors, that investors—the beneficial holders had articulated they didn't want sold while these funds were in transition, and that the–there was no business purpose to benefit the debtor to sell these assets."[100] To be clear, the so-called investors/beneficial holders were Non-

[96] 1/26/21 Transcript at 61:4-18.

[97] 1/5/21 Transcript at 41:22-43:11.

[98] *Id.* at 43:15-44:08.

[99] *Id.*

[100] *Id.* at 50:8-14; *see also, id.* at 89:8-25.

Debtor Highland Related Entities under the control of Mr. Dondero. And the Debtor, indeed, ***did*** have a business purpose—despite Mr. Dondero's belief that Mr. "Seery had no business purpose and he was doing it to tweak myself and everybody else."[101] For one thing, the Debtor is owed fees from managing these Highland CLOs and it cannot just defer them indefinitely—Highland needed liquidity to fund its Chapter 11 plan. Moreover, Mr. Seery credibly testified that he had consulted with many advisors on the Highland and Advisors team, and he concluded it was a good time to sell the AYVA and SKY securities. In any event, Mr. Dondero also communicated with Debtor employee Thomas Surgent, the Chief Compliance Officer, to inform him that he thought Mr. Seery was engaging in improper trades of Highland CLO assets and told Mr. Surgent he might face personal liability over this.[102] Finally, Mr. Dondero communicated with a text to Mr. Seery that stated: "Be careful what you do, last warning."[103] As a result of this conduct, the Debtor notified Mr. Dondero's counsel that they were essentially evicting Mr. Dondero from access to the Highland offices effective December 31, 2020 and terminating his Highland email account.[104]

Mr. Dondero stated that he communicated as he did regarding the Highland CLO asset sales because he thought Mr. Seery was acting improperly with the trades he was attempting to execute.[105] Mr. Dondero testified at the hearing on the Contempt Motion that he may have interfered with trades the week of Thanksgiving, but he did not after entry of the TRO. The evidence does not seem to support this testimony.[106]

---

[101] *Id.* at 55:5-6.

[102] *Id.* at 60:23-61-25.

[103] *Id.* at 62:25.

[104] *See* Debtor's Exh. 12 (DE # 80).

[105] 1/5/21 Transcript at 63:1-64:20.

[106] 3/22/21 Transcript at 80-81.

Mr. Dondero testified that he only talked to Jason Post about trades in late December and that Jason Post was not a Debtor employee but rather an employee of NexPoint.[107]

What was at the bottom of this? Mr. Dondero said he "viewed it as a violation of the Advisers Act and the spirit of the Advisers Act, when the beneficial holders have told you they're going to change managers and don't want their account liquidated."[108] Mr. Post inconsistently testified at one hearing that he believed the trades violated Advisors' policies and procedures because they were not initiated through an electronic system called the OMS (Order Management System).[109] It appears to this court that Mr. Dondero wanted these funds to be kept intact and not have any assets liquidated until he could get a new company up and running (or maybe one of his existing companies) to hopefully take over Highland's role of managing these Highland CLOs.

In any event, the Debtor pointed out, in response to Mr. Dondero's "defense" of his interference—that he was looking out for investors—that Mr. Dondero himself, during January-October 2020, while still an employee of Highland, traded a significantly larger amount of the AVYA stock that was held in the Highland CLOs, sometimes at a lower price than Mr. Seery did or attempted.[110] Mr. Seery, in fact, credibly testified that the original impetus to sell AVYA came from Mr. Hunter Covitz, one of the Highland CLO portfolio managers, who had been looking at this security and noticed it had started moving up after performing extremely poorly post its own Chapter 11. Mr. Covitz, during the summer of 2020, believed Highland should "start lightening up" on the AVYA holdings, and Mr. Seery also had the following additional personnel look into it: Kunal Sachdev (Highland analyst); Joe Sowin (head trader at HCFMA) and Matthew Gray (another

[107] *Id.* at 162.

[108] 3/22/21 Transcript at 168:22-25.

[109] 1/26/21 Transcript at 223:11-16.

[110] *Id.* at 106:9-20, 159-161.

senior analyst). They determined (Mr. Sachdev, in particular) that AVYA had reached its peak and even though it could continue to go up, they just did not think the value was there and thought it should be sold. A similar analytical process was undertaken with the SKY equity holdings.[111]

One might wonder, if Mr. Dondero and the Advisors and the NexPoint/HCMFA Funds believed that Mr. Seery and the Debtor were mismanaging the Highland CLOs, why not offer to take them over during Highland's case (or as part of Highland' Chapter 11 plan)? Mr. Seery credibly testified that:

> Q Has the Debtor made any attempt to transfer the CLO management agreements to the Defendants or to others?
>
> A Well, our original construct of our plan was to do that. We've since determined, when we tried to do that, we got virtually no response from the Dondero interests. The structure of the original thought of the plan was if we didn't get a grand bargain we would effectively transition a significant part of the business to Dondero entities, they would assume employee responsibilities and the operations, and then assure that the third-party funds were not impacted.
>
> As I think I testified on the -- I can't recall if it was the deposition or my prior testimony in court -- Mr. Dondero, true to his word, told me that would be very difficult, he would not agree, and he has made that very difficult.
>
> So we examined it. We've determined that we're going to maintain the CLOs and assume them. But we originally tried to contemplate a way to assign those management agreements.[112]

What's really going on here? These Highland CLOs are one of the ways that the Debtor earns revenue. Specifically, the CLO SPEs must pay fees to the Debtor. Highland's management of the CLO SPEs generates about $4.5-$5 million of fees for it per year.[113] That sometimes requires liquidation of assets in the CLO SPEs to pay the fees, since not all of the assets in the CLO SPEs

[111] *Id.* at 156-157.

[112] *Id.* at 163:5-22.

[113] *Id.* at 187:5-12.

are cash-generative.[114] To be more specific, these are very old CLOs that are no longer in a reinvestment period. The manager (Highland) can no longer sell assets and reinvest cash in new assets. Thus, the manager must either hold them or sell them. But the assets are for the most part not loans anymore—they are equity (such as MGM stock) and real estate. Many of the assets, as stated, do not regularly generate cash, so the only way Highland can generate cash to pay management fees is to sell assets (presumably at prudent times). When there is interference with liquidation of assets in the CLO SPEs, it interferes with Highland's revenue stream. Yes, it also reduces the assets in the CLO SPEs ultimately available for the equity tranche. ***But there would appear to be nothing in any contract (or any law presented to the court) that precludes Highland from liquidating assets in the CLO SPEs, from time to time, to pay its fees or otherwise as it deems fit—and the evidence was not at all convincing that there was any sort of bad decision making ongoing in that regard***. Most importantly, it was Highland's decision to make when and how to liquidate assets. It is easy to see a conflict of interest here. To the extent assets in a Highland CLO are not cash-generative, they will not have liquid funds to pay Highland, as portfolio manager, its management fees. That's not optimal for Highland to indefinitely defer/accrue management fees. But it ***would*** be optimal for Mr. Dondero and the Advisors as equity holders—they would rather see assets kept in the Highland CLOs longer to hopefully grow their investment. And it also might be optimal for Mr. Dondero and the Advisors for Highland to decide they do not want to manage these Highland CLOs anymore (because of inconsistent ability to pay management fees) and perhaps agree to assign their management agreements over to the Advisors so Mr. Dondero could once again have ultimate, total control over the Highland CLOs. Conspicuously absent on this issue are the indenture trustees and other ultimate equity holders of the Highland CLOs. Only

[114] *Id.* at 189:12-18.

Non-Debtor Dondero-Related equity holders have complained. The indenture trustees for the Highland CLOs even agreed to Highland continuing to be the portfolio manager on these CLOs post-confirmation.

The court concludes that Mr. Dondero interfered with the Debtor's trading of Highland CLO assets after entry of the TRO. Whether this amounted to contempt of the TRO will be addressed in the Conclusions of Law section below.

> The Evidence Regarding Mr. Dondero's Communications with Debtor Employees—in Particular, with Inhouse Counsel—to Coordinate His Own Legal Strategy Against the Debtor.

It is apparent from the evidence (numerous emails) that Mr. Dondero communicated with Highland inhouse general counsel Scott Ellington (who was terminated from Highland in January 2021) about all kinds of things post-TRO ***other*** than shared services, including Mr. Dondero's own personal litigation strategies.[115] As a reminder, Section 2(c) of the TRO stated that Mr. Dondero was enjoined, "from communicating with any of the Debtor's employees, except as it specifically relates to ***shared services provided to affiliates*** owned or controlled by Mr. Dondero" (emphasis added).

Mr. Dondero asserts that after entry of the TRO, he never spoke with any Debtor employees, including Mr. Ellington, regarding anything other than shared services, a "pot plan," and to Mr. Ellington in connection with his role as settlement counsel. In other words, Mr. Dondero's defense is that, yes, he conversed with Scott Ellington regarding things other than shared services provided to affiliates—such as Mr. Dondero's desire to propose a "pot plan" in the case and maybe a few other subjects—but this was permissible because Mr. Ellington was understood by all to be in some

[115] *See, e.g.,* Debtor's Exhs. 17, 18, 21 (DE # 80); Debtor's Exhs. 48, 49, 50, 52, 53 (DE # 101). *See also* 3/22/21 Transcript at 122:1-124:7; 124:15-125:12.

sort of role of "settlement counsel" in the case: "Scott Ellington, as my settlement counsel, or as the go-between with Seery and with the creditors, was an important piece of trying to get something done."[116] But this is simply not accurate. This court never would have approved that role for Mr. Ellington. Moreover, Mr. Seery, the current Highland CEO, credibly testified as follows:

> Q Did you task Mr. Ellington with the role of a go-between between the board and Mr. Dondero?
>
> A No. This -- this settlement counsel is something I'd never heard until Dondero raised it and made it up. It -- it's wholly fictitious.
>
> Now, what Ellington did do is he was on a number of calls with me and Dondero, and he had a communication line with Dondero. This was through the first half of the case and into -- into the summer. But as it started to become more adversarial, particularly around the mediation, he wasn't invited. So, for example, Mr. Ellington was not invited to -- to participate in the mediation. He asked. I said no.
>
> The -- in addition, this idea that he was drafting the pot plan, well, not to my knowledge or understanding, because I drafted it for Dondero and his lawyers because you guys [Pachulski] couldn't.[117]

Mr. Seery further credibly testified as follows:

> Q So you're denying Mr. Dondero's testimony to the contrary?
>
> A Yes.
>
> Q Did Mr. Dondero send messages to you through Mr. Ellington?
>
> A No. Mr. Ellington often came back and gave me messages. They were often critical of Mr. Dondero. I didn't always believe them, because I figured Mr. Ellington had an ulterior motive. But he took a number of, you know, shots at Mr. Dondero and he came back and gave his color of what he thought was going on in Mr. Dondero's mind.[118]

---

[116] 3/22/21 Transcript at 135:3-5.

[117] *Id.* at 257:6-21.

[118] *Id.* at 258:2-12.

In addition to this testimony, the documentary evidence reflects that just two days after the TRO was entered, Mr. Dondero was communicating with Scott Ellington seeking advice regarding an appropriate witness to support his interests at an upcoming hearing.[119] And just six days after entry of the TRO, Mr. Dondero was emailing Mr. Ellington telling him "I'm going to need you to provide leadership here" and Ellington replies "[o]n it."[120] Additionally, there are emails reflecting that inhouse lawyers Scott Ellington and Isaac Leventon were receiving and responding to information requests from Mr. Dondero[121] and were being copied on draft joint defense agreement prepared by the Dugaboy and Get Good Trusts' counsel.[122] And Mr. Dondero emailed with Scott Ellington on December 24, 2020 regarding his unhappiness and intention to object to a settlement between HarbourVest and Debtor.[123]

The Evidence Regarding Interference with Debtor's Duty to Produce Documents to the UCC.

On December 16, 2020, at 5:18 pm Mr. Dondero sent Melissa Schroth, a Highland employee (executive accountant), a text stating: "No dugaboy details without subpoena."[124] This was a reference to document requests from the UCC in which they were seeking documents that were on the Highland server concerning Mr. Dondero's family trust, the Dugaboy Trust.

[119] Debtor's Exh. 17 (DE # 80) (Scott Ellington email to Mr. Dondero and his counsel on 12/12/20 at 11:55 pm suggesting JP Sevilla for a witness for some unknown hearing). *See also* Debtor's Exh. 26 (DE # 80).

[120] *See* Debtor's Exh. 18 (DE # 80).

[121] *See* Debtor's Exh. 20 (DE # 80).

[122] *See* Debtor's Exh. 24 (DE # 80).

[123] Debtor's Exh. 21 (DE # 80).

[124] *See* Debtor Exh. 19 (DE # 80).

VI. Conclusions of Law

A. Jurisdiction and Authority.

Bankruptcy subject matter jurisdiction exists in this matter, pursuant to 28 U.S.C. § 1334(b). This bankruptcy court has authority to exercise such subject matter jurisdiction, pursuant to 28 U.S.C. § 157(a) and the Standing Order of Reference of Bankruptcy Cases and Proceedings (Misc. Rule No. 33), for the Northern District of Texas, dated August 3, 1984. This is a core matter pursuant to 28 U.S.C. § 157(b) in which this court may issue a final order. Section 105 of the Bankruptcy Code and the cases construing it are the substantive legal authority.

The Contempt Motion seeks for this court to hold Mr. Dondero in civil contempt of court for violating an order of this court (the TRO). It is well established that bankruptcy courts have civil (as opposed to criminal) contempt powers. "The power to impose sanctions for contempt of an order is an inherent and well-settled power of all federal courts—including bankruptcy courts."[125] 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.[126] Indeed, without such power, the court would be a "mere board[ ] of arbitration, whose judgments and decrees would be only advisory."[127]

---

[125] *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."); *Citizens Bank & Trust Co. v. Case (In re Case),* 937 F.2d 1014, 1023 (5th Cir. 1991) (held that bankruptcy courts, as Article I as opposed to Article III courts, have the inherent power to sanction and police their dockets with respect to misconduct).

[126] *SkyPort Global*, 2013 WL 4046397, at *1.

[127] *Id.* (internal quotations omitted); *see 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.").

Contempt is characterized as either civil or criminal depending upon its "primary purpose."[128] If the purpose of the sanction is to punish the contemnor and vindicate the authority of the court, the order is viewed as criminal. If the purpose of the sanction is to coerce the contemnor into compliance with a court order, or to compensate another party for the contemnor's violation, the order is considered purely civil.[129] It is clear that Highland's intent is to both seek compensation for the expenses incurred by Highland, due to Mr. Dondero's alleged violations of the TRO, and to coerce compliance going forward.[130]

B. Type of Civil Contempt: Alleged Violation of a Court Order.

There are different types of civil contempt, but the most common type is violation of a court order (such as is alleged here). "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."[131] Thus, the party seeking an order of contempt in a civil contempt proceeding need only establish, by clear and convincing evidence:[132] "(1) that a

[128] *Bradley*, 588 F.3d at 263.

[129] *Id.* (internal citations omitted).

[130] Highland seeks the following relief in the Contempt Motion: an order (i) finding and holding Mr. Dondero in contempt for violating the TRO; (ii) directing 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) directing 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 Clients' frivolous motion and related demands and threats and taking Mr. Dondero's deposition), payable within three (3) calendar days of presentment of an itemized list of expenses, (iv) imposing a penalty of three (3) times the Debtor's actual expenses incurred in connection with any future violation of any order of this Court, and (iv) granting the Debtor such other and further relief as the court deems just and proper under the circumstances.

[131] *Travelhost*, 68 F.3d at 961.

[132] *United States v. Puente*, 558 F. App'x 338, 341 (5th Cir. 2013) (per curiam) (internal citation omitted) ("[C]ivil contempt orders must satisfy the clear and convincing evidence standard, while criminal contempt orders must be established beyond a reasonable doubt.").

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."[133]

C. Specificity of the Order.

"To support a contempt finding in the context of a TRO, the order must delineate 'definite and specific' mandates that the defendants violated."[134] 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."[135]

D. Possible Sanctions.

To be clear, if the court ultimately determines that Mr. Dondero is in contempt of court, for not having complied with the TRO, the court can order what is necessary to: (1) compel or coerce obedience of the order; and (2) to compensate the Debtor/estate for losses resulting from Mr. Dondero's non-compliance with a court order.[136] The court must determine that the Debtor/movant showed by clear and convincing evidence that: (1) the TRO was in effect; (2) the TRO required certain conduct by Mr. Dondero; and (3) that Mr. Dondero failed to comply with the TRO.[137] "[T]he factors to be considered in imposing civil contempt sanctions are: (1) the harm from noncompliance; (2) the probable effectiveness of the sanction; (3) the financial resources of the contemnor and the burden the sanctions may impose; and (4) the willfulness of the contemnor in

[133] *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).

[134] *Am. Airlines, Inc. v. Allied Pilots Ass'n,* 228 F.3d 574, 578 (5th Cir. 2000) (citing Fed. R. Civ. P. 65).

[135] *Id.*

[136] *In re Gervin*, 337 B.R. 854, 858 (W.D. Tex. 2005) (citing *United States v. United Mine Workers*, 330 U.S. 258 (1947)).

[137] *In re LATCL&F, Inc.,* 2001 WL 984912. *3 (N.D. Tex. 2001) (citing to *Petroleos Mexicanos v. Crawford Enterprises, Inc.,* 826 F.2d 392, 400 (5th Cir. 1987)).

disregarding the court's order."[138] "Compensatory civil contempt reimburses the injured party for the losses and expenses incurred because of [their] adversary's noncompliance."[139] Ultimately, courts have "broad discretion in the assessment of damages in a civil contempt proceeding."[140]

E. Knowledge of the Order.

"An alleged contemnor must have had knowledge of the order on which civil contempt is to be based. The level of knowledge required, however, is not high. And intent or good faith is irrelevant."[141] To be clear, "intent is not an element in civil contempt matters. Instead, the basic rule is that all orders and judgments of courts must be complied with promptly."[142]

F. Willfulness of Actions.

For civil contempt of a court order to be found, "[t]he contemptuous actions need not be willful so long as the contemnor actually failed to comply with the court's order."[143] For a stay violation, the complaining party need not show that the contemnor intended to violate the stay. Rather, the complaining party must show that the contemnor intentionally committed the acts which violate the stay. Nevertheless, in determining whether damages should be awarded under the court's

[138] *Lamar Financial Corp. v. Adams,* 918 F.2d 564, 567 (5th Cir. 1990) (citing *United States v. United Mine Workers,* 330 U.S. 258 (1947)).

[139] *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).

[140] *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[]").

[141] *Kellogg v. Chester,* 71 B.R. at 38.

[142] *In re Unclaimed Freight of Monroe, Inc.,* 244 B.R. 358, 366 (Bankr. W.D. La. 1999). *See also In re Norris*, 192 B.R. 863, 873 (Bankr. W.D. La. 1995) ("Intent is not an element of civil contempt.")

[143] *Id.* (citing *N.L.R.B. v. Trailways, Inc.*, 729 F.2d 1013, 1017 (5th Cir.1984)).

contempt powers, the court considers whether the contemnor's conduct constitutes a willful violation of the stay.[144]

G. Applying the Evidence to the Literal Terms of the TRO.

The court concludes that there is clear and convincing evidence that Mr. Dondero violated the specific wording of the TRO in certain ways and, thus, is in contempt of the court as follows.

1. ***The TRO states in Section 2(c) that Mr. Dondero is enjoined, "from communicating with any of the Debtor's employees, except as it specifically relates to shared services provided to affiliates owned or controlled by Mr. Dondero."***

There are several examples of violations of this provision. And many of the communications appeared to be adverse to the Debtor's interests.

First, notably, Mr. Dondero actually admitted that he had conversations with some Debtor employees, including Scott Ellington, after December 10, 2020, regarding things other than "shared services," including a "pot plan" and, more generally, in connection with Mr. Ellington's role as "settlement counsel": "Scott Ellington, as my settlement counsel, or as the go-between with Seery and with the creditors, was an important piece of trying to get something done."[145] As indicated earlier, this court never would have approved that role for Mr. Ellington, and Mr. Seery credibly testified that this was never approved by him or the Independent Board. There was no exception for this in the TRO. As for Mr. Dondero's desire to pursue a pot plan, again, there's nothing in the TRO that allowed Mr. Dondero to speak with any of the Debtor's employees about the pot plan. It is clear that he knew that because on December 16, 2020, just six days after the TRO was entered, Mr. Dondero filed a motion seeking to modify the TRO to allow Mr. Dondero to speak directly with the Independent Board about a pot plan. He later withdrew that motion.[146]

---

[144] *In re All Trac Transport, Inc.,* 306 B.R. 859, 875 (Bankr. N.D. Tex. 2004) (internal citations omitted).

[145] 3/22/21 Transcript at 135:3-5.

[146] *See* DE # 24.

Additionally, as noted earlier in this Opinion, it appears that Mr. Dondero communicated with inhouse lawyer Scott Ellington about all kinds of other things such as: (a) reporting to him about his intention to object to the settlement by the Debtor of the HarbourVest claim;[147] (b) reporting to him about his desire to collaborate with UBS and its counsel to give them "evidence of Seery ineptitude" and they would "run with it";[148] (c) forwarding email conversations to Scott Ellington that Mr. Dondero was having with his counsel (and thereby eviscerating attorney-client privilege as to those emails) about various disputes involving certain Non-Debtor Dondero-Related Entities and regarding the Debtor's desire to seek discovery from Mr. Dondero;[149] (d) reviewing a joint defense agreement that the lawyer for his family trusts (Dugaboy and Get Good) had drafted;[150] and (e) "showing leadership"—whatever that meant—but likely meaning coordinating of all the many lawyers involved for Mr. Dondero's interests.[151]

Finally, Mr. Dondero communicated with Highland employee (executive accountant) Melissa Schroth about resisting production of Dugaboy documents that were on the Highland server without a subpoena[152] and Jason Rothstein about his phone.[153]

In summary, Mr. Dondero violated Section 2(c) of the TRO numerous times.[154] His intent does not matter. He knew about the TRO. Thus, he was in contempt for these numerous violations.

---

[147] Debtor's Exh. 21 (DE # 80).

[148] Debtor's Exh. 50 (DE # 101).

[149] Debtor's Exh. 52 & 53 (DE # 101).

[150] *See* Debtor's Exh. 24 (DE # 80).

[151] Debtor's Exh. 18 (DE # 80). *See also* 3/22/21 Transcript at 122:1-124:7; 124:15-125:12.

[152] *See* Debtor Exh. 19 (DE # 80) (on December 16, 2020, at 5:18 pm: "No dugaboy details without subpoena.").

[153] Debtor's Exh. 8 (DE # 80); 1/5/21 Transcript at 80-55; 3/22/21 Transcript at 57-58.

[154] The court notes that there was also clear and convincing evidence to suggest various conversations occurred between Mr. Dondero and his assistant Tara Loiben after December 10, 2020. However, it is not clear from the record if Tara Loiben was a Highland employee or an employee of one of the Non-Debtor Dondero-Related Entities. Moreover, there was evidence to suggest Mr. Dondero communicated with Mr. Ellington on December 11-12, 2020 regarding who should be a witness for Mr. Dondero at an upcoming hearing. However, the evidence of this was not

2. ***The TRO states at Section 3(a) that Mr. Dondero is "enjoined from causing, encouraging, or conspiring with (a) any entity owned or controlled by him, and/or (b) any entity acting on his behalf, from, directly or indirectly, engaging in any Prohibited Conduct" (and the "Prohibited Conduct" includes "interfering with or otherwise impeding" the Debtor's "decisions concerning disposition of assets controlled by the Debtor").***

The court concludes that there is clear and convincing evidence that Mr. Dondero violated this provision.

Things had grown very awkward at Highland, to say the least, by October 2020 when Mr. Dondero was terminated. It is clear from the evidence that Mr. Dondero did not like the way the bankruptcy case was playing out (his pot plan was not getting the attention or reception he hoped for from the UCC and the Debtor) and he did not like certain trading decisions that Mr. Seery was making. Conflicts of interest between the Debtor and Mr. Dondero (and the Non-Debtor Dondero-Controlled Entities) were seeming more and more problematic. It was against this backdrop that the TRO was entered. It was also against this backdrop that Mr. Dondero and his Non-Debtor Dondero-Related Entities began hiring armies of lawyers. In the midst of all of this, Mr. Dondero gave instructions to a Debtor employee, Hunter Covitz, not to sell "SKY" equity after Mr. Covitz had been instructed by Mr. Seery to sell it.[155] He also communicated with an employee named Matt Pearson, an equity trader, informing him that certain Non-Debtor Highland Related Entities ("HFAM" and "DAF")—who were investors in the NexPoint/HCMFA Funds—had "instructed Highland in writing not to sell any CLO underlying assets. There is potential liability. Don't do it again."[156] Matt Pearson, in response, canceled scheduled sales of SKY, as well as AVYA. Mr.

clear and convincing that Mr. Dondero spoke directly with Mr. Ellington (as opposed to being copied on conversations among Mr. Ellington and Mr. Dondero's counsel). *See* Debtor's Exhs. 17 (DE # 80), 48 & 49 (DE # 101).

[155] 1/5/21 Transcript at 41:22-43:11.

[156] *Id.* at 43:15-44:08.

Dondero also communicated with an employee of one of the Advisors named Joe Sowin regarding stoppage of trades of CLO assets.[157] Mr. Dondero also communicated with Debtor employee Thomas Surgent, the Chief Compliance Officer, to inform him that he thought Mr. Seery was engaging in improper trades of Highland CLO assets and told Mr. Surgent he might face personal liability over this.[158] Finally, Mr. Dondero communicated with a text to Mr. Seery that stated: "Be careful what you do, last warning."[159]

Mr. Dondero's "defense" of his interference—that he was looking out for investors—is neither relevant nor entirely credible. As earlier indicated, intent does not matter with civil contempt. Moreover, the evidence was credible that Mr. Dondero himself, postpetition, while still an employee of Highland, traded a significantly larger amount of the AVYA stock that was held in the Highland CLOs, sometimes at a lower price than Mr. Seery did or attempted.[160]

In summary, Mr. Dondero violated Section 3 of the TRO. His intent does not matter. He knew about the TRO. Thus, he was in contempt of court for interfering with or otherwise impairing the Debtor's business, including its decisions concerning disposition of assets controlled by the Debtor.

3. ***The TRO states in Section 2(e) that Mr. Dondero shall not violate section 362(a) of the Bankruptcy Code***.

The Debtor has argued that Mr. Dondero's actions with regard to the disappearing cell phone provided to him by the Debtor amounted to a violation of the automatic stay, section 362(a)(3) (as an exercise of control over property of the estate—*i.e.,* the phone and its data thereon) and, thus, a

[157] *Id.* at 50:8-14; *see also id.* at 89:8-25.

[158] *Id.* at 60:23-61-25.

[159] *Id.* at 62:25.

[160] *Id.* at 106:9-20, 159-161.

violation of this provision of the TRO. While the court is more than a little troubled by the mysterious disappearance of the cell phone—just hours after entry of the TRO and after a year of numerous ESI requests by the UCC during the case—the court cannot conclude that the disappearance was a clear and convincing violation of the TRO. There may or may not be a later evaluation of whether a spoliation of evidence has occurred, but for now, this is simply a matter of whether the TRO was violated.

As earlier stated, "To support a contempt finding in the context of a TRO, the order must delineate 'definite and specific' mandates that the defendants violated."[161] While 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,"[162] the court concludes that the TRO simply was not specific enough with regard to the phone. The TRO did not specifically state "turn over your cell phone." A letter on December 23, 2020 from Debtor's counsel to Mr. Dondero's counsel later made such a demand,[163] but this was not the same as there being a mandate in the four corners of the TRO. Additionally, the Highland Employee Handbook made it clear that the phone and its data were the Debtor's.[164] But this, too, is not the same as the TRO's literal terms.

Mr. Dondero should not consider this to be a victory. ***The court reiterates that it is highly concerned about possible spoliation of evidence that may or not be presented in a contested matter later***.[165] At the same time, no one else should consider "spoliation" to be a foregone

[161] *Am. Airlines, Inc. v. Allied Pilots Ass'n,* 228 F.3d 574, 578 (5th Cir. 2000) (citing Fed. R. Civ. P. 65).

[162] *Id.*

[163] Debtor's Exh. 12 (DE # 80).

[164] Debtor's Exhs. 54 & 55 (DE # 101).

[165] *See* Fed. R. Civ. Proc. 37(e) (dealing with failure to preserve electronically stored information); *Hawkins v. Gresham*, No. 3:13-CV-00312-P, 2015 WL 11122118, at *3 (N.D. Tex. Jan. 16, 2015) (dealing with the question of whether a defendant's sale of his phone containing relevant text messages after being notified of a lawsuit was a breach of his duty to preserve evidence); *Paisley Park Enterprises, Inc. v. Boxill*, 330 F.R.D. 226, 230-237 (D. Minn. 2019) (dealing with whether two defendants' loss of relevant text messages resulting from their phones' auto-delete function

conclusion here. The court never heard testimony from Jason Rothstein or Tara Loiben (who seem to have been involved with the disappearing phone). The court never heard evidence as to whether the inhouse lawyers (*e.g.,* Scott Ellington, Isaac Leventon) properly addressed with Highland employees, such as Mr. Dondero, as they should have, the preservation notice and document requests served on the Debtor by the UCC.[166] The court also cannot be sure at this time whether there was even relevant and retrievable information on the phone. The court has many lingering questions, but it cannot find contempt of the TRO based on the TRO's lack of specificity where the cell phone was concerned.

4. ***Other Allegations of TRO Violations***.

The Debtor has cited various other instances of Mr. Dondero's behavior that it believes were violative of the TRO. For example: (a) Mr. Dondero's alleged willful ignorance of it by not reading it or underlying pleadings associated with it; (b) trespassing on the Debtor's property after the Debtor had evicted him; and (c) allegedly interfering with the Debtor's obligation to produce certain documents that were requested by the UCC and that were in the Debtor's possession, custody, and

---

constituted spoliation of evidence when the defendants had explicitly discussed the possibility of litigation before the deletion and were principals of the company being sued); *First Fin. Sec., Inc. v. Freedom Equity Grp., LLC,* No. 15-CV-1893-HRL, 2016 WL 5870218, at *3-4 (N.D. Cal. Oct. 7, 2016) (dealing with whether Defendants' intentional deletion of text messages after they had discussed the likelihood of litigation was spoliation of evidence under Rule 37(e); also, whether sanctions were warranted when it was unclear whether the information contained in the deleted text messages would have been critical to plaintiff's claims); *Living Color Enterprises, Inc. v. New Era Aquaculture, Ltd.,* No. 14-CV-62216, 2016 WL 1105297, at *1-2, 4-7 (S.D. Fla. Mar. 22, 2016) (dealing with whether the deletion of text messages from Defendant's cell phone as a result of the phone's auto-delete feature after he reasonably anticipated litigation was spoliation of evidence that prejudiced the Plaintiff; also, whether Defendant's failure to disable the auto-delete feature that resulted in the deletion of text messages was evidence of his intent to deprive Plaintiff of relevant evidence.); *Clear-View Tech., Inc. v. Rasnick*, No. 5:13-CV-02744-BLF, 2015 WL 2251005, at *2, 7-11 (N.D. Cal. May 13, 2015) (whether Defendants spoliated text message evidence by purposefully deleting emails and discarding cell phones after receiving messages threatening a lawsuit from Plaintiff and discussing the possibility of litigation); *Kan-Di-Ki, LLC v. Suer,* No. CV 7937-VCP, 2015 WL 4503210, at *30 (Del. Ch. July 22, 2015) (whether Plaintiff's deletion of relevant emails and loss of his cell phone constituted spoliation and whether sanctions were warranted).

[166] Debtor's Exhs. 29-33 (DE # 80).

control. While the allegations are problematic, the court does not conclude these actions constituted civil contempt of the TRO.[167]

With regard to Mr. Dondero's alleged "willful ignorance" of the TRO, it is technically not a violation of any term of the TRO. The most important thing here is that Mr. Dondero cannot claim lack of knowledge of the TRO's contents. As mentioned earlier, "[a]n alleged contemnor must have had knowledge of the order on which civil contempt is to be based. The level of knowledge required, however, is not high."[168] When Mr. Dondero testified that he had not read the TRO (or the underlying pleadings supporting it), maybe he was trying to imply lack of knowledge of its terms as some sort of defense? Or maybe he really did not care to read the TRO and was relying entirely upon his counsel to tell him all of its terms. Whatever the explanation, it really does not matter much. The court determines that Mr. Dondero had the necessary knowledge of the TRO, for purposes of holding him accountable for compliance with it, but—even if he was somewhat cavalier in not actually reading the TRO line-for-line—this alone is not a violation of the TRO's terms.

With regard to Mr. Dondero's trespassing on the Debtor's property after the Debtor had evicted him, the problem here is that the "eviction" of Mr. Dondero occurred pursuant to the letter that Debtor's counsel sent to Mr. Dondero's counsel on December 23, 2010—not pursuant to the actual terms of the TRO.[169] The TRO itself did not specifically enjoin Mr. Dondero from going to

---

[167] The court should add that it does not conclude that letters sent by counsel for the Advisors and the NexPoint/HCMFA Funds, seeking to stop the sale of Highland CLO assets, and a motion that they filed to address Highland CLO management issues, constituted contempt of court by Mr. Dondero. *See* Debtor's Exh. 25 (DE # 80). While Mr. Dondero, as the President and portfolio manager of these Non-Debtor Dondero-Related entities, was/is no doubt in control of them, and while it is a very close call as to whether—through these lawyers' actions—Mr. Dondero was causing "(a) any entity owned or controlled by him, and/or (b) any person or entity acting on his behalf," to interfere with the disposition of assets controlled by the Debtor, the court ultimately believes that hiring lawyers to file motions (and those lawyers taking steps leading up to the filing of the motions, such as sending letters previewing that they may take legal actions), should not be viewed as having crossed the line into contemptuous behavior. Again, this was a close call.

[168] *Kellogg v. Chester,* 71 B.R. at 38.

[169] Debtor's Exh. 12 (DE # 80).

the Highland offices. The later preliminary injunction entered on January 8, 2021 for the first time contained such an injunction.[170] Thus, even though Mr. Dondero showed up in the Debtor's offices on January 5, 2021 to sit for the Debtor's virtual deposition of him, the court does not conclude that this violated a term of the TRO.

With regard to Mr. Dondero's allegedly interfering with the Debtor's obligation to produce certain documents that were requested by the UCC and that were in the Debtor's possession, custody, and control, the court understands this to be a reference to Mr. Dondero texting Highland employee Melissa Schroth and instructing her not to turn over documents concerning the Dugaboy Trust (that were on Highland's server) without a subpoena.[171] The court has already addressed this as a TRO violation, ***since it was a communication with a Highland employee regarding matters other than "shared services."*** For the avoidance of doubt, there was no shared services agreement between the Dugaboy Trust and Highland. This clearly was a TRO violation.

V. Damages.

The Contempt Motion 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, 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.

[170] DE # 59 at ¶ 5.

[171] Debtor's Exh. 19 (DE # 101).

As indicated earlier, the court can order what is necessary to: (1) compel or coerce obedience of an order; and (2) to compensate the Debtor/estate for losses resulting from Mr. Dondero's non-compliance with a court order. Here, the court believes compensatory damages are more appropriate than a remedy to compel or coerce future compliance. Compensatory damages are supposed to reimburse the injured party for the losses and expenses incurred because of their adversary's noncompliance. Courts have broad discretion but may consider such factors as: (1) the harm from noncompliance; (2) the probable effectiveness of the sanction; (3) the financial resources of the contemnor and the burden the sanctions may impose; and (4) the willfulness of the contemnor in disregarding the court's order.

As far as the harm from noncompliance, the Debtor presented invoices of the fees incurred by its counsel relating to the TRO and Contempt Motion. The Debtor did not attempt to quantify any potential economic harm to the Debtor from Mr. Dondero's prohibited conversations with Debtor employees and attempted interference with trading. Should this matter? Once again, is this much ado about nothing? In answering this question, context matters. Recall that the Corporate Governance Settlement between the Debtor and UCC from January 2020 was ***all about removing Mr. Dondero from control of the Debtor but avoiding the drastic remedy of a Chapter 11 Trustee***. It was heavily negotiated and extremely detailed in its terms. Ultimately, Mr. Dondero was kept around at the company in a non-control capacity, but eventually conflicts between the Debtor and him (and between the Debtor and the Non-Debtor Dondero-Related Entities) became intolerable. Mr. Dondero was, therefore, terminated. But almost immediately, he essentially began instructing Debtor employees to ignore their boss (Mr. Seery) and do as Mr. Dondero said instead. All of this was occurring at a critical time when the Debtor had filed a Chapter 11 plan, was still negotiating it with creditors, and was set for a confirmation hearing—and, meanwhile, Mr. Dondero was trying

to gain support for his own pot plan that would involve him regaining control of the company and/or transitioning the Debtor's managed funds over to his control. His interference—even if not ultimately resulting in quantifiable harm to the Debtor's balance sheet or cash flow—posed a risk to the Debtor's plan of reorganization that, ultimately ended up being supported by hundreds of millions of dollars-worth of creditors (in fact, all creditors except the Non-Debtor Dondero-Related Entities). The reality is that the Debtor's counsel acted quickly in bringing the Contempt Motion before much damage could be done. The fact that they acted swiftly—before the Debtor had incurred any quantifiable damage other than significant attorneys' fees—should not preclude the Debtor from alleging harm and receiving reimbursement of its attorneys' fees and expenses incurred relating to the TRO and Contempt Motion.

As far as the attorneys' fees incurred relating to the TRO and Contempt Motion, the Debtor presented invoices of the fees incurred by its primary bankruptcy counsel, Pachulski Stang, during December 2020 and January 2021, pertaining to "Bankruptcy Litigation"—much of which it represented related to its attorney time devoted to the Contempt Motion. The Debtor admitted that there were some other litigation matters mixed in these invoices.[172] Total December fees were $526,686. The court has reviewed the December invoice and conservatively estimates that **$170,919** of the fees reflected in the December invoice related to the TRO and Contempt Motion (other fees appeared to relate to other litigation matters such as the HarbourVest settlement, Pat Daugherty issues, UBS, demand note litigation, and Dugaboy claims). Total January fees were $698,770. The court has reviewed this invoice and conservatively estimates that **$195,002** of the fees reflected in the January 2021 invoice related to the TRO and Contempt Motion (again, other

[172] Debtor's Exhs. 38 & 39 (DE # 128).

fees appeared to relate to other litigation matters such as UBS and other litigation). These two sums total **$365,921**.

However, the hearing on this matter (as a result of continuances sought by Mr. Dondero) did not occur until March 22 & 24, 2021. The court was presented with no invoices for February or March. The court estimates that the hearing on this matter (March 22 & 24, 2021) required 10 hours of in-court time. The primary attorney handling this matter for the Debtor (Mr. Morris) charged at $1,245 per hour and his paralegal (Ms. Canty) charged $425 per hour. The court will assume that they each spent 10 hours during the day or two before the hearing preparing for it. This would amount to an additional **$33,400** of fees, bringing the total now to **$399,321**. The court stresses that it used conservative math when scrutinizing the invoices. Moreover, this represents fees only. The court assumes that the various depositions and transcripts required as a result of this litigation resulted in many thousands of dollars of additional expenses. Also, Pachulski had local counsel (Hayward & Associates) whose invoices were not submitted. Additionally, the UCC had counsel monitoring all of this (Sidley & Austin)—whose fees and expenses are reimbursed by the bankruptcy estate—and their fees and expenses have not been included. In summary, the $399,321 number is extremely conservative, and it does not include likely significant add-ons (expenses; local counsel; and UCC counsel). The court determines that it is reasonable to round the $399,321 number up approximately $50,000, to **$450,000** because of these extra items. In considering the probable effectiveness of the sanction, the financial resources of Mr. Dondero and the burden the sanctions may impose, and the willfulness of Mr. Dondero in disregarding the court's TRO, the court believes—based on information it has learned at numerous hearings about Mr. Dondero's compensation and the size of the companies he has been running for almost 30 years—he has substantial resources, and this $450,000 compensatory sanction will not place much of a burden on

him at all. The court believes that there was willfulness with regard to many of Mr. Dondero's actions. The court has no idea about the probability of these sanctions being effective. Time will tell.

The Debtor has asked for the court to impose a penalty of three times the Debtor's actual expenses incurred in connection with any future violation of any order of this Court. The court declines to do this. However, the court will add on a sanction of $100,000 for each level of rehearing, appeal, or petition for *certioriari* that Mr. Dondero may choose to take with regard to this Order, to the extent any such motions for rehearing, appeals, or petitions for *certiorari* are not successful.

Accordingly, it is hereby ORDERED that:

(i) Mr. Dondero is in civil contempt of court in having violated the court's December 10, 2020 TRO—the court having found by clear and convincing evidence that: (1) the TRO was in effect and Mr. Dondero knew about it; (2) the TRO required certain conduct by Mr. Dondero; and (3) Mr. Dondero failed to comply with the TRO;

(ii) In order to compensate the Debtor's estate for loss and expense resulting from Mr. Dondero's non-compliance with the TRO, Mr. Dondero is directed to pay the Debtor (on the 15th day after entry of this order) an amount of money equal to **$450,000;**

(iii) The court will add on a sanction of **$100,000** for each level of rehearing, appeal, or petition for *certioriari* that Mr. Dondero may choose to take with regard to this Order, to the extent that any such motions for rehearing, appeals, or petitions for *certiorari* are pursued by him and are not successful;

(iv) Other sanctions are denied at this time; and

(v) The court reserves jurisdiction to interpret and enforce this Order.

TAB B

The following constitutes the ruling of the court and has the force and effect therein described.

Signed December 10, 2020

United States Bankruptcy Judge

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

In re: HIGHLAND CAPITAL MANAGEMENT, L.P.,[1] Debtor.	§	Chapter 11 Case No. 19-34054-sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, vs. JAMES D. DONDERO, Defendant.	§	Adversary Proceeding No. 20-03190-sgj

ORDER GRANTING DEBTOR'S MOTION
FOR A TEMPORARY RESTRAINING ORDER AGAINST JAMES DONDERO

Having considered the *Debtor's Motion for a Temporary Restraining Order and*

[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.

Preliminary Injunction against James Dondero [Docket No. 6] (the "Motion"), the *Memorandum of Law* (the "Memorandum of Law")[2] in support of the Motion, and the *Declaration of James P. Seery, Jr. in Support of the Debtor's Motion for a Temporary Restraining Order against James Dondero* [Docket No. 4] (the "Seery Declaration"), including the exhibits annexed thereto; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and this Court having found that venue of this proceeding and the Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that injunctive relief is warranted under sections 105(a) and 362(a) of the Bankruptcy Code and that the relief requested in the Motion is in the best interests of the Debtor's estate, its creditors, and other parties-in-interest; and this Court having found that the Debtor's notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and that no other notice need be provided; and this Court having determined that the legal and factual bases set forth in the Motion and the Memorandum of Law establish good cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor and for the reasons set forth in the record on this Motion, it is **HEREBY ORDERED THAT**:

1. The Motion is **GRANTED** as set forth herein.

2. James Dondero is temporarily enjoined and restrained from (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

[2] Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Memorandum of Law.

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; and (e) otherwise violating section 362(a) of the Bankruptcy Code (collectively, the "Prohibited Conduct").[3]

3. James Dondero is further temporarily enjoined and restrained from 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.

4. All objections to the Motion are overruled in their entirety.

5. The Court shall retain exclusive jurisdiction with respect to all matters arising from or relating to the implementation, interpretation, and enforcement of this Order.

END OF ORDER

[3] For the avoidance of doubt, this Order does not enjoin or restrain Mr. Dondero from seeking judicial relief upon proper notice or from objecting to any motion filed in the above-referenced bankruptcy case.

TAB C

PACHULSKI STANG ZIEHL & JONES LLP
Jeffrey N. Pomerantz (CA Bar No. 143717) (*admitted pro hac vice*)
Ira D. Kharasch (CA Bar No. 109084) (*admitted pro hac vice*)
John A. Morris (NY Bar No. 266326) (*admitted pro hac vice*)
Gregory V. Demo (NY Bar No. 5371992) (*admitted pro hac vice*)
Hayley R. Winograd (NY Bar No. 5612569) (*admitted pro hac vice*)
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone: (310) 277-6910
Facsimile: (310) 201-0760

HAYWARD PLLC
Melissa S. Hayward (TX Bar No. 24044908)
MHayward@HaywardFirm.com
Zachery Z. Annable (TX Bar No. 24053075)
ZAnnable@HaywardFirm.com
10501 N. Central Expy, Ste. 106
Dallas, TX 75231
Telephone: (972) 755-7100
Facsimile: (972) 755-7110

Counsel for Highland Capital Management, L.P.

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

In re: HIGHLAND CAPITAL MANAGEMENT, L.P.,[1] Debtor.	§	Chapter 11 Case No. 19-34054-sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, vs. JAMES D. DONDERO, Defendant.	§	Adversary Proceeding No. 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.

PLAINTIFF'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

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"), by and through its undersigned counsel, files this motion (the "Motion") seeking entry of 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 the Motion, the Debtor respectfully states the following:

JURISDICTION AND VENUE

1. This Court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 157 and 1334(b). The Motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O).

2. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1409.

3. The predicates for the relief requested in the Motion are sections 105(a) and 362(a) of title 11 of the United States Code (the "Bankruptcy Code") and Rules 7065 and 7001 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

RELIEF REQUESTED

4. The Debtor requests that this Court issue the proposed form of order to show cause, attached hereto as **Exhibit A** (the "Proposed Order"), pursuant to sections 105(a) and 362(a) of the Bankruptcy Code and Rules 7001 and 7065 of the Bankruptcy Rules.

5. The evidence and arguments supporting the Motion are set forth in the Debtor's *Memorandum of Law in Support of Its 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 "Memorandum of Law"), and the *Declaration of John A. Morris 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 "Morris Declaration"), and the exhibits annexed thereto, filed contemporaneously with this Motion. For the reasons set forth the Memorandum of Law, 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, 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.

6. In accordance with Rule 7007-1 of the *Local Bankruptcy Rules of the United States Bankruptcy Court for the Northern District of Texas* (the "Local Rules"), contemporaneously herewith and in support of this Motion, the Debtor is filing: (a) its Memorandum of Law, (b) the Morris Declaration, and (c) the Debtor's *Motion for Expedited Hearing on 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 to Expedite").

7. Based on the exhibits annexed to the Morris Declaration, and the arguments contained in the Memorandum of Law, the Debtor is entitled to the relief requested herein as set forth in the Proposed Order.

8. Notice of this Motion has been provided to Mr. Dondero. The Debtor submits that no other or further notice need be provided.

WHEREFORE, the Debtor respectfully requests that the Court (i) enter the Proposed Order substantially in the formed annexed hereto as **Exhibit A** granting the relief requested herein, and (ii) grant the Debtor such other and further relief as the Court may deem proper.

Dated: January 7, 2021.

PACHULSKI STANG ZIEHL & JONES LLP
Jeffrey N. Pomerantz (CA Bar No. 143717)
Ira D. Kharasch (CA Bar No. 109084)
John A. Morris (NY Bar No. 266326)
Gregory V. Demo (NY Bar No. 5371992)
Hayley R. Winograd (NY Bar No. 5612569)
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone: (310) 277-6910
Facsimile: (310) 201-0760
Email: jpomerantz@pszjlaw.com
ikharasch@pszjlaw.com
jmorris@pszjlaw.com
gdemo@pszjlaw.com
hwinograd@pszjlaw.com

-and-

HAYWARD PLLC

/s/ Zachery Z. Annable
Melissa S. Hayward
Texas Bar No. 24044908
MHayward@HaywardFirm.com
Zachery Z. Annable
Texas Bar No. 24053075
ZAnnable@HaywardFirm.com
10501 N. Central Expy, Ste. 106
Dallas, Texas 75231
Tel: (972) 755-7100
Fax: (972) 755-7110

Counsel for Highland Capital Management, L.P.

EXHIBIT A

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

In re: HIGHLAND CAPITAL MANAGEMENT, L.P.,[1] Debtor.	§	Chapter 11 Case No. 19-34054-sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, vs. JAMES D. DONDERO, Defendant.	§	Adversary Proceeding No. 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.

ORDER GRANTING PLAINTIFF'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

Having considered (a) 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* [Docket No. __] (the "Motion"); [2] (b) the *Debtor's Memorandum of Law in Support of Its Motion for an Order Requiring Mr. James Dondero to Show Cause Why He Should Not Be Held in Civil Contempt for Violating the TRO* [Docket No. __] (the "Memorandum of Law"); (c) the exhibits annexed to the *Declaration of John A. Morris 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* [Docket No. __] (the "Morris Declaration"); and (d) all prior proceedings relating to this matter, including the December 10, 2020 hearing on the *Debtor's Motion for a Temporary Restraining Order and Preliminary Injunction against James Dondero* [Docket No. 6] (the "TRO Hearing") and the hearing (the "Restriction Motion Hearing") on the *Motion for Order Imposing Temporary Restrictions on Debtor's Ability, as Portfolio Manager, to Initiate Sales by Non-Debtor CLO Vehicles* [Bankr. Case Docket No. 1528] that was brought by certain financial advisory firms and investment funds that are represented by the law firm K&L Gates (collectively, the "K&L Gates Clients"); and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and this Court having found that venue of this proceeding and the Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that sanctions are warranted under sections 105(a) and 362(a) of the Bankruptcy Code and that the relief requested in the Motion is in the best interests of the

[2] Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Motion.

Debtor's estate, its creditors, and other parties-in-interest; and this Court having found that the Debtor's notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and that no other notice need be provided; and this Court having determined that the legal and factual bases set forth in the Motion establish good cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor and for the reasons set forth in the record on this Motion, it is **HEREBY ORDERED THAT**:

1. The Motion is **GRANTED** as set forth herein.

2. Mr. Dondero shall show cause before this Court on **Friday, January 8, 2021 at 9:30 a.m. (Central Time)** why an order should not be granted: (i) finding and holding Mr. Dondero in contempt for violating the TRO; (ii) directing 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) directing 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 Clients' frivolous motion and related demands and threats and taking Mr. Dondero's deposition), payable within three (3) calendar days of presentment of an itemized list of expenses, (iv) imposing a penalty of three (3) times the Debtor's actual expenses incurred in connection with any future violation of any order of this Court, and (iv) granting the Debtor such other and further relief as the Court deems just and proper under the circumstances.

3. The Court shall retain exclusive jurisdiction with respect to all matters arising from or relating to the implementation, interpretation, and enforcement of this Order.

END OF ORDER

TAB D

PACHULSKI STANG ZIEHL & JONES LLP
Jeffrey N. Pomerantz (CA Bar No. 143717) (*admitted pro hac vice*)
Ira D. Kharasch (CA Bar No. 109084) (*admitted pro hac vice*)
John A. Morris (NY Bar No. 2405397) (*admitted pro hac vice*)
Gregory V. Demo (NY Bar No. 5371992) (*admitted pro hac vice*)
Hayley R. Winograd (NY Bar No. 5612569) (*admitted pro hac vice*)
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone: (310) 277-6910
Facsimile: (310) 201-0760

HAYWARD PLLC
Melissa S. Hayward
Texas Bar No. 24044908
MHayward@HaywardFirm.com
Zachery Z. Annable
Texas Bar No. 24053075
ZAnnable@HaywardFirm.com
10501 N. Central Expy, Ste. 106
Dallas, Texas 75231
Tel: (972) 755-7100
Fax: (972) 755-7110

Counsel for Highland Capital Management, L.P.

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

In re:	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	§	Case No. 19-34054-sgj11
Debtor.	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Adversary Proceeding
Plaintiff,	§	No. 20-3190-sgj11
vs.	§	
JAMES D. DONDERO,	§	
Defendant.	§	

[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.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Rules

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.

Appendix 076

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 thing, 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.

PACHULSKI STANG ZIEHL & JONES LLP
Jeffrey N. Pomerantz (CA Bar No. 143717)
Ira D. Kharasch (CA Bar No. 109084)
John A. Morris (NY Bar No. 266326)
Gregory V. Demo (NY Bar No. 5371992)
Hayley R. Winograd (NY Bar No. 5612569)
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone: (310) 277-6910
Facsimile: (310) 201-0760
Email: jpomerantz@pszjlaw.com
ikharasch@pszjlaw.com
jmorris@pszjlaw.com
gdemo@pszjlaw.com
hwinograd@pszjlaw.com

-and-

HAYWARD PLLC

/s/ Zachery Z. Annable
Melissa S. Hayward
Texas Bar No. 24044908
MHayward@HaywardFirm.com
Zachery Z. Annable
Texas Bar No. 24053075
ZAnnable@HaywardFirm.com
10501 N. Central Expy, Ste. 106
Dallas, Texas 75231
Tel: (972) 755-7100
Fax: (972) 755-7110

Counsel for Highland Capital Management, L.P.

TAB E

D. Michael Lynn
State Bar I.D. No. 12736500
John Y. Bonds, III
State Bar I.D. No. 02589100
John T. Wilson, IV
State Bar I.D. No. 24033344
Bryan C. Assink
State Bar I.D. No. 24089009
BONDS ELLIS EPPICH SCHAFER JONES LLP
420 Throckmorton Street, Suite 1000
Fort Worth, Texas 76102
(817) 405-6900 telephone
(817) 405-6902 facsimile

ATTORNEYS FOR DEFENDANT JAMES DONDERO

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

In re:	§	**Case No. 19-34054**
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.	§	**Chapter 11**
	§	
Debtor.	§	

	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	
	§	
v.	§	
	§	**Adversary No. 20-03190**
JAMES D. DONDERO,	§	
	§	
Defendant.	§	

JAMES DONDERO'S OBJECTION AND RESPONSE TO PLAINTIFF'S MOTION FOR AN ORDER REQUIRING MR. JAMES DONDERO TO SHOW CAUSE

James D. Dondero ("Defendant" or "Dondero"), the defendant in the above-captioned adversary proceeding, hereby files this Objection and Response to *Plaintiff'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* [Adv. Dkt. 48]. In support thereof, Defendant respectfully represents as follows:

Table of Contents

Table of Authorities

Cases

Statutes

Rules

I. PRELIMINARY STATEMENT

1. The Contempt Motion[1] has little to do with a legitimate violation of a court order and resulting damages to the Debtor. The Debtor well knows that the majority of actions complained of in the Contempt Motion do not violate a clear and specific provision of the TRO. Yet, it has brought the motion to further impugn Dondero's reputation before this Court, prevent Dondero and his related entities from being able to exercise and pursue their legal rights and remedies related to this case or their relationship with the Debtor or its business, and to attempt to gain an undue advantage in potential future disputes between the parties. The evidence will show—contrary to the Debtor's bluster and inuendo at prior hearings—that Dondero substantially complied with the TRO and did not violate any clear and specific provision of the TRO. Accordingly, the Contempt Motion should be denied.

2. The grounds underlying the Contempt Motion evidence the concern that Dondero expressed to the Court during both the TRO and the Preliminary Injunction hearings that the broad and vague TRO (and later the injunction) does not provide clear notice to Dondero of the acts restrained and allows the Debtor to use the threat of contempt as a weapon to enjoin otherwise lawful conduct.

3. As can be seen by the Contempt Motion, the Debtor has done just that. Despite not being explicitly restrained by the TRO, the Debtor is seeking to have Dondero found in contempt for a number of actions that cannot reasonably be interpreted to violate the TRO, including (i) Dondero replacing his cell phone and leaving the old phone at Debtor's office; (ii) going into Debtor's empty office space (which Dondero was arguably entitled to do under the shared services

[1] As used herein, the term Contempt Motion shall refer to *Plaintiff'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* [Adv. Dkt. 48] and the supporting brief [Adv. Dkt. 49], collectively.

agreements) to appear for a deposition noticed by the Debtor; (iii) two letters sent by counsel for third-party entities to Debtor's counsel making certain requests, which requests the Debtor rejected and for which no additional action was taken by Dondero or these third parties after the sending of the letters; and (iv) the filing (and eventual prosecution) of a motion brought by third party entities before the TRO was even entered and which action was explicitly allowed under the TRO. The Contempt Motion does not even attempt to describe how these actions violated the TRO. Nor could it. Under its terms, the TRO simply does not apply to these actions. The Debtor will not be able to satisfy its high burden that these actions violated a clear and specific term of the TRO.

4. While Dondero admits that there were certain, extremely limited communications made between him and certain of the Debtor's employees, the evidence will show that all or substantially all of the communications made were allowed and Dondero substantially complied with this provision of the TRO. The limited communications exchanged between Dondero and Debtor employees were either allowed pursuant to the Shared Services Agreements, related to the Pot Plan or other settlement discussions, or were otherwise authorized by the Debtor. Even if certain communications could be found as violating the letter of the TRO, there were no communications made that related to, interfered with, or otherwise impeded the Debtor's business, or that caused harm to the Debtor's business.

5. For these reasons, the Contempt Motion should be denied. The Debtor will not be able to show by clear and convincing evidence that Dondero violated a clear and specific provision of the TRO. To the extent the Court finds that there were any ministerial violations of the TRO, the Court should refrain from holding Dondero in contempt because (i) he substantially complied with the TRO; (ii) any ministerial communications made and not subject to an exception under the TRO did not relate to, interfere with, or otherwise impede the Debtor's business; and (iii) the

Debtor's business suffered no actual damages or harm as a result of such communications or other potential violation of the TRO.

II. ARGUMENT AND AUTHORITIES

6. Bankruptcy courts in the Fifth Circuit have the authority to conduct civil contempt proceedings. *Placid Refining Company v. Terrebonne Fuel and Lube, Inc.,* 108 F.3d 609, 613 (5th Cir. 1997). The test for contempt in the Fifth Circuit requires the showing that (1) a court order was in effect; (2) the order required certain conduct; and (3) the respondent failed to comply with the order. *Piggly Wiggly Clarksville, Inc. v. Mrs. Baird's Bakeries, Inc.,* 177 F.3d 380, 382 (5th Cir. 1999). In civil contempt, the burden of proof is clear and convincing, as opposed to preponderance of evidence. *Petroleos Mexicanos v. Crawford Enterprises, Inc.,* 826 F.2d 392, 401 (5th Cir. 1987). Clear and convincing evidence is "that weight of proof which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case." *Travelhost, Inc. v. Blandford,* 68 F.3d 958, 961 (5th Cir. 1995). "A party commits contempt when he violates a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order." *Id.*

7. "A party may avoid a contempt finding where it can show that it has substantially complied with the order, or has made every reasonable effort to comply." *United States Steel Corp. v. United Mine Workers,* 598 F.2d 363, 368 (5th Cir. 1979).

8. "[S]anctions for civil contempt are meant to be wholly remedial and serve to benefit the party who has suffered injury or loss at the hands of the contemnor." *Petroleos Mexicanos,* 826 F.2d at 399. "Compensatory damages awarded as a sanction for violation of a court order are to

"[reimburse] the injured party for the losses and expenses incurred because of his adversary's noncompliance." *Norman Bridge Drug Co. v. Banner,* 529 F.2d 822, 827 (5th Cir.1976).

A. The TRO is not clear and unambiguous.

9. A finding of civil contempt must be supported by clear and convincing evidence that "(1) the allegedly violated order was valid and lawful; (2) the order was clear and unambiguous; and (3) the alleged violator had the ability to comply with the order." *Ga. Power Co. v. NLRB*, 484 F.3d 1288, 1291 (11th Cir. 2007); *Riccard v. Prudential Life Ins. Co.*, 307 F.3d 1277, 1298 (11th Cir. 2002).

10. Injunctions and Temporary Restraining Orders are required to be definite and specific to be enforceable. Rule 65(d) of the Federal Rules of Civil Procedure provides that "[e]very order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." The specificity requirement "ensures that a party who is restrained by a preliminary injunction knows clearly what conduct is being restrained and why." *MillerCoors LLC v. Anheuser-Busch Cos., LLC*, 940 F.3d 922, 924 (7th Cir. 2019).

11. The specificity provisions of Rule 65(d) are not mere technical requirements. "The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (per curiam). Accordingly, an injunction "cannot be so general as to leave the party open to the hazard of conducting business in the mistaken belief that it is not prohibited by the injunction and thus make him vulnerable to prosecution for contempt." *Williams v. United States*, 402 F.2d 47, 48 (10th Cir. 1967).

12. As the Supreme Court has stated,

> The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one. Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid.

Longshoremen's Ass'n, Local 1291 v. Philadelphia Marine Trade Ass'n, 389 U.S. 64, 76 (1967).

13. Two principles must be established to show a civil violation of a court order. "The first of these is that it must be proved that the alleged contemnor had knowledge of the order which he is said to have violated. The corollary of this proposition is that the order which is said to have been violated must be specific and definite."[2]

14. As to the latter issue, "[a]n order may be so vague or indefinite that, even though the alleged contemnor is chargeable with knowledge of such order, he cannot be punished for doing what he did in view of lack of certainty as to what it prohibited or directed." *Id.* In addition, it is a "long-standing, salutary rule in contempt cases [] that ambiguities and omissions in orders redound to the benefit of the person charged with contempt." *Id.*

15. As described in detail below, several provisions of the TRO (and later the Preliminary Injunction) are too broad, vague, nonspecific, and ambiguous as to be enforceable. Given the lack of specificity and ambiguous nature of the order, the Court should err on the side of caution, resolve the ambiguities in Dondero's favor, and deny the Contempt Motion

16. First, the provision of the TRO that prohibits Dondero from "interfering with or otherwise impeding, directly or indirectly, with 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" is not clear, definite, and specific because it does not list specific acts that are to be restrained. Rather,

[2] *Eavenson v. Holtzman*, 775 F.2d 535, 544 (3d Cir. 1985).

it lists a broad, vaguely-worded category of conduct that could be read to apply to any number of unidentified actions related to this bankruptcy case or Debtor's business. Interpreted broadly, this provision could be read to prevent any action of Dondero or his related entities to assert their individual legal rights in this case or to protect their individual business interests. This provision could also be read to restrict any action that is in disagreement with a decision of the Debtor, such as whether claims are properly treated or classified ("treatment of claims"), whether the Debtor's Plan complies with applicable law ("pursuit of the Plan"), whether Dondero can disagree with any sale of assets owned or controlled by the Debtor ("disposition of assets owned or controlled by the Debtor"), and whether Dondero could attempt to pursue his own alternative plan ("alternative to the Plan"). Further, it is not clear how Dondero, as a former employee of the Debtor, can "interfere" with the "Debtor's decisions" given that he has no standing, decision-making authority, or ability to control the Debtor or its independent decisions, rather than simply to disagree with them or assert his own legal positions that may be adverse to the Debtor.

17. This is similar to a broad and sweeping injunction that broadly attempts to enjoin any "interference" with the administration of the Debtor's estate or the Debtor's business, which courts in other circumstances have held is not specific enough to be enforceable. *See, e.g.*, *Robinson v. Rothwell (In re Robinson)*, 342 Fed. Appx. 235, 2009 U.S. App. LEXIS 19040 (8th Cir. 2009) (reversing contempt finding resulting from provision in order preventing "any actions to interfere in any way with administration of these jointly administered bankruptcies," because bankruptcy court's order was neither sufficiently specific to be enforceable, nor clear and unambiguous).

18. Here, the restrictions in the TRO are similar in that the TRO contains the broad phrase "interfering with or otherwise impeding, directly or indirectly, the Debtor's business"

which is just as non-specific, unclear and ambiguous as the phrase from the case above. Further, it appears the intent of this provision is at least partially to prevent Dondero from supposedly "interfering" with the bankruptcy case as the Debtor then lists a series of general duties of a debtor in possession as being included within this broad and amorphous category of interference. The "treatment of claims," for example, has nothing to do with how the Debtor's business operates. It instead appears the intent of this provision is also to enjoin Dondero and his related entities (and their attorneys) from exercising their legal rights and asserting legal positions that the Debtor simply disagrees with. Accordingly, these alleged restrictions are likewise non-specific, vague, and ambiguous because no specific actions are identified as being restricted. It remains unclear what actions Dondero can or cannot do related to this bankruptcy case or the Debtor's business.

19. The ambiguity of the TRO is further evidenced by the fact that the Debtor has asserted that attorneys for the Funds and Advisors[3] may not send letters to the Debtor asserting certain legal positions and making certain requests because such actions "interfere" with the Debtor's business, even if no further action was taken after the letters were sent. While the TRO does not say that counsel for certain of Dondero-related entities are prohibited from sending letters to Debtor's counsel to make requests, the Debtor has asserted that these entities sending such letters caused Dondero to violate the TRO as falling under this broad category of "direct or indirect" interference with Debtor's business.[4] Plainly put, if legal requests made by third parties through their counsel can cause Dondero to violate the TRO, neither Dondero nor his related entities have fair notice of the acts allegedly restrained by the TRO.

20. By way of example, this is probably why the TRO entered against the Funds and

[3] As used herein, "Funds and Advisors" shall mean and refer to Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., Highland Income Fund, NexPoint Strategic Opportunities Fund, and NexPoint Capital, Inc.

[4] *See* Debtor's Brief in Support of Motion for Order to Show Cause, Adv. Dkt. 49.

Advisors is more specific as to the acts restrained and includes a restriction on the Funds and Advisors "seeking to terminate the portfolio management agreements and/or servicing agreements between the Debtor and the CLOs." The TRO entered against Dondero, however, contains no such restriction. The sending of letters by these attorneys for third parties does not violate the TRO entered against Dondero.

21. In addition, while Dondero is bound to respect the automatic stay, the provision of the TRO (and later the injunction) that prevents Dondero from "violating section 362(a) of the Bankruptcy Code" is nonspecific, lacking in detail, and too vague as to be enforceable. There are no specific prohibited actions listed, and it is unclear what actions the Debtor may assert violate the automatic stay, particularly as to sections 362(a)(1)-(5) (preventing actions against the Debtor and property of the Debtor's estate). This lack of specificity is material and significant because the Debtor has apparently taken the position (or may later take the position) in this adversary proceeding that any action taken by Dondero or his related entities that *may* impact the property of non-Debtor subsidiaries may violate the automatic stay, despite asserting elsewhere in this bankruptcy case that the property held by these subsidiaries is not property of the estate or subject to the Bankruptcy Court's jurisdiction or oversight.[5][6] Therefore, this provision of the TRO does not describe in reasonable detail the acts restrained and, in explicit violation of Rule 65(d), makes reference to an outside source.

22. In sum, the TRO on its face lacks specificity and is unclear and unambiguous. The

[5] *See Debtor's Response to Mr. James Dondero's Motion for Entry of an Order Requiring Notice and Hearing for Future Estate Transactions Occurring Outside the Ordinary Course of Business* [Docket No. 1546], Para. 5 ("[T]he assets of a debtor's non-debtor subsidiaries are *not* property of a debtor's estate." and "transactions occurring at non-Debtor entities . . . were otherwise arguably outside of this Court's jurisdiction and oversight.') (emphasis in original).

[6] *Id.* at para. 10 ("Even though the value of the subsidiary's outstanding shares owned by the debtor may be directly affected by the subsidiary's disputes with third parties, Congress did not give the bankruptcy court exclusive jurisdiction over all controversies that in some way affect the debtor's estate.") (citing *Parkview-Gem, Inc.*, 516 F.2d 807, 809 (8th Cir. 1975)) (internal citations and quotations omitted).

Debtor's actions indicate that it has interpreted the TRO so broadly as to make it impossible for Dondero to know what actions he can or cannot take. The Preliminary Injunction is substantially similar to the TRO and identical in the particular areas of concern presented to the Court here. Given how the Debtor has moved for contempt based on the non-specific, broad, and unclear provisions of the TRO, there is an imminent danger that the Debtor will broadly interpret the terms of the Preliminary Injunction the same way, all without fair notice to Dondero. The Court should not hold Dondero in contempt based on an unclear, broad, and non-specific order that can be so broadly interpreted.

B. Even if the TRO is clear and unambiguous, the vast majority of actions alleged by the Debtor do not violate the TRO.

23. Even if the TRO is clear and unambiguous, the vast majority of actions the Debtor alleges violate the TRO do not do so under any fair reading. Further, the Contempt Motion fails to state a plausible claim for relief for nearly all actions it alleges violated the TRO. Accordingly, the Contempt Motion should be denied.

24. As described in detail below, despite not being explicitly or even implicitly restrained by the TRO, the Debtor is seeking to have Dondero found in contempt for a number of actions that plainly cannot violate the TRO, including (i) Dondero replacing his cell phone and leaving the old phone at Debtor's office; (ii) Dondero going into Debtor's mostly-empty office space (which Dondero was arguably entitled to do under the shared services agreements) to appear for a deposition noticed by the Debtor; (iii) two letters sent by counsel for third-party entities to Debtor's counsel making certain requests, which the Debtor rejected and for which no additional action was taken by Dondero or these third parties after the Debtor denied the requests made in the letters; and (iv) the filing (and eventual prosecution) of a motion brought by third party entities before the TRO was even entered and which action was explicitly allowed under the TRO. The

Contempt Motion does not even attempt to describe how these actions violated the TRO. Nor could it. Under its terms, the TRO simply does not apply to these actions. Accordingly, the Debtor will not be able to satisfy its high evidentiary burden that these actions violated a clear and specific term of the TRO.

25. To the extent that the Court finds that any of these actions are *consistent* with an alleged violation (rather than violate a clear and specific term under clear and convincing evidence), the Court should resolve any ambiguities and omissions in the TRO for Dondero's benefit. *See Doe v. Bush*, 261 F.3d 1037, 1062 (11th Cir. 2001) (reversing contempt finding when there were two reasonable, competing interpretations of order, stating that ambiguities should be construed in favor of the alleged contemnor).

i. Dondero's alleged "trespass" did not violate the TRO because the TRO contained no restriction on his ability to be in the shared office space and the Debtor did not request he vacate the space until December 23, 2020.

26. Dondero's alleged "trespass" of the Debtor's office space was not a violation of the TRO. As the Court is aware, the TRO was entered on December 10, 2020. The Debtor did not request that Dondero cease using his office space until nearly two weeks later, on December 23, 2020. Dondero does not understand how this can be a violation of the TRO, especially when his only reason for entering the office space was to ensure attendance at a deposition requested by the Debtor. Similarly, Dondero, as President and a portfolio manager of NexPoint Advisors, L.P. ("NexPoint") and Highland Capital Management Fund Advisors, LP ("HCMFA"), was entitled to share the Debtor's office space under the shared services agreements between the Debtor NexPoint and HCMFA. Nevertheless, and despite his rights under these shared services agreements, he, after receipt of the Debtor's demand letter, did timely vacate the permanent use of his office space and only returned to attend this deposition. Perhaps that was not the wisest decision, but it did not

violate the TRO, and the Debtor suffered no harm as a result.

ii. The request letters sent by counsel for the Funds and Advisors did not violate the TRO, and no subsequent actions were taken that could have impacted the Debtor's business.

27. The request letters sent by counsel for the Funds and Advisors do not violate a clear and specific provision of the TRO. First, the letters were not sent by Dondero, but by counsel for third parties, the Funds and Advisors, who made an independent decision to send these letters on behalf of their clients. While Dondero is the President of the Advisors, there is no evidence that he is solely in "control" of either the Funds or Advisors, and the evidence shows that the Funds each have an independent board of directors. At any rate, most of this is beside the point because the letters themselves did nothing. They made requests of the Debtor, which the Debtor rejected. Neither the Funds and Advisors, nor Dondero, took any subsequent action on these requests after they were rejected. There is no clear and specific provision of the TRO preventing counsel for the Funds and Advisors from sending request letters related to the CLOs. Even if there were, no subsequent action was taken and the Debtor suffered no harm.

iii. Contrary to the Debtor's assertion, Dondero did not prevent the Debtor from executing any trades.

28. Contrary to the Debtor's assertion, Dondero did not prevent the Debtor from executing certain securities transactions.

29. As Mr. Seery has testified during his deposition, no finalized trades were ultimately prevented from occurring.[7] With respect to the trades of December 22, 2020, at that time the Debtor requested that two non-Debtor employees (Matt Pearson and Joe Sowin), both of whom worked for non-Debtor HCMFA, to settle the trades of AVYA and SKY. These trades were not

[7] *See* Seery Deposition Transcript dated January 20, 2021, p. 55:13-14 ("I don't think we had an agreed trade that didn't close.").

"interfered with," as alleged by the Debtor. Rather, the potential trade was simply delayed (meaning simply the Debtor did not execute the trade in the market at the exact moment requested) because the non-Debtor employees of HCMFA wanted to first independently investigate whether the trade should occur based on concerns raised by their compliance department. The Advisors' Chief Compliance Officer, Jason Post, testified at the Funds and Advisors Preliminary Injunction hearing that Dondero did not instruct or pressure him or HCMFA employees not to book Seery's proposed trades. Rather, Dondero merely requested that HCMFA look at the trades from a compliance perspective.[8] After review of the proposed trades by compliance, compliance made the independent decision not to have HCMFA book the trades because they had not been run through its pre-trade compliance process. As an independent entity with no apparent written agreement with the Debtor requiring it to settle these trades, HCMFA was well within its rights to temporarily not book the trades to investigate whether they satisfied its compliance process.[9] There was no agreed trade that was prevented from occurring,[10] and the Debtor appears to have ultimately sold some or all of these securities a short time later.

iv. The filing and prosecution of the CLO Motion by the Funds and Advisors does not violate the TRO because the Motion was filed before the TRO was entered, the Motion was not filed by Dondero, and the TRO contains a carve out allowing Dondero to "seek judicial relief" with the Court.

30. While it is unclear whether the Debtor is seeking to hold Dondero in contempt for

[8] *See* January 26, 2021 Hearing Transcript, p. 95: 13-15 ("My recollection is I encouraged Compliance to look at those trades") and p. 96: 3-4 ("I never gave instructions not to settle the trades that occurred, but that's a different ball of wax.").

[9] Mr. Seery has testified at his deposition that he is not aware of any written contract or agreement (other than potentially shared services) between the Debtor and HCMFA that would require HCMFA to settle these trades. See January 20, 2021 Seery Deposition Transcript, p. 50: 3-8.

[10] *See* January 26, 2021 Hearing Transcript, p. 96: 3-4 ("I never gave instructions not to settle the trades that occurred, but that's a different ball of wax."); Seery Deposition Transcript, p. 55:13-14 ("I don't think we had an agreed trade that didn't close.").

the filing and prosecution by the Funds and Advisors of the CLO Motion,[11] to the extent Debtor purports to do so it did not violate the TRO and, accordingly, the Debtor should not be granted its attorney fees incurred in connection with the motion as it requests in the Contempt Motion.

31. While Dondero understands that the Court did not find the presentation of the CLO Motion to be persuasive, the motion was filed before the TRO was entered and the TRO, even if it applies to the conduct of the Funds and Advisors, provided a carve-out to allow for "seeking judicial relief upon proper notice." The CLO Motion was a request for relief that was made by the Funds and Advisors upon proper notice. Accordingly, while the Court ultimately denied the motion, the filing and prosecution of the motion by the Funds and Advisors cannot be found to violate the TRO.

32. While the Debtor has presented very limited evidence on the management or ownership structure of the Funds and Advisors, it repeatedly asserts that, because Dondero has ownership or control rights in these entities that these entities do not, and cannot, act independently. But the evidence shows that the Funds have independent boards that meet frequently, have independent counsel, and they make independent decision. The Advisors, while owned by Dondero, are not solely controlled by Dondero. Dondero, of course, has influence with these entities, but they are independent companies that act to protect their independent interests.

33. In any event, to the extent that the filing and prosecution of the CLO Motion by the Funds and Advisors can even be attributed to Dondero, those actions cannot be fairly read to violate a clear and specific provision of the TRO because (i) the motion was filed before the TRO was even entered; and (ii) the filing and prosecution of the CLO Motion fall under the carve out of "seeking judicial relief upon proper notice" as explicitly allowed under the TRO.

[11] *Motion for Order Imposing Temporary Restrictions on Debtor's Ability, as Portfolio Manager, to Initiate Sales by Non-Debtor CLO Vehicles* [Docket No. 1522] (the "CLO Motion").

34. In addition, like with the sending of letters by counsel for the Funds and Advisors, there was no harm to the Debtor's business as a result of the filing of the CLO Motion. Mr. Seery has testified that no finalized trades were blocked or stopped as a result of the letters or the CLO Motion[12] and that no contracts were terminated or breached as a result of either action.[13]

35. Because the filing and prosecution of the CLO Motion did not violate the TRO, the Debtor should not be granted any attorney's fees or expenses incurred relating to the CLO Motion. Further, the Debtor should also not be granted its attorney's fees because the motion was filed by a separate entity, not Dondero, and other potential remedies existed against those entities if the Debtor desired to recover its attorney's fees. The Court should not allow the Debtor to sidestep proper procedures by making Dondero pay the Debtor for attorney fees related to a motion he did not file, which was filed before the TRO was even entered, and which was specifically authorized to be filed under the TRO.

v. Dondero's replacement of his cell phone did not violate the TRO because the TRO contained no provision preventing the phone's replacement.

36. Dondero understands that the Court is concerned about the cell phone. And the Debtor certainly made it appear as though Dondero replacing his cell phone was some significant, watershed event. But from Dondero's perspective, it was completely reasonable for him to replace his cell phone. Dondero was no longer an employee of the Debtor as of October 9, 2020—about two months before he replaced his phone. It is worth recalling that, at the time Dondero bought his new cell phone and left his old phone at Highland's offices on December 10th, the Debtor was anticipating terminating all or virtually all employees before December 31, 2020. Given that Dondero was no longer an employee of the Debtor at that time, and the fact that the company in

[12] *See* Seery Deposition Transcript, p. 55:13-14 ("I don't think we had an agreed trade that didn't close.").

[13] *See id.* at p. 62.

its then-present form would no longer exist within a few short weeks, it was not only reasonable but expected that Dondero would replace his phone. This is probably why a week before the end of the year the Debtor sent its December 23, 2020 letter stating that Dondero's cell phone plan would be terminated as of December 31, 2020 and requesting that Dondero return his phone.

37. Dondero, to prepare for the unwinding of the Debtor's business, purchased a new phone in early December before the TRO was entered and, in accordance with historic company practice, left his prior phone with IT to be recycled or disposed of on or around December 10th. [14]

38. At the time Dondero replaced his phone, he had not been sent any preservation notice, litigation hold letter, or any discovery requests in this adversary proceeding or in any other matter related to this bankruptcy case.

39. But whether Dondero followed proper company procedure in replacing the phone is irrelevant to the Contempt Motion because the TRO contains absolutely no restriction on his ability to replace his phone. And without such a clear and definite restriction, he cannot be held in contempt. *See Waste Management of Wash. v Kattler*, 776 F.3d 336, 343 (5th Cir. 2015) (reversing district court's contempt order for party's failure to turn over iPad where no "definite and specific" court order required the same).

40. In sum, at the time Dondero bought his new cell phone and worked to replace his phone, (i) the TRO either had not been entered or Dondero did not yet have knowledge about its entry;[15] (ii) Dondero was not under any litigation hold or similar letter (the Debtor sent the preservation request letter nearly two weeks *later* on December 23rd along with the sole discovery requests served against Dondero in this case); and (iii) no discovery was pending against Dondero

[14] Dondero also testified at his deposition that his phone may have been provided under Shared Services Agreements.

[15] Deposition Transcript of James Dondero, January 5, 2021, p. 71:24-25 – 72:3.

in this adversary proceeding, the bankruptcy case, or in any other adversary proceeding or contested matter. Further, the only discovery that has been sought in this adversary proceeding predominantly asked for documents and communications starting on the date the TRO was entered (December 10, 2020) onward—meaning the replacement of his phone on or around December 10 did not impact his responses to the Debtor's document requests, which Dondero fully and completed complied with. No party in this adversary proceeding or bankruptcy case has requested that Dondero produce documents or communications from before December 10, 2020, with one limited exception under the document requests served by the Debtor in this proceeding on December 23, 2020.[16]

41. It is worth reiterating the point that, except with respect to the Clubok communications requested in this adversary on December 23, 2020, no party has actually asked Dondero to produce any text messages from any time period prior to December 10, 2020. On December 23, 2020, about 2 weeks after Dondero replaced his phone, the Debtor by letter instead demanded that Dondero *turn over* the cell phone to the Debtor and preserve all communications on the phone, presumably so the Debtor could have unfettered access to all communications Dondero made, in any nature, business-related or not, which would likely include a great deal of privileged communications with his attorneys.

42. In fact, it was the Debtor's obligation under the Term Sheet[17] to take "reasonable and proportional" steps to preserve discoverable information, including by "notifying employees

[16] The document requests propounded by the Debtor in this adversary proceeding on December 23 asked for documents and communications starting on December 10 with the exception of document requests related to Dondero's communications with Andrew Clubok, which period commenced on November 1, 2020, which were not relevant to the claims in this proceeding. After having the opportunity to review emails and documents exchanged between Dondero and Clubok, including settlement discussions and communications related to the Pot Plan, the Debtor later admitted on the record that its alleged concerns were unfounded.

[17] *See* Term Sheet, Dkt. 354, Exhibit C.

possessing relevant information of their obligation to preserve such data."[18] If the Debtor believed that Dondero might possess relevant information, it was the Debtor's obligation under the Term Sheet to notify Dondero. The Debtor did not do so until December 23, 2020. The Debtor's failure to timely do so should not be imputed to Dondero, when Dondero had held his phone for more than a year after this case was filed and only replaced it when it became clear that the company's monetization plan would proceed and nearly all employees would be imminently terminated.

C. Any violation of the TRO was ministerial, the Debtor suffered no harm, and Dondero substantially complied with the order.

43. While Dondero concedes that he made certain, extremely limited and inconsequential communications with certain of the Debtor's employees, Dondero believed that those communications were allowed for him to pursue his Pot Plan or were otherwise explicitly allowed as a result of the Shared Services Agreements, pursuant to which certain employees of the Debtor (referred to as the "Shared Employees" in those agreements) also provide certain services to NexPoint and HCMFA, including in the areas of information technology, legal and compliance, accounting, telecom (including cell phones), and administrative and secretarial support. As an employee and/or representative of these two entities, it was standard practice for Dondero to confer with these employees under the Shared Services Agreements related to these services.

44. And even if there were communications made that could be viewed as violating the TRO, the communications themselves were either ministerial in nature or did not in any way relate to trying to interfere with or other impede the Debtor's business. The Debtor will not be able to show these communications interfered with or impeded the Debtor's business or how they caused harm, financial or otherwise, to the Debtor.

[18] *Id.* at p. 44 of 62. ("Debtor acknowledges that they should take reasonable and proportional steps to preserve discoverable information in the party's possession, custody or control. This includes notifying employees possessing relevant information of their obligation to preserve such data").

45. The ministerial nature of the communications is evidenced by the communications themselves. One such communication put into evidence by the Debtor was a text message to Isaac Leventon wherein Dondero simply requested the contact information for the Committee's counsel so he could contact them regarding his Pot Plan. Other communications identified by the Debtor are similar in that they do not relate to the Debtor's business or operations or any attempt by Dondero to interfere with the Debtor's business. All or substantially all of the communications made by Dondero to Debtor's employees, which were extremely limited, were made under the Shared Services Agreements, related to the Pot Plan, or were otherwise explicitly authorized by the Debtor or made for settlement purposes.

46. In this case of communications with Scott Ellington, for example, the evidence will show that the communications between Dondero and Ellington were extremely limited during the applicable period and were made only pursuant to Shared Services or in Ellington's role as "go-between" or "settlement counsel" for Dondero and the Debtor.

47. For these reasons, although there were certain limited communications made between Dondero and certain of the Debtor's employees, the Court should find that Dondero substantially complied with the TRO because the communications were either subject to an exception under the TRO, related to the Pot Plan, or were otherwise not related to the Debtor's business or any attempt by Dondero to interfere with the Debtor's business. In the event the Court finds that any communications violated the TRO, the sanctions should be limited because the Debtor suffered no harm to its business or operations as a result of these limited communications.

D. The Debtor improperly seeks to conduct irrelevant and unauthorized discovery against third parties in connection with the Contempt Motion.

48. The Debtor asserts that Dondero violated the TRO by preventing the Debtor from completing its document production related to The Dugaboy Investment Trust and The Get Good

Trust that the Debtor alleges, without support, are hidden on its system. But whether these allegations are true or not is irrelevant to this proceeding because the TRO contained no provision requiring these documents be produced or any provision in any way related to the discovery matters between the Debtor and the Committee. If the Debtor or the Committee believes they are entitled to discovery from Dugaboy or Get Good, they can seek to conduct that discovery. But considering this matter in the context of a contempt proceeding against Dondero individually confuses the issue, wastes the Court's time, and potentially draws the Court into the middle of a discovery dispute between those who aren't even a party to this proceeding. It is also unclear how the Debtor expected or expects Dondero to produce documents on the Debtor's system when he has been prevented from accessing the Debtor's system for quite some time and has not had access to it for months. Further, given that the Committee filed suit against Dugaboy and Get Good in December 2020 and there is now a pending adversary proceeding,[19] it seems that trying to require Dondero (who is not the Trustee of the trusts) to produce these documents may deprive Dugaboy and Get Good of their rights and discovery protections under the Federal and Bankruptcy Rules.[20] The TRO did not contemplate this issue and the Court should not consider it in this context.

49. Moreover, even if this issue is relevant, the evidence will show that counsel for the Trusts and the Debtor have been engaging in discussions since mid-December and into January 2021 regarding the production of these documents, and the Trusts have been working in good faith with the Debtor to foster the eventual production of these documents.

E. The Debtor improperly seeks damages and to punish Dondero for conduct that could not in good faith violate the TRO and that pre-dated the TRO.

[19] *See Official Committee of Unsecured Creditors v. CLO Holdco, Ltd., et al.*, Adv. Proc. No. 20-03195, Amended Complaint at Adv. Dkt. 6.

[20] There are also concerns about production in this context because the Debtor, on January 22, 2021, commenced adversary proceedings against all Dondero-related entities for certain demand notes except for those between the Debtor and Dugaboy and Get Good.

50. The Court should reject the Debtor's attempt to impose broad damages on Dondero related to actions that could not in good faith be found to violate the TRO. To the extent the Court finds any material violations of the TRO, the damages should be limited to actual damages resulting directly from such actions only, which Dondero believes will be minimal because the Debtor's business suffered no harm. The Debtor is improperly seeking damages resulting from numerous actions and events that have nothing to do with the TRO, pre-dated the TRO, or just are plainly wholly outside the scope of the TRO.

51. Among these are (i) Dondero's replacement of his cell phone; (ii) Dondero's "trespass" on Debtor's property; (iii) the filing and prosecution of the CLO Motion by the Funds and Advisors; and (iv) the sending of request letters to the Debtor by counsel for the Funds and Advisors. As explained above, none of these actions can be considered violations of the TRO and therefore should not be considered in any damages, compensatory or otherwise, sought by the Debtor, including Debtor's request for attorney's fees and expenses related to the CLO Motion.

III. ADMISSIONS/DENIALS[21]

52. Paragraph 1 of the Contempt Motion asserts a legal conclusion to which no response is required, to the extent a response is required, Dondero denies the allegations.

53. Dondero admits the allegations in paragraph 2 of the Contempt Motion.

54. Paragraph 3 of the Contempt Motion asserts a legal conclusion to which no response is required. To the extent a response is required or appropriate, Dondero lacks knowledge upon which to either admit or denial the allegations.

[21] Dondero makes these qualified admissions and denials to comply with applicable law and rules, but denies that the allegations in the Contempt Motion, including Sections B, C, and G, and certain of these admissions and denials in response are relevant or admissible in the hearing on the Contempt Motion, particularly as in response to the allegations made in Sections B, C, and G of the Contempt Motion. On February 20, 2021, Dondero filed a motion in limine seeking to exclude irrelevant and prejudicial evidence the Debtor will seek to admit on these matters. Dondero objects to the inclusion of any evidence related to these matters at the Contempt Hearing and reserve all rights.

55. Paragraphs 4-6 of the Contempt Motion asserts legal conclusions to which no response is required. To the extent a response is required, Dondero denies the allegations.

56. Dondero denies the allegations in paragraph 7 of the Contempt Motion.

57. Dondero admits that notice of the Contempt Motion was provided to his counsel as alleged in paragraph 8 of the Contempt Motion.

58. To the extent necessary, Dondero further responds to the legal assertions and other allegations made in the Debtor's Brief[22] as follows: Dondero admits that on December 10, 2020, the TRO was entered as alleged in paragraph 1 of the Brief. This paragraph is not an exact recitation of the terms of the TRO, and Dondero avers that the terms of the TRO speak for themselves. To the extent a response is required or appropriate, Dondero denies the allegations because that is not an accurate recitation of the terms of the TRO.

59. Dondero denies the allegations contained in paragraphs 2-4 of the Brief.

60. Dondero admits that on December 10, 2020, the TRO was entered as alleged in paragraph 5 of the Brief. This paragraph does not appear to be an exact quotation of the terms of the TRO, and Dondero avers that the terms of the TRO speak for themselves. Dondero denies the remainder of the allegations contained in paragraph 5 of the Brief.

61. Dondero denies the allegations contained in the first sentence of paragraph 6 of the Brief. Dondero admits he never reviewed the declaration of Seery. With respect to the remainder of the allegations of paragraph 6, Dondero admits that the bullet points 1, 4, 5, 6 appear to be a generally accurate recitation of Dondero's deposition testimony on January 4. Dondero denies the remainder of the allegations as they are not a complete and accurate portrayal of the facts surrounding Dondero's efforts to review the TRO.

[22] *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* [Docket No. 49] (the "Brief").

62. Dondero denies the allegations contained in paragraph 7 of the Brief.

63. Dondero lacks knowledge after reasonable inquiry to form a belief as to the allegations in the first and second sentences of paragraph 8 of the Brief, and therefore denies same. Dondero denies the allegations contained in the third sentence of paragraph 8 of the Brief. Dondero admits that during his deposition he could not recall what happened to the phone. Dondero denies the remainder of the allegations of paragraph 8 of the Brief. Dondero has also testified that the phone may have been provided to him for use under the Shared Services Agreements.

64. Dondero lacks knowledge after reasonable inquiry to form a belief as to the allegations in paragraph 9 of the Brief about the Debtor's demands, and therefore denies same. Dondero denies the remainder of the allegations in paragraph 9 of the Brief.

65. Dondero admits he has previously communicated by text as alleged in paragraph 10 of the Brief. Dondero denies the remainder of the allegations in this paragraph.

66. Dondero admits that on or about December 23, 2020, the Debtor demanded that Dondero no longer access the Debtor's office space as alleged in paragraph 11 of the Brief. Dondero denies the remainder of the allegations contained in paragraph 11.

67. Dondero admits that he was at the Debtor's office on January 5th to attend his deposition, but denies that he was not authorized to access the space and denies that this was a violation of the TRO. Dondero denies the remainder of the allegations in this paragraph.

68. Dondero admits that he did not seek Debtor's explicit permission to enter the premises as alleged in paragraph 13 of the Brief, but believes no permission was required, because he was only there to attend his deposition and because of the shared services agreements.

69. Dondero denies the allegations made in the first sentence of paragraph 14 of the Brief, however Dondero admits that he has certain control and/or ownerships rights of certain

funds and financial advisory firms that are not named or identified in this paragraph. Therefore, Dondero lacks knowledge on which to admit or deny the allegations or insinuations made by the Debtor in paragraph 14 of the Brief, and therefore denies same. Dondero denies the remainder of the allegations made in paragraph 14 of the Brief.

70. While Dondero upon information and belief is aware that letters were sent by attorneys for certain funds and financial advisory firms to the Debtor on or around December 22, 23, and 30, 2020, Dondero lacks knowledge after reasonably inquiry sufficient to form a basis to admit or deny the remainder of the allegations of paragraph 15 of the Brief, and therefore denies same. Dondero denies the remainder of any additional allegations made in this paragraph. Dondero denies there were any threats in any letters to the Debtor.

71. Dondero admits that he knew the letters were being sent but denies that he knew the full content of the letters as alleged by the Debtor in paragraph 16 of the Brief. Dondero denies the remainder of the allegations of paragraph 16 of the Brief.

72. In reference to paragraph 17 of the Brief, while Dondero admits that there were certain extremely limited communications made between him and Leventon and Ellington, he believed that those communications were allowed under an exception to the TRO, to pursue his Pot Plan, under the shared services agreements, or with respect to Ellington, due to his role as a "go-between" between him and the Debtor or the Independent Board. Dondero denies the insinuations and allegations made by the Debtor related to the alleged communications in paragraph 17 of the Brief. Dondero denies the remainder of the allegations in paragraph 17.

73. With respect to paragraph 18 of the Brief, Dondero admits he became aware that "several entities" had reportedly been looking for the Dugaboy and Get Good financial documents, but otherwise denies the allegations in paragraph 18 of the Brief. Dondero denies that the

documents of Dugaboy and Get Good are the Debtor's property. Dondero denies the remainder of the allegations of paragraph 18 of the Brief.

74. Paragraphs 19-21 of the Brief contain legal authorities/assertions to which no responses are required. To the extent a response is required or appropriate, Dondero denies the allegations. Dondero denies the allegations contained in paragraph 22 of the Brief.

CONCLUSION

Defendant respectfully requests that the Court deny the Contempt Motion and grant Defendant such other and further relief to which he may be justly entitled.

Dated: February 21, 2021

Respectfully submitted,

/s/ Bryan C. Assink

D. Michael Lynn
State Bar I.D. No. 12736500
John Y. Bonds, III
State Bar I.D. No. 02589100
John T. Wilson, IV
State Bar I.D. No. 24033344
Bryan C. Assink
State Bar I.D. No. 24089009
BONDS ELLIS EPPICH SCHAFER JONES LLP
420 Throckmorton Street, Suite 1000
Fort Worth, Texas 76102
(817) 405-6900 telephone
(817) 405-6902 facsimile
Email: michael.lynn@bondsellis.com
Email: john@bondsellis.com
Email: john.wilson@bondsellis.com
Email: bryan.assink@bondsellis.com

ATTORNEYS FOR DEFENDANT JAMES DONDERO

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on February 21, 2021, a true and correct copy of the foregoing document was served via the Court's CM/ECF system on counsel for the Plaintiff.

/s/ Bryan C. Assink
Bryan C. Assink

TAB F

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

In Re:	**Case No. 19-34054-sgj-11**
	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	Dallas, Texas
	Monday, March 22, 2021
	9:30 a.m. Docket
Debtor.	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	**Adversary Proceeding 20-3190-sgj**
Plaintiff,	PLAINTIFF'S MOTION FOR ORDER REQUIRING JAMES DONDERO TO SHOW CAUSE WHY HE SHOULD NOT BE HELD IN CIVIL CONTEMPT FOR VIOLATING THE TRO [48]
v.	
JAMES D. DONDERO,	
Defendant.	

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

WEBEX APPEARANCES:

For the Debtor/Plaintiff:	John A. Morris PACHULSKI STANG ZIEHL & JONES, LLP 780 Third Avenue, 34th Floor New York, NY 10017-2024 (212) 561-7700
For Defendant James D. Dondero:	John T. Wilson Bryan C. Assink BONDS ELLIS EPPICH SCHAFER JONES, LLP 420 Throckmorton Street, Suite 1000 Fort Worth, TX 76102 (817) 405-6900

APPEARANCES, cont'd.:

For Scott Ellington and Isaac Leventon:	Debra A. Dandeneau BAKER & MCKENZIE, LLP 452 Fifth Avenue New York, NY 10018 (212) 626-4875
For Scott Ellington and Isaac Leventon:	Michelle Hartmann BAKER & MCKENZIE, LLP 1900 North Pearl Street, Suite 1500 Dallas, TX 75201 (214) 978-3421
For Scott Ellington and Isaac Leventon:	Frances A. Smith ROSS & SMITH, P.C. Plaza of the Americas 700 N. Pearl Street, Suite 1610 Dallas, TX 75201 (214) 593-4976
Recorded by:	Michael F. Edmond, Sr. UNITED STATES BANKRUPTCY COURT 1100 Commerce Street, 12th Floor Dallas, TX 75242 (214) 753-2062
Transcribed by:	Kathy Rehling 311 Paradise Cove Shady Shores, TX 76208 (972) 786-3063

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

DALLAS, TEXAS - MARCH 22, 2021 - 9:39 A.M.

THE COURT: We have a setting in Highland Capital Management, Case No. 20-3190. It's an adversary. We have Plaintiff's Motion to Hold Mr. James Dondero in Civil Contempt of Court.

Let's get lawyer appearances to start out with. Who do we have appearing for Highland this morning?

MR. MORRIS: Good morning, Your Honor. It's John Morris from Pachulski Stang Ziehl & Jones on behalf of the Debtor.

THE COURT: Good morning. All right. And who is appearing for Mr. Dondero's legal team?

MR. WILSON: This is John Wilson, Bonds Ellis Eppich Schafer Jones, for Mr. Dondero.

THE COURT: All right. I know we have lots of other observers on the video, but those are the only appearances I will take for this matter.

All right. Well, let's talk about some housekeeping matters before we get underway. Just to be clear, the motion --

MS. SMITH: I can't hear.

THE COURT: Who says they can't hear? All right. Can everyone hear me?

MR. MORRIS: Yes, Your Honor.

THE COURT: Okay. Mr. Wilson, you can hear me okay?

MS. DANDENEAU: Excuse me, Your Honor. This is Debra Dandeneau from Baker McKenzie. I believe that our local -- our co-counsel, Ms. Smith, wanted to make an appearance because we will be participating in this hearing, and I believe she's the one who's having the audio issues. Sorry to interrupt.

THE COURT: All right. Now, well, first, Ms. Smith, can you hear me okay?

(No response.)

THE COURT: All right. Ms. Dandeneau, remind me who your clients are and what their role is in this matter.

MS. DANDENEAU: Your Honor, our clients are Mr. Leventon and Mr. Ellington, at least in this matter. And they have been -- they've -- they were requested to appear as witnesses at this hearing. And so we are appearing to represent them in connection with this hearing. By agreement with the Pachulski firm, we're voluntarily producing them. We are appearing -- I'm here. My partner, Michelle Hartmann from Baker McKenzie, is here. Ms. Smith is here -- unfortunately, without audio.

And we do have an agreement with the Debtor that, among other things, they are -- they are not parties to this proceeding. We are producing them voluntarily. But we do have an agreement with the Pachulski firm that we will be permitted to at least ask questions on redirect of these

witnesses, and just wanted to make that clear, why we are here and why our -- and Mr. Ellington and Mr. Leventon are appearing voluntarily in this matter.

THE COURT: All right. Well, thank you, Ms. Dandeneau. Hopefully, Ms. Smith will get her audio working here shortly.

So I guess I should ask at this point, are there any other attorneys in a similar posture that want to make an appearance before we get started?

All right. Well, then let me get going with some preliminary housekeeping matters. I'm noting for the record that this motion asking the Court to hold Mr. Dondero in contempt of court was filed January 7, 2021, and the order that Mr. Dondero is alleged to have violated is a December 10, 2020 TRO the Court issued in this adversary proceeding, a short three-page order.

So what I want to clarify at the outset is this. There's been a lot of activity in the adversary. For example, on the very day after this motion to hold Mr. Dondero in contempt was filed, the Court issued a preliminary injunction, okay, in other words, the follow-up to the TRO, on January 8th. So sort of a weird posture, you might say. We're having a hearing now, over two months later, on a motion to hold Mr. Dondero in contempt of the TRO from December 10th, even though we've subsequently had a preliminary injunction.

I'm just clarifying that point to make sure our evidence is carefully tailored here today. I think it would only be evidence for activity between December 10, 2020 and January 7, 2021, because, again, you know, order entered December 10th, motion to hold Mr. Dondero in contempt filed January 7th. So this doesn't pertain to any alleged violations of the preliminary injunction after it was issued on January 8th.

So, with that, I will allow opening statements. And if you have anything to clarify about what the Court just said, if someone views this any differently, please let me know in your opening statements.

All right. Mr. Morris, you may proceed.

OPENING STATEMENT ON BEHALF OF THE DEBTOR

MR. MORRIS: Good morning, Your Honor. John Morris; Pachulski Stang Ziehl & Jones; for the Debtor. Let me begin by saying you have it exactly right.

THE COURT: Okay.

MR. MORRIS: We are only going to put forth evidence of violations of the TRO that took place between December 10th and the day that the preliminary injunction was issued on January 8th. So it's a very short 29-period -- 29-day period, and that really is what we're focused on here today.

As Your Honor just alluded to, on December 10th the Debtor obtained a TRO against Mr. Dondero. The TRO was based on uncontroverted testimony, including written threats to Mr.

Seery and Mr. Surgent. It included evidence of interference with Mr. Seery's trading activities as the CLO manager. And so that happened on December 10th.

The TRO, Your Honor, is very clear. It is completely unambiguous. If Your Honor will recall, on December 10th you actually read out word for word of the operative portion of the TRO and you made assessments with respect to every provision in it as to whether or not it was clear and unambiguous and whether or not it was reasonable. And after that painstaking analysis, Your Honor signed the order.

In their opposition, Mr. Dondero now asserts -- and this is said several times -- the exact opposite. He claims not to know what conduct was prohibited. This is just not credible. We are going to go through the TRO as applicable to the violations that the Debtor is alleging here and we will show that there is no room for debate as to what the TRO provided and how his conduct was in violation of those very clear and unambiguous provisions.

Mr. Dondero makes much in his opposition papers of the clear and convincing evidence standard, Your Honor, and they suggest that it's such a high hurdle we can't possibly meet that here. Your Honor, the evidence that we will present today doesn't prove that Mr. Dondero violated the TRO by clear and convincing evidence. It proves it, not that we have to, beyond reasonable doubt. Okay? There is no doubt that he

violated the TRO in more than a dozen ways, and we're going to prove that to you today.

Again, we don't have to meet that high standard, but clear and convincing evidence is easy. Why is it easy? It's easy for two very simple reasons. Mr. Dondero has already admitted to certain of the violations, and you are going to see documents today that say what they say, their meaning is unambiguous, you will see the parties to the communications, you will see the interference with the business, you will see -- there is just no room for debate. It is not clear and convincing. It's to a certainty that he violated the TRO more than a dozen times.

Mr. Dondero claims repeatedly in his papers that he substantially complied with the TRO. I don't know of any law, any case that says that the Court is supposed to overlook violations of a TRO if the person against whom it was entered is otherwise in substantial compliance, but it's really irrelevant. He did not substantially comply with anything. The fact is that, despite being in place for only 29 days, we are going to present evidence today of 17 specific violations that are beyond dispute. Seventeen violations in just 29 days. The notion that he was in substantial compliance is not credible.

I've got a short deck, Your Honor, that I just want to go through with the Court so that I can preview the evidence that

we're going to present today. And if Ms. Canty can just put up the first page of the deck.

So, I don't know that the evidence is going to come in in exactly this order, but the TRO states in Section 2(c) that Mr. Dondero is enjoined, quote, from communicating with any of the Debtor's employees except as it specifically relates to shared services. It is a blanket prohibition on communicating with the Debtor's employees unless it relates to shared services. Not ambiguous. Pretty clear. The conduct couldn't -- right? Put yourself in Mr. Dondero's position. You have been ordered by a court of law not to communicate with the Debtor's employees unless it relates to shared services.

And so if you read the opposition, you'll see all the different kinds of excuses as to these communications. You'll see that they talked about the pot plan. There's nothing in the TRO that allowed Mr. Dondero to speak with any of the Debtor's employees about the pot plan. And he knew that and his lawyers knew that. And how do you know they knew that? Because on December 16th, just six days after the TRO was entered into, they filed a motion at Docket 24 seeking to modify the TRO to allow Mr. Dondero to speak directly with the independent board about a pot plan. Right? He knew he couldn't speak to anybody about the pot plan. He wanted to speak with the board about the pot plan.

If he thought that the TRO allowed him to speak with the

Debtor's employees about the pot plan, why didn't he think that it was -- allowed him to talk to the independent board about the pot plan?

He withdrew that motion, Your Honor, but that's -- that was his state of mind. He knew he couldn't do that.

But here's the thing, Your Honor. None of the communications that we're going to be -- put before you today have anything to do with the pot plan. So not only is discussion about the pot plan not permitted, it's not even -- it's not even relevant to today's discussion. But it's in their papers.

They also put in their papers that somehow these communications were authorized. Other than what Mr. Dondero may say, there will be no evidence of any kind that the Debtor authorized any of the communications. In fact, Mr. Seery is going to testify and he will tell Your Honor that he did not only not know of these communications, but had he known of them, whether there was a TRO or not, he would have fired the employees on the spot. And we're going to see the communications, and Your Honor can form your own judgment as to whether or not an employer, particularly an employer in bankruptcy, should tolerate the communications that we're about to look at.

Shared services. You might hear, oh, oh, these communications were about shared services. They will never be

able to prove that because they have not put on their exhibit list any shared services agreement. And why don't they have a shared services agreement on their exhibit list? Because Mr. Dondero is not party to one. He is not party to one. The lawyers at Bonds Ellis do not represent an entity that was party to a shared services agreement. Doug Draper, who you will see on some of these emails, does not represent an entity who was party to any shared services agreements. There is no exception in the TRO for the communications that we will look at.

Can you go to the next slide, please?

Here are 13 separate communications that we're going to go through today that included Mr. Dondero and one of the Debtor's employees or Mr. Dondero's lawyers and one or more of the Debtor's employees. They cover topics. The first three relate to the Bonds Ellis firm's request of Mr. Ellington to provide a witness who was going to testify on behalf of Mr. Dondero against the Debtor. There's communications about a common interest agreement that was going to be between and among, among others, Mr. Dondero and certain of the Debtor's employees. There's communications about the UBS appeal of the Redeemer 9019 settlement and the HarbourVest settlement. There's -- there is communications where Mr. Dondero asks Mr. Ellington to provide leadership in the coordination of all of the lawyers representing Mr. Dondero's interests.

There's more. We're going to go through these in detail, Your Honor, but there's 13 different communications that took place in just the two weeks after the TRO was entered into. Every single one of them -- these are not technical violations. This is not Mr. Dondero saying hello to an employee in the hallway. This is not Mr. Dondero asking about somebody's, you know, family. Every single one of these communications is adverse to the Debtor. Adverse to the Debtor's interests. And the Debtor knew about none of them.

Go back to the first slide, please.

The automatic stay. Section 2(e) of the TRO prohibits Mr. Dondero from otherwise violating Section 362(a) of the Bankruptcy Code. Section 362(a)(3) states that the filing of a bankruptcy acts as, quote, to prevent any act to exercise control over the property of the estate. There can't be anything ambiguous about a TRO that says don't violate the automatic stay. If there's an ambiguity in that provision, there must be an ambiguity in Section 362(a). And I submit, Your Honor, there's no ambiguity in Section 362(a)(3) that says you are prohibited from exercising control over property of the estate. But that's exactly what Mr. Dondero did, not once, not twice, but three times in the short 29-day period following the entry of the TRO.

Can we go to the third slide, please?

As Your Honor may recall from the preliminary injunction

hearing, Mr. Dondero's cell phone that he admitted was the company's property was thrown in the garbage. So that's stay violation one. I remember Mr. Lynn kind of flippantly saying he offered to pay the $500, but he completed missed the point then and I think they continue to miss the point now. Because the second stay violation was the tossing in the garbage of the Debtor's text messages.

The Debtor, for years, right -- Mr. Dondero, this is his baby, he ran this company -- they had an employee handbook. The employee handbook were the company's policies that guided and dictated the conduct of its employees. And they have a provision in there, and we're going to look at it carefully with Mr. Dondero. They had an option where the company might subsidize some of the phone bill if employees participated. But importantly, Your Honor, on this slide is an excerpt from Page 13 of the handbook. It'll be Debtor's Exhibit 55. And it says, regardless of whether the employee chooses to participate in the policy, right -- this is for people who had their own phone, not even ones that were paid by the company -- this says specifically all text messages, quote, sent and/or received related to company business remain the property of Highland.

There's that word property again, right out of 362(a)(3). Property. Do not control the Debtor's property. All employees, including Mr. Dondero, were told that text messages

related to company business shall remain the property of Highland.

Mr. Dondero knew this. How do we know that Mr. Dondero knew this?

Let's go to the next slide, please.

Mr. Dondero is going to tell you, because it's going to be in evidence, that periodically each year Mr. Surgent, as the chief compliance officer, had certain senior employees fill out certifications. On the screen is an excerpt from Mr. Dondero's certification done in early 2020. And in that certification, he says, among other things, quote, I have received, have access to, and have read a copy of the employee handbook and I am in compliance with the obligations applicable to employees set forth therein.

So this is his certification that he understands that text messages are the Debtor's property -- to the extent that they relate to company business, admittedly. And he knew long ago that the U.C.C. wanted his text messages. How do we know that? Because he filed a pleading and he told Your Honor that.

If we can go to the next slide, please.

If Your Honor will recall, last summer the U.C.C. made a motion to compel the production of documents. They sought to get emails and ESI from nine custodians. Mr. Dondero's lawyers filed a response to that motion. On the screen now is

Paragraph 3 from Docket No. 942, which is Debtor's Exhibit 40 for this purpose. And in Mr. Dondero's own pleading to the Court, he tells the Court the Committee seeks the ESI from nine different custodians, who include the Dondero. The Committee has requested all ESI for the nine custodians, including text messages.

So, so Mr. Dondero knew. Certainly, his lawyers knew. He knew in July that the U.C.C. wanted the text messages. The employee handbook provided that they're the Debtor's property. He certified that he understood that. He told the Court that he was aware the U.C.C. wanted Mr. Dondero's text messages.

The TRO is entered into, is entered by the Court during the afternoon of December 10th, and later in the evening we know the phone still exists. How do we know that? Again, not clear and convincing evidence, beyond a reasonable doubt, because if we go to the next slide, certainty. Forget beyond a reasonable doubt. Certainty. At 6:25 p.m., Mr. Dondero is told, on the day that the TRO is entered into, that the phone exists.

The phone doesn't exist now. It was thrown in the garbage. Mr. Dondero doesn't know how, why, who, when, what. He had the phone. He knew it was -- it contained the Debtor's text messages. He knew the U.C.C. wanted them. And the phone doesn't exist today.

Call it spoliation. Call it a violation of 362(a).

There's no question that this is a violation of the TRO.

The third way he violated the TRO, Section 2(e) under 362(a)(3), is by entering the Debtor's premises without permission. Now, I will admit and Mr. Seery will probably tell Your Honor that if this was the only thing that Mr. Dondero did, you know, maybe it wouldn't be a big deal. But it's not, and it's consistent -- we're seeking to hold him in contempt today, Your Honor, but here's the thing. He holds the Debtor in contempt. He holds this Court in contempt. He could not care less what anybody has to say. He will do what he wants. And how do we know that? How do we know that, that this is not a gotcha thing? Because we sent a letter to him.

Can we go to the next slide, please?

This is going to be in evidence. It's going to be at Exhibit 12. You will see the letter that we sent on December 23rd, while the TRO is in effect, where we gave him seven days before we were evicting him. We were evicting him because the Debtor believed he was interfering with the business, but the Debtor didn't need a reason, frankly. But they gave notice. Not only did they give notice of eviction, look at what they told Mr. Dondero. Any attempt by Mr. Dondero to enter the office, regardless of whether he is entering on his own or as a guest, will be viewed as an act of trespass.

We told him. He knew that. And yet what does he do? He waltzes right into the Debtor's offices right after the new

year to give a deposition. If you read carefully Mr. Dondero's response to the Debtor's motion here, he says, well, there was nobody in the office, like -- he says he used his judgment. He thought it was okay. They even make the argument that maybe the shared services allowed this, the shared services agreement.

Again, there's no shared services agreement. Mr. Dondero's not a party to a shared services agreement. But let's remember what the purpose of the exercise was. He went to the office to give a deposition in connection with a motion for a preliminary injunction against him personally. How could this -- every time you hear this shared services, remember -- ask yourself, where is the agreement, how do I know, and how could this possibly relate to shared services?

And Mr. Seery is going to tell you he's not going to be able to say, oh, I need $10 or $100 or I can quantify the damage. He's going to tell you, Your Honor, that this and all of the communications that we looked at, he just completely undermined his authority. They undermined the Debtor. They created -- because everybody knows that Mr. Dondero was evicted from the office. But he walks right in. And he's creating -- this is what Mr. Seery will tell you -- noneconomic harm that the Debtor has suffered by Mr. Dondero's unmitigated arrogance and contempt that he has for the Debtor.

The Debtor is a company in bankruptcy. They have -- they

have asked for your resignation. They have sought and obtained a TRO. They have evicted you from the offices. They told you that if you come back we will treat it as trespass. He is in contempt of the Debtor, of the TRO, of this Court. He could not care less, Your Honor. And that's really why -- that's why we're here. That's what all of this shows.

Contempt. I've got more.

Can we go back to the first page, please?

Section 3(a) of the TRO enjoins Mr. Dondero from causing, encouraging, or conspiring with any entity owned or controlled by him to engage in any of the prohibited conduct. And the prohibited conduct includes interfering or otherwise impeding the Debtor's business.

Now, you remember, when we got the TRO, one of the things that happened -- and I'm not saying that this is a violation of the TRO, I'm just trying to provide some context, and you'll hear it from Mr. Dondero himself -- one of the reasons we got the TRO is, remember about Thanksgiving, he interfered with Mr. Seery's attempt to sell AVYA and SKY stock on behalf of the CLOs, right? And that's where he made the threat to Mr. Surgent, right? So, --

And go to the last slide here.

He does the exact same thing on December 22nd. He engages in the exact same conduct that formed the basis of the TRO just 12 days after the TRO was entered. And he admits to it,

Your Honor. This is not can I meet a clear and convincing? It is not even beyond a reasonable doubt. There is no doubt. There is a certainty. Because he admitted to it right here at the preliminary injunction hearing.

Question, "And you personally instructed, on or about December 22nd, employees of those Advisors to stop doing the trades that Mr. Seery had authorized, right?" Answer, "Yeah. Maybe we're splitting hairs here, but I instructed them not to trade them. I never gave instructions not to settle the trades that occurred, but that's a different ball of wax."

And later on, question, "And you would agree with me, would you not, that you personally instructed the employees of the Advisors not to execute the very trades that Mr. Seery identifies in this email, correct?" Answer, "Yes."

You know, certainty, Your Honor. Not clear and convincing. Not beyond a reasonable doubt. Certainty, because he has admitted to it.

So there you have it, Your Honor. We're going to present evidence today of -- I think I've got 17 separate violations in just a 29-day period. Mr. Seery will testify, hopefully quite briefly, that he never authorized any of this, that he had no knowledge of this, that if he knew any of this was occurring he would have fired these people immediately, whether or not there was a TRO in place.

We're going to put evidence before the Court as to the

fees that my firm has charged the Debtor's estate dealing with all of this. Mr. Seery will testify that those fees don't begin to adequately compensate the Debtor because they don't include the fees that are incurred by the Creditors' Committee or FTI or DSI. Mr. Seery will testify that the Debtor went out and hired Kasowitz Benson because they needed some very technical advice on the CLOs. Another $70,000.

He's going to testify that there's noneconomic harm here. The undermining of his authority. The -- just the contempt with which all of the employees clearly saw Mr. Dondero treating the Debtor with. And all of that is really problematic.

So, at the end of the day, Your Honor, I don't know what Mr. Dondero's excuses are going to be here, but I want to be really, really clear: These provisions could not be more clear. They're going to have to explain away 17 different things. There is no pot plan exception, there is no settlement exception, although there will be no communications that relate to either topic. There will be no shared services exception because nobody party to these communications are party to a shared services agreement, and there will be no shared services agreement in the record.

The Debtor is tired of this. I'm tired of it, personally. I've really gone through this way too much. I know this record better than I should, to be honest with you. But we're

going to do it today, and I'm glad we're going to do it today, and I assure you, Your Honor, that I will do my very best to make sure this hearing is concluded today.

Thank you very much.

THE COURT: All right. A couple of follow-up questions on that point, concluding today. I know that at one point there was some back-and-forth through my courtroom deputy about putting limitations on the time this hearing would take. And I never weighed in, I don't think, on that. How many witnesses and how much time do you expect your case in chief to take? You've mentioned Seery and we've heard about Leventon and Ellington.

MR. MORRIS: Yeah. Well, I'll just -- I'll just put it out there right now, Your Honor. We made a decision yesterday, because we are so desirous of getting this done today, I don't think we're going to call Mr. Leventon and Mr. Ellington today. I think that they have information that corroborates some of the allegations and some of the facts that we'll be adducing, but I think, between the documents and Mr. Dondero himself, you know, we thought long and hard about it, but I'm prepared to try to limit -- I don't know how long I took on the opening, but I offered to do this with Mr. Dondero and say three-and-a-half hours each, and that way we get done today. And I'm still prepared to do that.

And so now, you know, now the cat's out of the bag. I'm

not going to call Mr. -- I mean, I'll cross them if -- because they're on -- they're on Mr. Dondero's list, too. I mean, you know, I heard counsel talk about agreements with the Debtor and all of that. I don't know what agreement she has with Mr. Dondero. But he's on their list, too, so that, you know, Mr. Dondero may call them, and if they do, I'll certainly cross them then. But I want to get this case done today. I'm going to call Mr. Dondero, I'm going to call Mr. Seery, and I'm going to rest. So there's no surprises.

THE COURT: All right. Well, it sounds like you're not committing a hundred percent to no Leventon and no Ellington.

MR. MORRIS: No, I am, in fact. I'm committing a hundred percent --

THE COURT: You're just saying --

MR. MORRIS: -- to my case in chief.

THE COURT: Okay.

MR. MORRIS: To my case in chief. If Mr. --

THE COURT: You're just saying if --

MR. MORRIS: If Mr. Dondero chooses to call them, --

THE COURT: If Dondero calls them, --

MR. MORRIS: -- I'll cross them.

THE COURT: -- you'll cross them?

MR. MORRIS: Yeah.

THE COURT: Okay.

MS. DANDENEAU: Your Honor, this is Debra Dandeneau. In light of what we just heard from Mr. Morris, which we have not heard up until now, may Mr. Ellington and Mr. Leventon be excused? We have no agreement with any other party to produce Mr. Ellington and Mr. Leventon for this hearing.

THE COURT: All right. Mr. Wilson, --

MR. WILSON: Yes, Your Honor.

THE COURT: -- do you have anything to say on this?

MR. WILSON: Yes. I was planning to ask some questions, not a whole lot, but I did want to ask questions of both Mr. Ellington and Mr. Leventon. They are on our witness list as well.

MS. DANDENEAU: Okay. Thank you.

THE COURT: All right. Let's have them stick around.

MS. DANDENEAU: I tried, Mr. Morris.

THE COURT: Okay.

MR. MORRIS: And I tried for you.

THE COURT: All right. Well, Mr. Wilson, let me hear from you on how many witnesses and how long you think your case will take.

MR. WILSON: Your Honor, I am planning to conclude my presentation in the time that we've agreed to. I don't have any additional witnesses that I plan on calling except those that have been mentioned already.

There is a reference to Jason Post on our exhibit list,

but he will not be called today.

THE COURT: All right. So you expect to have questions of Seery, Dondero, and Leventon and Ellington. Is that correct?

MR. WILSON: That's correct, Your Honor.

THE COURT: All right. Well, can we talk about mechanics? Rather than recalling them, I mean, can we just all agree that any cross can go beyond the scope of direct so we can --

MR. MORRIS: Yes, Your Honor.

THE COURT: -- only call them one time? Everyone agree? Mr. Morris says yes.

MR. MORRIS: Yes.

THE COURT: Can you agree?

MR. WILSON: Yes, I agree to that.

THE COURT: Okay. All right. Well, do you agree to three-and-a-half hours total for your case?

MR. WILSON: Are you speaking to me, Your Honor? If so, yes, I do.

THE COURT: Okay. Very good.

Well, Nate, we've got the time parameters to work within.

Mr. Wilson, the one other housekeeping matter I had was I see on the docket that I never specifically entered an order on your motion *in limine*. I did remember telling you all at one point in open court right after it was filed that I was

not inclined to grant it, but I want you to know that I'm not going to grant that.

As you know, there's no jury. And as we judges tend to say in this context, we can weed out what is relevant versus irrelevant. And so I think we need to go ahead and sustain the objection on that and allow the full amount of testimony and evidence that Movant seeks to put in.

All right. So, with that, you may make your opening statement.

MR. WILSON: All right. Thank you, Your Honor. May it please the Court?

THE COURT: Go ahead.

OPENING STATEMENT ON BEHALF OF JAMES D. DONDERO

MR. WILSON: The Fifth Circuit instructs that a party commits contempt when he violates a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order. And we know that from a variety of Fifth Circuit cases, but the one I was just quoting from is *Travelhost v. Blandford*, 68 F.3rd 958.

We also know that in a civil contempt proceeding the burden of proof, as Mr. Morris alluded to, is clear and convincing evidence. And the Fifth Circuit in the *Travelhost* case defines clear and convincing evidence as that weight of proof which produces in the mind of the trier of fact a firm

belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the factfinder to come to a clear conviction without hesitancy of the truth of the precise facts of the case.

And I submit to you, Your Honor, that the evidence that you will hear today does not rise to the level of clear and convincing that Mr. Dondero violated a definite and specific order of the Court.

In fact, I think the evidence will demonstrate just the opposite. Mr. Dondero recognized why the Court entered the temporary restraining order, and he's going to talk to you about that. He took the Court's order seriously. He discussed it with his counsel and he even had follow-up discussions with his counsel to ask specific questions about what the order allowed him and did not allow him to do. And then, accordingly, he tried to shape his behavior so that he would not run afoul of the order.

But unfortunately, the Debtor interprets the order much more broadly than Mr. Dondero and his counsel did, and therein lies the problem. If the Debtor is correct and Mr. Dondero getting a new phone or appearing at the Highland office to give his deposition or attempting to ensure that the proper procedures for discovery are followed violates the TRO, it is simply too broad and too vague to be enforceable.

In reality, what the Debtor wants to do is hold Mr. Dondero in contempt for violating not the TRO but a letter that the Debtor's counsel sent to Mr. Dondero's counsel two weeks after the TRO was entered. You're going to see that letter today.

The prohibitions against communications in the order are confusing and problematic. There's a nonspecific carve-out for communications regarding shared services. And by the way, contrary to what Mr. Morris told you, Mr. Dondero has both the shared services agreements on his exhibit list today, Exhibits 1 and 2.

The only two Highland employees that the Debtor alleges that Mr. Dondero communicated with are two lawyers who are covered by the shared services agreement. Moreover, Mr. Ellington was also tasked -- and you'll hear about this -- as being a go-between between Mr. Seery and Mr. Dondero from the inception of the independent board and continuing through Mr. Seery becoming the CEO and until the day Mr. Ellington was terminated in January.

Mr. Seery never told Mr. Ellington that he was to stop performing his go-between role with Mr. Dondero, even after the December 10th TRO was entered. In fact, he instructed Mr. Ellington to take Mr. Dondero's calls, and he continued to send messages to Mr. Dondero through Mr. Ellington up until the day before Mr. Ellington was terminated.

The footnote in the TRO is equally confusing because the footnote states that, for the avoidance of doubt, this order does not enjoin or restrain Mr. Dondero from seeking judicial relief upon proper notice or from objecting to motions filed in the above-referenced bankruptcy case. However, the Debtor now says that Mr. Lynn, Mr. Dondero's attorney, sending emails to Mr. Ellington seeking to identify a witness for a hearing violates the TRO. This is true even though Mr. Seery instructed Mr. Ellington that he could talk to Mr. Lynn as much as he wanted to.

The evidence will further reveal that the meaning of the words "interference" and "threat" are subject to varying interpretations. And you'll hear evidence of what the Debtor contends are threats and interference, and you'll hear testimony from Mr. Seery about how he was impeded, if at all, in his conduct running the Debtor.

Now, Mr. Dondero has conceded that the events that led to the TRO in the first place were inappropriate, and he will testify about that today. He sent emails and texts that ultimately led to the TRO. But he changed his behavior. He conscientiously tried to avoid doing any like thing after the entry of the TRO.

I think Mr. Seery will testify today that no trades were stopped, he has not changed his investment strategies or any other aspect of his responsibility since the entry of the TRO.

And so therefore, even if Mr. Morris is going to argue that the violations of the TRO by Mr. Dondero impeded the Debtor, I think the evidence will reflect otherwise. At most, it could be considered a technical violation, but I believe that Mr. Dondero tried his best to do nothing to violate this TRO and only operate -- tried to operate within its bounds.

Now, the Supreme Court has stated in a case called *Longshoremen Association v. Philadelphia Marine Trade*, 389 U.S. 64, that the judicial contempt power is a potent weapon. When it's founded upon a decree too vague to be understood, it can be a deadly one. Congress responded to that danger by requiring that a federal court frame its orders so that those who obey them will know what the court intends to require and what it means to forbid.

The evidence today is going to show that Mr. Dondero did not understand that the items that the Debtor contends violate the TRO were, in fact, violations of the TRO. Because as you'll see when you look at the language of the TRO and compare it to the allegations made by the Debtor, that there's no violation of a clear and specific provision of the TRO.

Thank you.

THE COURT: All right. Thank you.

Mr. Morris, you may call your first witness.

MR. MORRIS: Thank you, Your Honor. The Debtor calls Mr. James Dondero.

THE COURT: All right. Mr. Dondero, could you speak up and say, "Testing, one, two" so I can pick up your --

MR. DONDERO: Testing, one, two.

THE COURT: All right. I hear you but I don't see you yet. Is your video turned on?

MR. DONDERO: Here we go.

THE COURT: Okay. Gotcha. Please raise your right hand.

(The witness is sworn.)

THE COURT: All right. Thank you.

Mr. Morris, go ahead.

MR. MORRIS: Thank you, Your Honor.

JAMES D. DONDERO, DEBTOR'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. MORRIS:

Q Good morning, Mr. Dondero. You're aware, sir, are you not, that Judge Jernigan entered a TRO against you on December 10th, correct?

A Yes.

Q But you never reviewed the declaration that Mr. Seery filed in support of the Debtor's motion for the TRO, correct?

A I don't believe so.

Q You didn't even know the substance of what Mr. Seery alleged in his declaration, correct?

A I discussed the TRO itself and I guess, broadly, the

supporting documents with counsel.

MR. MORRIS: Just one moment, Your Honor.

THE COURT: Okay.

(Pause.)

BY MR. MORRIS:

Q I'll ask the question again. You didn't even know the substance of what Mr. Seery alleged in his declaration, correct?

A As far as I know, it hinged on the trades in the week of Thanksgiving.

Q Okay. As of the time of the preliminary -- withdrawn. Do you recall that you testified at the preliminary injunction hearing on January 8th?

A Yes.

Q Okay. And do you recall, as of that time, you did not even know the substance of what Mr. Seery alleged in his declaration?

A I don't recall what I said then.

Q That's because you didn't even think about the fact that the Debtor was seeking a TRO against you; isn't that right?

A That I don't -- what do you mean by that?

Q You didn't even think about the fact that the Debtor was obtaining a TRO against you when you put yourself back in December; isn't that right?

A When the TRO was put in, I changed my behavior materially,

and I -- I got enough of an understanding of it from my counsel.

MR. MORRIS: Move to strike, Your Honor.

THE COURT: Sustained.

BY MR. MORRIS:

Q You did not care that the Debtor was seeking a TRO against you; isn't that right?

A I wouldn't describe it like that, no.

MR. MORRIS: Can we go to -- you know what? Before I do that, Your Honor, in order to just make this easier, I'd like to move into evidence the Debtor's exhibits at one time, now that we have Your Honor's ruling on the motion *in limine*. The Debtor has Exhibits 1 through 37 that were lodged at Adversary Proceeding Docker No. 80 on February 1st. I guess let's just do them one at a time. And the Debtor would respectfully request that those documents be admitted into evidence.

THE COURT: All right. Mr. Wilson, any objection? (Pause.) You're on mute. Mr. Wilson, you're on mute.

MR. WILSON: I didn't understand the request. Did he say all of his evidence?

THE COURT: Well, he's got --

MR. MORRIS: We're --

THE COURT: -- a couple of different batches on the docket. He's asked for 1 through 37 at Docket Entry No. 80 to

be admitted at this time.

MR. WILSON: Okay. I do have some objections to some of those items.

THE COURT: Okay. Do you want to go through which ones you want to object to?

MR. WILSON: Yeah. I would object to 3, 4, 5, 6, 16, 23, 29, 30, 31, 32, 33, 34, and 35.

THE COURT: Well, so shall we just let you offer those the old-fashioned way, Mr. Morris, as you want a witness to testify about them? Or do you have a response right now? I haven't really heard the substance of the objection, but it probably makes more sense to just admit what's not objected to now and you can --

MR. MORRIS: Yeah. Let's start, let's start with that.

THE COURT: All right.

MR. MORRIS: Let's start with that.

THE COURT: All right. So the Court is admitting 1, 2, 7 through 15, 17 through 22, 24 through 28, and then 36 and 37 at this time. All right?

(Debtor's Exhibits 1, 2, 7 through 15, 17 through 22, 24 through 28, 36, and 37 are received into evidence.)

MR. MORRIS: All right. And next we have, Your Honor, Exhibits 40 through 59 that can be found at Adversary Proceeding Docket No. 101 that was filed on February 19th.

THE COURT: All right. You're offering all of those?

MR. MORRIS: Yes.

THE COURT: All right. Mr. Wilson, any objection?

MR. WILSON: Yes. I object to 40 through 46 and then 56 through 69.

THE COURT: All right. Well, so I will admit 47 through 55, and then we'll let Mr. Morris offer the others the old-fashioned way if he wants to.

(Debtor's Exhibits 47 through 55 are received into evidence.)

MR. MORRIS: Okay. And just to make this easy for the Court, the Debtor will withdraw Exhibits 41 through 46 --

THE COURT: Okay.

MR. MORRIS: -- and 58 and 59.

THE COURT: All right.

(Debtor's Exhibits 41 through 46 and Exhibits 58 and 59 are withdrawn.)

MR. MORRIS: All right. So if we go back now, Exhibit 36 is in evidence. Exhibit 36 is the transcript from the preliminary injunction hearing on January 8th. And I would ask Ms. Canty to put up Page 23, Lines 10 through 12.

BY MR. MORRIS:

Q Mr. Dondero, were you asked this question and did you give this answer? Actually, beginning at Line 8. Question, "You didn't even know the substance of what Mr. Seery alleged in

his declaration at the time I deposed you on Tuesday, correct?" Answer, "Correct."

And that's because --

A I'm sorry, what page are you on?

Q Yeah, it's Page -- I apologize -- 23.

MR. MORRIS: And then you can see, Your Honor, we read from his deposition transcript and I ask the following question and get the following answer beginning at Line 10.

BY MR. MORRIS:

Q (reading) Question, "Did you care that the Debtor was seeking a TRO against you?" Answer, "I didn't think about it."

That was the testimony that you gave at your deposition and that you affirmed at the hearing on January 8th. Isn't that right, Mr. Dondero?

A Yes.

Q Okay.

MR. MORRIS: Can we take this down, please?

BY MR. MORRIS:

Q You didn't listen to the hearing where the Court considered the Debtor's motion for the TRO, correct?

A Correct.

Q You never read the transcript in order to understand what took place in the courtroom when Judge Jernigan decided to enter the TRO against you, correct?

A Correct. I relied on counsel.

MR. MORRIS: I move to strike the latter portion of the answer.

THE COURT: Overruled.

BY MR. MORRIS:

Q Mr. Dondero, at least as of the preliminary injunction hearing on January 8th, you never bothered to read the TRO that was entered against you, correct?

A Again, I relied on counsel. I don't -- I don't remember exactly when I read it. But I -- I think you're correct.

Q Okay. Let's talk about the cell phone for a bit. How long were you the CEO of Highland Capital Management?

A Since 1994.

Q And Highland had an employee handbook; isn't that right?

A Yes.

Q And they had that handbook during the period of time that you were the CEO, right?

A I'm not sure we had one for the first half-dozen years, but more recently, for sure, we've had a handbook.

Q Is it fair to say that you had the handbook for at least ten years prior to the petition date?

A Yes.

Q Okay. And as the CEO of Highland Capital Management, you knew that the purpose of maintaining the handbook was to inform Highland's employees of Highland's policies and

practices, correct?
A Yes.
Q Okay. And you personally reviewed the handbook, right?
A Once a year, in compliance training, we go over the compliance manual or any major changes for about half an hour.
Q Can you describe for the Court the compliance training that you just referred to?
A Usually, senior executives would meet with Thomas Surgent for -- one-on-one for about half an hour to go over any changes or anything different on the regulatory front that affect the manual.
Q And that included both the compliance manual and the employee handbook, correct?
A I -- I believe so. Mainly the compliance manual, but -- yeah, I believe so.
Q And you actually completed certifications on an annual basis with respect to your compliance with the compliance policies and the employee handbook, right?
A When the meeting is concluded, yes, we sign what was gone over in the meeting. But that paper would probably explain what was gone over in the meeting. I don't remember exactly what was gone over.
Q Okay. That's fair.
MR. MORRIS: Can we -- let's take a look at Exhibit 55, if we could. That's a copy of the employee handbook, and

that's been admitted into evidence.

BY MR. MORRIS:

Q Do you recall that one of the --

MR. MORRIS: If we could just go to the first page of the document. Yeah.

BY MR. MORRIS:

Q Do you recall that one of the policies in the handbook pertained to a cell phone benefit that HCMLP made available to employees?

A No.

MR. MORRIS: Okay. Can we go to Page 12, please? Scroll down just a little bit.

BY MR. MORRIS:

Q You see there's a cell phone benefit there? And do you recall that under the cell phone benefit employees could obtain up to a hundred dollars a month towards the cost of their own cell phone if they -- if they complied with the policy?

A Yes, I see that.

Q Yeah. And participation in the cell phone benefit, that was voluntary, right? Nobody was required to do that?

A I -- I -- I don't know.

MR. MORRIS: All right. Let's go to the next page, Page 13.

BY MR. MORRIS:

Q Do you see the first sentence of the first full paragraph, "Participation in this policy is entirely voluntary"? Do you see that?
A Yes.
Q So does that refresh your recollection that the cell phone benefit policy was voluntary?
A We can go through the manual. I don't have a detailed memory of the employee manual. It says what it says. I --
Q Okay.
A I don't know.
Q Okay.
MR. MORRIS: Let's just scroll down a little bit. Right there.
BY MR. MORRIS:
Q Do you see the paragraph beginning, Employees?
A Yes.
Q And about halfway through that paragraph, there's a sentence that begins, "Further." Can you just read that sentence out loud?
A (reading) Further, regardless of whether employees choose to participate in this policy, all email, voicemail, text messages, graphics, and other electronic data composed, sent, and/or received related to company business remain the property of Highland.
Q So that was the company's policy, correct?

A Yes.
Q And that was --
A It appears so.
Q And that was the company's policy that applied to all employees, correct?
A As far as I know, although didn't we just establish it's voluntary, the participation, or no?
Q Voluntary to participate in the -- in the cell phone benefit. But what you just read says, quote, Further, regardless of whether the employees choose to participate in this policy, all --
A Okay.
Q And then it goes on. So will you agree with me that it applies to all employees?
A Yes.
Q Okay. The compliance group was responsible for making sure that all of its -- all of Highland's employees were in compliance with the various firm policies, correct?
A Yes.
Q And for a number of years prior to the petition date, Thomas Surgent served as the chief compliance officer, correct?
A Yes.
Q And I think, as you just alluded to, at least on an annual basis, Mr. Surgent sat down with senior executives to go over

the compliance in the -- the compliance policies in the employee handbook, correct?

A Yes.

Q And you personally participated in those meetings, right?

A Yes. And I believe I followed it to the letter.

Q Okay. And as part of the process, you certified that you were in compliance with the obligations applicable as set forth in the employee handbook, correct?

A Yes, and I believe I have been.

MR. MORRIS: Can we put up Exhibit 56, please?

BY MR. MORRIS:

Q And is this the certification --

MR. MORRIS: And we can scroll down.

BY MR. MORRIS:

Q Again, this is the first like real document we're looking at here, Mr. Dondero. The same rule always applies: If there's anything that you think you need to see in the document, just let me know. We've taken pains to redact all of your personal information.

MR. MORRIS: If we go down.

BY MR. MORRIS:

Q But this is the form that was completed for you in 2020 with respect --

MR. MORRIS: If we go to the top.

BY MR. MORRIS:

Q This is the Annual Certification and Conflicts of Interest Disclosure in 2019. This is the firm you were referring to earlier, right?
A Can you show me the part that talks about the employee manual? Because I didn't see that.
Q Sure.
MR. MORRIS: Let's go to the last page, please.
BY MR. MORRIS:
Q Do you see Notes there?
A Yes.
Q All right. And about five lines down -- and I'm just going to read from it -- it says, quote, I have received, have access to, and have a -- and have read a copy of the employee handbook, and I am in compliance with the obligations applicable to employees set forth therein.
Have I read that correctly?
A Yes.
Q So this is your compliance certification in which, among other things, you certify that you had access to and had read and were in compliance with the employee handbook, right?
A Yes.
Q Okay.
A I believe I was, within my tenure at Highland, compliant with it.
Q Okay.

MR. MORRIS: Can we go to Exhibit 57, please?

BY MR. MORRIS:

Q And this is a Q3 2020 questionnaire and transaction certification from you effective as of October 7th. Do you see that?

A Yes.

Q And is this just another periodic compliance certification that Mr. Surgent and the compliance group obtained from senior employees?

A I'm not aware of this one. I mean, I -- I don't remember these questions being part of a --

(Echoing.)

Q Okay.

MR. MORRIS: Let's look to the bottom of the document, Page 8 of 8.

BY MR. MORRIS:

Q Again, we've tried to redact everything that's personal to you, sir. You'll see that there's another certification that you had, quote, received, have access to, and are otherwise in compliance with the handbook. Do you see that?

A Yes.

Q And was that a true statement in October 2020?

A Yes.

Q Okay.

MR. MORRIS: Your Honor, these two exhibits, 56 and

57, are two exhibits that Mr. Dondero's counsel had objected to, so I move for their admission into evidence.

THE COURT: All right. Mr. Wilson, your objection?

MR. WILSON: I'm sorry, Your Honor, were you asking for a response from me?

THE COURT: Yes. Earlier you had objected to 56 and 57 --

(Echoing.)

MR. WILSON: I'm getting a lot of feedback. I'm having trouble hearing.

THE COURT: Yes. Mr. Dondero, your past few answers have had some distortion. So I don't know if you've got anyone there to kind of help you make some adjustments. I'm not sure what --

It's coming from Mr. Dondero, correct?

THE WITNESS: I'm sorry, are you saying it's on my end, the distortion?

THE COURT: Yes. Right now you're loud and clear, but your -- a few answers previously, it's been distorted.

All right. So let's just turn to Mr. Wilson. You had earlier objected to Exhibits 56 and 57. They are now being offered. Do you have an objection still?

MR. WILSON: Well, I do, Your Honor. I don't believe that Mr. Dondero has authenticated these exhibits. He wasn't familiar with them. They're not signed by him. I think that

-- I think they're also hearsay.

Without -- without more confirmation by Mr. Dondero as to what's in these, that he actually made these statements and he signed them, I don't think that they qualify as competent evidence.

THE COURT: Mr. Morris?

MR. MORRIS: If I may, Your Honor.

THE COURT: Uh-huh.

MR. MORRIS: Number one, Mr. Dondero testified unambiguously that each year he -- he completed this form. Particularly as it relates to Exhibit 56, he specifically acknowledged that that was the form that was prepared for him at that time as of the date.

It is true that he did say that with respect to 57 he didn't specifically recall it, but he did testify that he was in compliance and that he understood and agreed with the statement that's in the note itself. And that's the only reason that we're offering the document. So, based on his testimony, I'd respectfully request that both documents be admitted into evidence.

THE COURT: All right. I'll overrule the objections. 56 and 57 are admitted.

(Debtor's Exhibits 56 and 57 are received into evidence.)

THE COURT: All right. Mr. Morris, --

MR. MORRIS: Mr. Dondero?

THE COURT: -- you may continue.

MR. MORRIS: Yes.

BY MR. MORRIS:

Q Mr. Dondero, you knew no later than July 2020 that the U.C.C. wanted your text messages; isn't that right?

A I heard your opening but I was not specifically aware or noticed, nor did I -- nor did I believe getting a new phone changed any of that.

MR. MORRIS: I move to strike, Your Honor.

THE COURT: Sustained.

BY MR. MORRIS:

Q Mr. Dondero, you knew no later than July 2020 that the U.C.C. wanted your text messages, correct?

A No.

Q In fact, this Court and all parties in interest were explicitly told in July that you knew the U.C.C. wanted your text messages; isn't that correct?

A I was not specifically aware.

Q Okay. Do you remember last summer that the Creditors' Committee made a motion to compel?

A I have no recollection of that.

Q Okay.

MR. MORRIS: Can we put up Exhibit 34, please?

Okay. Your Honor, this is a copy of the Creditors' Committee Emergency Motion to Compel Production by the Debtor

dated -- I'm not sure of the date.

Can we just go up to the top?

Dated July 8th, 2020, that was lodged at Docket No. 808. And I'd like to offer this into the record simply to establish that a request was publicly made by the U.C.C. for Mr. Dondero's text messages.

THE COURT: All right. Mr. Wilson, you had an objection earlier. What would you like to say?

MR. WILSON: Yes. Yes, Your Honor. My objection is just primarily relevance. As you stated in your opening remarks, the time period we're concerned with is December 10th through January 7th, I believe, and the Debtor is trying to use a document from July of 2020 to impute some knowledge to Mr. Dondero and tie it into that time period six months later. I don't believe that's proper and I would object.

MR. MORRIS: If I may, Your Honor?

THE COURT: You may.

MR. MORRIS: This is -- this is a very simple connect-the-dots. Mr. Dondero was the CEO of Highland Capital Management. Highland Capital Management had an employee handbook. The employee handbook specifically said that text messages related to the company's business were the company's property. Mr. Dondero certified in the exhibits that were just admitted into evidence that he was familiar with the company's employee handbook and that he was in compliance

thereof.

This document establishes that the Debtor -- that the Creditors' Committee wanted Mr. Dondero's text messages. The next document that we're going to look at is from Mr. Dondero's own lawyers where he acknowledges that he understands that the Creditors' Committee wants his text messages. And all of that is directly relevant to why, when the phone gets thrown away after the TRO is entered into, the damage that is caused the Debtor. The Debtor has lost its property, in violation of 362(a)(3) of the Bankruptcy Code. It's property that Mr. Dondero knew was the Debtor's property. It's property that Mr. Dondero's -- at least his lawyers knew the U.C.C. wanted.

So I'm not charging that anything that happened in July 2020 was a violation of the TRO. What I am saying, though, and what the evidence clearly shows, is that when that phone was disposed of after the TRO was entered, it was disposed of at a time when Mr. Dondero knew that these text messages were the company's property and that the U.C.C. wanted them.

THE COURT: All right. I overrule the objection. 33 is admitted.

(Debtor's Exhibit 33 is received into evidence.)

MR. MORRIS: Go to Paragraph 6, please, just to make it clear.

BY MR. MORRIS:

Q Okay. In Paragraph 6 there, there is a sentence that says, quote, In particular, the Committee has spent a considerable amount of time attempting to obtain any production of emails, chats, texts, or ESI communications from the Debtor.

Do you see that?

A Yes.

Q And the U.C.C. specifically identified you as one of the custodians from whom it was seeking this information. Do you recall that?

A Vaguely.

Q All right. Let's just go to Paragraph 10 and Footnote 8. There's a reference to nine identified custodians. Do you see Footnote 8? You're among the custodians that the U.C.C. identified as folks from whom they wanted text messages and other ESI. Right?

A Yes.

Q And your lawyers certainly knew that the U.C.C. wanted your text messages, right?

A Why didn't they just get them from the phone company? Just, if they were trying that hard, why -- why did they -- why did they not get them from -- directly from the phone company?

MR. MORRIS: I move to strike, Your Honor.

THE COURT: Sustained.

BY MR. MORRIS:

Q Mr. Dondero, your lawyers knew that the U.C.C. wanted your text messages. Isn't that correct?

A I don't know.

Q Do you recall that your lawyers filed a response to the U.C.C.'s motion?

A (no immediate response)

Q Do you recall that your lawyers filed a response to the U.C.C.'s motion?

A I -- I do not. I hope they said, just get all the texts you want from the phone company. I hope that's what they said.

MR. MORRIS: Okay. Can we put up -- I move to strike, Your Honor.

THE COURT: Overruled.

MR. MORRIS: Can we put up Exhibit 40, please?

BY MR. MORRIS:

Q And this document is in evidence. Do you see that this is your response or the response that was filed on your behalf?

A Yes.

MR. MORRIS: Can we go to Paragraph 3, please?

BY MR. MORRIS:

Q Can you just read that paragraph out loud?

A (reading) Accordingly, the proposed protocol of the Committee seeks, among other things, documents, emails, and

other electronically-stored information, ESI, exchanged from or between nine different custodians, to include Dondero. The Committee has requested all the ESI for the nine custodians, including, without limitation, email, chat, and text, Bloomberg Messaging, or any other ESI attributable to the custodians.

Q So, on July 14th, your lawyers told the Court on your behalf that it knew -- that they knew that you were on one of nine custodians from whom the Committee wanted text messages. Correct?

A That's what it says.

Q Okay. And are you aware that the Court subsequently entered an order giving the Committee the relief that it sought?

A Okay. No, I'm not specifically aware.

Q Okay. Until -- until at least December 10th, the day that the TRO was entered into, you had a cell phone that was bought and paid for by the Debtor. Correct?

A Yes.

Q And that cell phone had text messages on it. Correct?

A Yes.

Q And from time to time, you use your phone to exchange text messages concerning company business. Correct?

A Very rarely. But yes.

Q But you do. Correct?

A Yes.
Q And in fact, in fact, we're going to look at certain text messages that were sent to you or that were sent by you on your new phone concerning company business. Correct?
A Yes, we will.
Q And we know that the cell phone existed after the TRO was entered, correct?
A I don't -- maybe a day or two, but it -- it -- I don't know if it's fair to say it existed. I followed protocol. I gave my old phone to the tech group. They got me a new phone. They handled it according to the manual and the protocol. When it was put back in Tara's drawer, I don't know if it had any information on it at that point in time. But, again, you could have gotten all the texts you want from the phone company.
MR. MORRIS: I move to strike, Your Honor.
THE COURT: Sustained.
MR. WILSON: Your Honor, can Mr. Morris state the objection that he has to that testimony?
MR. MORRIS: It's not responsive to the question. It's a speaking -- it's just -- it's what he wants to say. I'm asking a leading question, Your Honor, that's a yes or no answer, and he's giving me the answer that he wants, --
THE COURT: All right. I agree --
MR. MORRIS: -- not the answer that I've asked for.

THE COURT: I agree. It was nonresponsive.

MR. MORRIS: Your Honor, I forgot in my -- in going over the exhibits. Last night, we filed a notice of a replacement of certain exhibits. That could be found at Docket No. 128. And among the three exhibits that were replaced was Exhibit 11.

Exhibit 11 is a copy of the TRO. The reason that we replaced it is because the version that was on Docket No. 80 had -- I guess there was typing along the top so you couldn't see the date and time of the entry.

But I would ask Ms. Canty just to put up onto the screen the version of Exhibit 11 that was attached to Document 128 last night.

THE COURT: Okay.

BY MR. MORRIS:

Q And so here, you can see -- you see this is the TRO, Mr. Dondero? We can scroll down a little bit if that's helpful. All right. This is the TRO, right?

A Yep.

Q And if you go to the top, you can see that it's entered on December 10th at 1:31 in the afternoon. Am I reading that correctly?

A Yes.

Q Okay. And later that night, you were told that your own

-- your old phone was in the top of Tara's desk drawer. Correct?

A Yes.

Q Okay.

MR. MORRIS: Can we just put up Exhibit 8, please?

BY MR. MORRIS:

Q And this is the text message that Mr. Rothstein sent to you on December 10th at 6:25 p.m. at night. Right?

A Yes.

Q And so your phone existed after the TRO was put into effect, correct?

A Again, I have to answer that question by saying that the process for getting a new phone started two weeks earlier. The technology group, Jason and crew, could have saved or done whatever with the phone, but they followed protocol and they wiped the phone exactly as Thomas Surgent and the employee manual says, and the phone that was put back on my desk, the old phone, had nothing on it.

MR. MORRIS: I move to strike, Your Honor.

THE COURT: Okay. Sustained.

MR. MORRIS: It's a very simple question.

THE COURT: Mr. Dondero, I'm going to --

MR. MORRIS: Sir, --

THE COURT: I'm going to remind you of the rules. You need to give direct answers to the questions, and most of

these questions are yes or no answers. And then when Mr. Wilson has the chance to examine you, presumably he will ask follow-up questions that allow you to give some of these answers that I guess you're wanting to give. Okay? So please, please listen carefully and just directly answer the questions.

All right. Mr. Morris, go ahead.

THE WITNESS: I'll do the best -- Your Honor, listen, I'll do the best I can. In all due respect, I will do the best I can. But if I don't believe I can give an honest or not misleading answer with a yes/no, I need to give a more detailed answer or I need to say I can't answer the question that you've put forward.

THE COURT: Okay. I understand why it's difficult, but, again, that's why we allow direct, cross, redirect, recross, because it is your own lawyer's responsibility, in cooperation with you, to ask questions that allow you to give the fulsome answers that you think the Court needs to hear. But at this juncture, please just try to directly answer the question yes or no when that's all it is aimed at asking.

All right, Mr. Morris. Go ahead.

MR. MORRIS: Thank you, Your Honor.

BY MR. MORRIS:

Q On December 10th at 6:25 p.m., after the TRO was entered into, Mr. Rothstein told you that your old phone was in the

top of Tara's desk. Correct?
A Yes.
Q Okay. And Mr. Rothstein is not going to testify in this proceeding, is he? You're not calling him to testify on your behalf, right?
A I don't know.
Q Mr. Surgent is not being called to testify in connection with this proceeding, correct?
A I -- I don't -- I didn't hear him mentioned earlier. I don't think so.
Q Okay. Tara was still serving as your assistant as of January 8, 2021, right?
A Yes.
Q So it's fair to say that you were informed on December 10th that the phone, the old phone, was not thrown in the garbage, had not been disposed of, but was instead sitting in Tara's desk. Correct?
A Yes.
Q And it's also fair to say that, as of December 10th, Mr. Rothstein didn't take it upon himself to throw your old cell phone away. Correct?
A I don't know.
Q So it's fair to say that you were informed on December 10th that the phone was not thrown in the garbage -- withdrawn. It's also fair to say that, as of December 10th,

Mr. Rothstein didn't take it upon himself to throw your old phone in the garbage. Right?

A I don't know what happened to the phone. I don't know what Jason did or did not do.

MR. MORRIS: Can we pull up Page 61 from the transcript of the preliminary injunction proceeding? And if we can go down to Line 20 to 23?

BY MR. MORRIS:

Q Were you asked this question and did you give this answer: "And it's also fair to say that, as of December 10th, Mr. Rothstein didn't take it upon himself to throw your old phone in the garbage, right?" Answer, "Not as that moment, but like I said, I can find out how it was disposed of."

Did you give that answer to that question at that time?

A Yes.

Q Okay. But you don't know who threw your phone away, right?

A No.

Q It never occurred to you to get the Debtor's consent before the phone was thrown away, correct?

A I -- everything I did with regard to the phone was with the Debtor's consent and process. If that answers your question.

Q Sir, you never -- you never asked the Debtor for permission to throw your phone away, did you?

A I -- I didn't have to because I handled it according to the employee manual by giving it to the tech group.
Q Does the employee manual tell you that you're allowed to throw away a phone with the Debtor's property on it when a party to a litigation has asked for the text messages?
A There were no text messages on the phone by that point in time.
Q So, so you -- so you allowed the text messages to be erased, even though your lawyers told the Court that the -- that they understood that the U.C.C. wanted your text messages, and in fact, the Court entered an order in order to get those text messages?
A No, that is not correct. I gave it to the tech group, which was part of the Debtor, and they handled it in any which way they could have, but in compliance with the manual. And they wiped the old phone as they got me a new phone. And the Debtor at that point in time could have downloaded, copied, or got from the phone company whatever text messages they wanted.
Q But Mr. Seery didn't even know you were doing this; isn't that right?
A I have no idea.
Q You have no reason to believe that Mr. Seery had any knowledge that you were trading out your phone, correct?
A I believe he knew because he had told all employees to get new phones within the next 30 days. So it wasn't -- it wasn't

a surprise, I don't think, to him or anybody else. And I don't under -- this -- I don't understand the brouhaha over what's really nonsense.

Q Do you think it's nonsense that text messages that are the company's property were disposed of even though they were specifically requested by the U.C.C. and ordered by the Court to be produced? That's what you describe as nonsense?

A I describe it as nonsense when everybody was told to get new phones and everybody got new phones and everybody went through the protocol of giving them to the tech group. The tech group ordered the new phones, got rid of the old phones to protect client data, et cetera, like they've always done. And the Debtor could have made as much copies of anything, knowing that everybody had to get new phones because they were canceling everybody's cell phone in the next 30 days. The Debtor could have done whatever it wanted with the material. And just because the tech group went through the normal historic process, you're trying to hold me and other people on that list somehow accountable, and it's craziness.

Q Okay. It never occurred to you to get the Debtor's consent before you did this, right?

A By not doing it on my own, by not ordering my own phone, I didn't think it was necessary to get Debtor consent because I gave the phone to the Debtor as part of getting a new phone.

MR. MORRIS: Can we get Exhibit -- go to Page 58,

please, Line 15?

BY MR. MORRIS:

Q Were you asked this question and did you give this answer?

MR. MORRIS: If we can scroll down to Line 15.

BY MR. MORRIS:

Q Question, "Did it ever occur to you to get the Debtor's consent before doing this?" Answer, "No."

Did you give that testimony, sir?

A Yes. Because I gave the Debtor my phone. When I got a new phone, I gave them my old phone. The Debtor wiped the phone and gave it back to me.

THE COURT: Is it --

MR. MORRIS: I move to strike every -- after -- after he confirms that he gave that answer to his prior testimony.

THE COURT: Sustained.

MR. MORRIS: Sir, --

MR. WILSON: Your Honor, I'll object that Mr. Morris has asked and answered these questions several times. At this point, he's badgering the witness.

THE COURT: Overruled.

BY MR. MORRIS:

Q Sir, you had the billing changed from the company account to your personal account, correct?

A As did everybody, at the direction of Seery.

Q Sir, you had your account changed; isn't that correct?

A I -- I handled my personal -- or, I had my assistant handle my own personal phone based on the notice that Seery had given everybody.

Q Do you have a copy of that notice? Are we going to have that in evidence today?

A I don't think Seery would deny it. He's not -- hasn't -- well, whatever. No, I don't have a -- I don't have a copy of a memo.

Q So you're telling me that Mr. Seery gave an instruction for everybody to throw the cell phones away that had been asked for by the U.C.C., and he didn't even do that in writing? That's your testimony, is that -- is that he gave that instruction to throw cell phones away that had been specifically requested by the U.C.C., and he didn't even do that in writing?

MR. WILSON: Objection, Your Honor. Mr. Morris is mischaracterizing the testimony.

THE WITNESS: He's -- he's horribly mischaracterizing it.

THE COURT: Okay.

THE WITNESS: I'm saying he told everybody and he stopped paying everybody's cell phone bill at the end of January and he told everybody to get new phones. And to be as compliant as possible, I gave it to the Debtor's employees to handle buying a new phone and handling the old phone according

to the manual and whatever else the Debtor needed to do with the phone.

THE COURT: Okay. Let's try to --

THE WITNESS: So the Debtor --

THE COURT: -- get back on track.

THE WITNESS: -- wiped the phone.

THE COURT: Let's try to get back on track --

MR. MORRIS: So, so you --

THE COURT: -- with the instruction --

MR. MORRIS: Go ahead.

THE COURT: -- of giving yes and no answers. Again, Mr. Wilson is going to get all the time he needs to follow up with his own questions. All right?

Go ahead, Mr. Morris.

MR. MORRIS: Sir, -- thank you, Your Honor.

BY MR. MORRIS:

Q Sir, you never asked the Debtor for permission to change the phone from its account to your personal account. Correct?

A As I've stated, I gave the Debtor my phone. No, I did not ask specific permission. That would be ridiculously redundant.

MR. MORRIS: I move to strike, Your Honor. It's a really simple question. Either he -- either he -- either he asked for permission or he did not. The commentary really needs to stop.

THE COURT: Sustained.

Yes or no? Permission or not?

BY MR. MORRIS:

Q I'll ask the question again. Sir, you never asked the Debtor for permission to change the phone from its account to your personal account, correct?

A I believe I implicitly did by giving them the phone, so I'm going to say yes.

MR. MORRIS: Go to Page 59, please, Line -- Line 11.

BY MR. MORRIS:

Q Were you asked this question and did you give this answer? Question, "And you never asked the Debtor for permission to do that. Correct?" Answer, "No."

Did you give that testimony on January 8th?

A Yes. But I'd like to correct it as I just said.

Q Sir, you never even told the Debtor you were doing what you did. You never even told the Debtor that you were changing, let alone -- withdrawn. Not only didn't you obtain their consent, you never told the Debtor that you were changing the account from its account to your personal account. Correct?

A We were required to move our phones, so no, I didn't tell them that we were honoring their request.

Q This notion of being required to do that, did your lawyers mention that in their papers in opposition to this motion

today, that Mr. Seery had required all of this? Do you recall reading the papers? Is there anything in there about that?

A It's the truth. I -- I don't -- in the papers. I don't know.

Q Okay. Let's look at Line 14, since it's just still on the screen, and I'll ask it again. Were you asked this question and did you give this answer? "You never told the Debtor you were doing that. Correct?" Answer, "No."

Was that the testimony you gave then?

A Again, yes, but I'd like to --

Q Okay.

A -- clarify with what I just said.

Q And you never told Mr. Seery or anybody at my firm that the phone was being thrown in the garbage, correct?

A They knew what the protocol was. You knew what the protocol was. I didn't think there was a reason to.

Q Sir, you never told anybody at my firm or Mr. Seery that you were throwing -- that the phone was being thrown in the garbage, correct?

A No, I did not.

Q Okay. That's all I'm asking. You didn't believe it was necessary to give the Debtor notice that you were taking the phone number for your own personal account and throwing the phone in the garbage, correct?

A I'm sorry. Can you repeat that question?

Q You didn't believe it was necessary to give the Debtor notice that you were taking the phone number for your own personal account and throwing the phone in the garbage. Correct?

A I didn't think -- correct. I didn't think I needed to do anything other than what I did.

MR. MORRIS: I move to strike after the word "Correct," Your Honor.

THE COURT: Overruled.

BY MR. MORRIS:

Q Do you remember, a couple of weeks after Mr. Rothstein told you that your own -- old phone was in Tara's drawer, that the Debtor sent a letter to your lawyers in which it gave notice to you to vacate the offices and return its cell phone?

A I believe, yeah, I believe that was the end of December.

MR. MORRIS: Can we look at that document, please? It's Exhibit 27.

This document is in evidence, Your Honor.

And if we can go to the bottom of the second page.

BY MR. MORRIS:

Q This is a letter from my firm to your lawyers, right?

A Yes.

Q You want to read the first sentence of that last paragraph out loud? "HCMLP."

A (reading) HCMLP will also terminate Mr. Dondero's cell

phone plan and those cell phone plans associated with parties providing personal services to Mr. Dondero -- collectively, the cell phones. HCMLP demands that Mr. Dondero immediately turn over the cell phones to HCMLP by delivering them to you. We can make arrangements to recover the phones from you at a later date.

MR. MORRIS: Okay. Can we just scroll back --

MR. WILSON: Your Honor?

MR. MORRIS: -- to see the

MR. WILSON: Can I -- can I make a request that the rule of optional completeness be invoked and the date of the letter be shown?

MR. MORRIS: Yeah. I was just about to get there, sir. I join.

THE COURT: All right. Fair enough.

MR. MORRIS: It's December 23rd.

BY MR. MORRIS:

Q Do you see that, sir?

A Yes.

Q So, if we can go back to what you just read down at the bottom there. So, on December 23rd, my firm, on behalf of the Debtor, is informing your lawyers that it will terminate your cell phone plan. Isn't that right?

A Yes.

Q Can you think of any reason why they would be informing

your lawyers of that on December 23rd if they had already told you that?

MR. WILSON: Objection, Your Honor. He has no knowledge of what the Debtor's lawyers were thinking when they wrote this letter.

THE COURT: Overruled. He can answer if he has an answer.

THE WITNESS: I have -- I have no idea.

BY MR. MORRIS:

Q Okay. But it's true that, on December 23rd, my firm, on behalf of the Debtor, informed your lawyer of its intent to terminate the phone plan of which you were a part. Correct?

A Again, no. I believe the notice happened much sooner, and that's why a whole bunch of people changed their phones at or around the time I did.

Q Who else had phones that were paid for by the Debtor?

A I believe a significant majority of the firm.

Q Isn't it true that only you and Mr. Ellington had phones that were paid for by the Debtor? I'm not talking about the $100 policy that we looked at before. But isn't it true that you and Scott Ellington were the only people in the whole firm who had phones that were paid for by the Debtor?

A I did not know that.

Q Okay. All right. So do you see later on in that paragraph, at the top of Page 3 -- I'll just read it. Quote,

HCMLP further demands --

MR. MORRIS: Oh, no. I'm sorry. Can we go back up a little bit? I'm having trouble. Yeah. Right there.

BY MR. MORRIS:

Q (reading) The cell phones and the accounts are property of HCMLP. HCMLP further demands that Mr. Dondero refrain from deleting or wiping any information or messages on the cell phone. HCMLP, as the owner of the account and the cell phones, intends to recover all information relating to the cell phones and the accounts and reserves the right to use the business-related information.

Have I read that correctly?

A Yes.

Q And that's what your -- that's what -- that's what the Debtor told your lawyers on December 23rd. Correct?

A Yes.

Q But the Debtor was a couple of weeks too late in making these demands. Correct?

A Because the Debtor wiped my phone. I never wiped my phone.

Q Sir, the Debtor was a couple of weeks too late in making these demands. Correct?

A No.

MR. MORRIS: Page 65 of the transcript, please. Line 4 through 5.

BY MR. MORRIS:

Q (reading) "We were a couple of weeks too late, huh?" Answer, "It sounds like it."

Did you give that answer back on January 8th?

A Yes.

Q And that's because the phones were already in the garbage. Correct?

A No, it -- the phones were already wiped by the Debtor's personnel.

Q Look at Line 6 and Line -- through Line 8 and see if you gave this testimony on January 8th. Question, "Because the phones were already in the garbage; isn't that right?" Answer, "Yes."

Did you give that answer back on January 8th?

A Yes.

Q And that's not -- but that's not what Mr. Lynn told the Debtor in response to the Debtor's letter of January 20 -- December 23rd. Correct?

A I don't know.

Q Well, let's see.

MR. MORRIS: Can we go to Exhibit 22, please?

BY MR. MORRIS:

Q This is your lawyer's response to the December 23rd letter that we just saw. Do you see that?

A Yep.

Q Mr. Lynn doesn't say anything about the cell phone being thrown in the garbage, right?
A He doesn't know what happened to the phone. Neither do I.
Q Sir, Mr. Lynn doesn't say anything about the cell phone being thrown in the garbage, does he?
A No.
Q And Mr. Lynn doesn't say that the phone was disposed of, correct?
A (no immediate response)
Q Mr. Lynn didn't say that the phone was disposed of, did he?
A No, I don't see it in that paragraph.
Q Okay. Mr. Lynn didn't describe any company or policy whereby old cell phones are to be thrown in the garbage or otherwise disposed of, correct?
A I don't know if he would have awareness of that, but no, he doesn't mention it.
Q Mr. Lynn doesn't cite to anything Mr. Seery said with respect to the wiping of phones, right?
A No.
Q Mr. Seery -- Mr. Lynn doesn't reference Mr. Seery at all in this letter response to my colleague, correct?
A Nope.
Q He doesn't cite to any policy in the employee handbook to justify the loss of the cell phone, correct?

A No.
Q And you have no reason to believe that Mr. Lynn would withhold from the Debtor the information that the cell phone had been thrown in the garbage consistent with company practice, correct?
A No.
Q Let's talk about the trespass issue for a moment. Where are the Debtor's offices located, to the best of your knowledge?
A 300 Crescent Court, Suite 700.
Q And how long have they --
A Dallas, Texas.
Q And they're a tenant in that space; is that correct?
A Yes.
Q And they're a tenant pursuant to a lease; is that right?
A Yes.
Q And to the best of your knowledge, Suite 300, the Debtor is the sole tenant under the lease for that space. Correct?
A I -- yeah, I bel... I don't know. I -- the building has rules for subleases. I don't know if it -- affiliates are on the lease or not. I -- I don't -- I don't have an awareness of the lease.
Q So, but you don't have any reason to believe that anybody's on the lease other than the Debtor. Is that fair?
A I -- I just don't know. But it -- I don't -- when it

started, when the lease started ten years ago or eight and a half years ago, I'm sure it had just Highland, but I don't know who's on it now.

Q Okay. Okay. To the best -- you understand the Debtor is subject to the bankruptcy court's jurisdiction, correct?

A Yes.

Q And in that December 23rd letter that we just looked at, the Debtor demanded that you vacate their offices. Correct?

A Yes.

MR. MORRIS: Okay. Let's just look at a little bit of that letter, if we can call back Exhibit 27, please.

BY MR. MORRIS:

Q On the second page, do you see that there's a statement, the paragraph beginning, "As a consequence." That's the paragraph where the Debtor informed your lawyers that your access, quote, will be revoked effective Wednesday, December 30, 2020. Do you see that?

A Yes.

Q And the Debtor informed your lawyers that it was taking steps to revoke your access to the offices because the Debtor believed that you were interfering with the Debtor's business. Right?

A It doesn't say that here, but --

Q Well, look at the paragraph above, if we can. And I don't mean to -- I don't mean to, you know, play games, but the

paragraph above says specifically that, as a result of the conduct, your presence at the offices is being revoked because it's too disruptive to continued management. Do you see that?

A Yes.

Q So I'm not asking you if you agree with it, but there's no question that, on December 23rd, the Debtor told your lawyers that your access was being revoked as of December 30th because the Debtor believed that you were being a disruptive force in the offices. Right?

A Yes.

Q Okay.

MR. MORRIS: And if we can go to the last page, please. If we could just push it down a little bit, because I have this in the upper right corner. No, the other way. I'm sorry. Yeah. Right there.

BY MR. MORRIS:

Q And the Debtor told your lawyers, quote, any attempt by Mr. Dondero to enter the office, regardless of whether he is entering on his own or as a guest, will be viewed as an act of trespass. Do you see that?

A Yes.

Q So the Debtor's position was very, very, very clear to your lawyers as of January -- as of December 23rd. Is that fair?

A No.

Q The Debtor never -- no, you think -- is it -- are you aware of any exception that Debtor made in this letter that would allow you entry into the offices without protest by the Debtor?

A As I've stated before, my belief was, for the deposition on the 4th, I had no other way to electronically appear, I would have had to cancel, other than coming back to the main conference room at Highland. It looks like there's four days' difference, but with New Year's and the holiday and days off, there's really one business day difference between when I got kicked out and the deposition. I wouldn't have been able to attend the deposition otherwise if -- I didn't -- I still don't believe attending the deposition that you required was a trespass.

Q The Debtor never told you that you would be permitted to enter their offices after December 30th if you, in your own personal discretion, believed it was appropriate. Correct?

MR. WILSON: Objection, Your Honor. I'm going to object to this line of questioning because this doesn't have anything to do with the TRO and instead it's a letter dated December 23rd, 2020 from the Debtor's counsel.

THE COURT: Your response?

MR. MORRIS: Yeah. This is just so simple, Your Honor. The TRO prevents Mr. Dondero from violating the automatic stay. The automatic stay says that Mr. Dondero

cannot take any steps to control the Debtor's property.

The evidence is now in the record that the Debtor is a lease -- is the leaseholder on this space. The Debtor told Mr. Dondero not to enter the space because he was a disruptive force, and the Debtor told Mr. Dondero that if he attempted to enter the space for any purpose, that they would be viewing it as an act of trespass.

So, by entering into the Debtor's premises, by entering into the Debtor's property without the Debtor's consent, is a violation of the automatic stay.

As I said at the beginning of this, if this were the only thing, Your Honor, I probably wouldn't belabor the point. But it's -- it is just more evidence of his complete contempt for the Debtor and for the automatic stay and for the TRO. And I believe it's completely relevant.

THE COURT: All right. I'm going to --

MR. WILSON: Your Honor, my response to that is that he's now got the TRO and trying to invoke two different documents, one of which being 362 itself and the other being this letter, but Rule 65(d) states that a restraining order must describe in reasonable detail, and not by referring to the complaint or other document, the act or acts restrained or required.

THE COURT: Okay. I'm going to sustain the objection. Let's move on.

MR. MORRIS: Okay.

BY MR. MORRIS:

Q During the first week of January, you just walked right into the Debtor's office and sat for the deposition. Correct?

A Yes.

Q And you didn't have the Debtor's approval to enter their offices at any time in the year 2021. Correct?

A Not explicitly.

Q You didn't have the Debtor's approval to enter their offices to give a deposition. Correct?

A Not explicitly. Correct.

Q Now, --

MR. WILSON: Your Honor, I believe you sustained my objection, and I would renew it to the extent that Mr. Morris is trying to establish that entering the Debtor's property on January 4th was a violation of the temporary restraining order.

THE COURT: All right. Well, I think we have a legitimate issue whether the so-called trespass, the entry of Mr. Dondero onto the premises in early January, violated the explicit terms of the TRO, so I'm going to sustain the objection, and move on, please.

MR. MORRIS: Okay.

BY MR. MORRIS:

Q Mr. Dondero, in December, after the TRO was entered into,

you interfered with the Debtor's business, correct?
A No, I did not.
Q Well, one of the reasons that the Debtor evicted you is precisely because you were interfering with their business. Correct?
A No, I did not.
MR. MORRIS: Can we go back to Exhibit 27, please?
BY MR. MORRIS:
Q Do you see on the first page, at the bottom, there is an explanation about the Debtor's management of the CLOs?
A Yes.
Q And there's a recitation of the history where, around Thanksgiving, you intervened to block those trades?
A Yes.
Q And if we can continue, the next paragraph refers to a prior motion that was brought by K&L Gates on behalf of the Advisors and certain funds managed by the Advisors?
MR. MORRIS: If we keep going. Yeah.
THE WITNESS: Yes.
BY MR. MORRIS:
Q You were aware of that motion when it was filed, correct?
A Yes.
Q And you were -- you were supportive of making that motion. Right?
A Yes. Generally.

Q Okay.

MR. MORRIS: And just scroll down, down to the next paragraph.

BY MR. MORRIS:

Q The next paragraph says, quote, on December 22, 2020, employees of NPA and HCMFA.

MR. MORRIS: I'm sorry. I can't read it. If we can just push the language down. Let me try again.

BY MR. MORRIS:

Q (reading) On December 22, 2020, employees of NPA and HCMFA notified the Debtor that they would not settle the CLOs' sale of AVYA and SKY securities. Have I read that correctly?

A Yes.

Q NPA refers to NexPoint, right?

A Yes.

Q That's an entity that you largely own and control, correct?

A Yes.

Q And HCMFA refers to Fund Advisors, another advisory firm that you own and control. Correct?

A Yes.

Q On or about December 22, 2020, you personally instructed employees of the Advisors not to execute trades that Mr. Seery had authorized with respect to SKY and AVYA, correct?

A No. That's absolutely not true. I've corrected that

several times now.

Q Sir, you personally instructed employees of the Advisors not to execute the very trades that Mr. Seery wanted executed. Correct?

A Not on December 22nd. The week before Thanksgiving, yes. I respected the -- I respected the TRO and the week of Christmas trades that also gave a multimillion dollar loss to the Funds. I just asked Jason Post to look at the trades.

MR. MORRIS: Can we go to Page 76 of the transcript, please? Line 15 through Line 19.

BY MR. MORRIS:

Q Did you give this answer to this question? Question, "And you would agree with me, would you not, that you personally instructed the employees of the Advisors not to execute the very trades that Mr. Seery identifies in this email, correct?" Answer, "Yes."

Is that the answer you gave back on January 8th?

A I have corrected this half a dozen times.

Q Okay. When you said you corrected it, let me ask you this, is that because instead of saying that the letter shouldn't have referred to the refusal to settle trades, that -- that it would be more appropriate that you instructed Advisors' employees not to execute the trades?

A No, that is not correct.

MR. MORRIS: Can we go to Page 73, please?

BY MR. MORRIS:

Q Were you asked these questions and did you give these answers? Question, "And you personally instructed, on or about December 22, 2020, employees of the Advisors to stop doing the trades that Mr. Seery had authorized with respect to SKY and AVYA. Right?" Answer, "Yeah. Maybe we're splitting hairs here, but I instructed them not to trade them. I never gave instructions to settle trades that occurred, but that's a different ball of wax." "Okay." Question, "But you did instruct them not to execute trades that had not yet been made. Right?" Answer, "Yeah. Trades that I thought were inappropriate for no business purpose, I -- I told them not to execute."

Was that truthful testimony at the time you gave it?

A No. It's -- this is part of the -- this is part of the clarification from 6 or 8 lines ago or 10 or 15 lines ago. It's all the same. I was in a truly emotional disapproving state during this part of the deposition. I believed it was against the Advisers' Act and Seery was intentionally causing harm to the CLOs. And I stopped the trades around Thanksgiving. I called the traders. I specifically stopped them.

Once the TRO was in effect, I respected the TRO. I respected the Court. I did not call anybody. There's no evidence of me calling anybody. No one said I called anybody.

I just sent one email to Jason Post, a non-Highland employee, that he should look at the trades. And all this gobbledygook is -- is -- for the last 10 or 15 lines is the same question that I've clarified half a dozen times.

Q Okay. That's fine. Let's talk about some of your communications with the Debtor's employees.

MR. MORRIS: I apologize. Before I -- I'm going to move to the next and last topic, Your Honor, but this will be a little bit -- while longer, and I just wanted to check and make sure, I don't know if the Court wanted to take a short break. I'm okay. Or if the witness did. We've been going for a while.

THE COURT: All right. Let's take a ten-minute break. It's 11:40 Central time. We'll come back at 11:50.

MR. MORRIS: Okay. Thank you, Your Honor.

THE CLERK: All rise.

(A recess ensued from 11:40 a.m. until 11:52 a.m.)

THE CLERK: All rise.

THE COURT: Please be seated. All right. We are going back on the record in the Highland matter.

Mr. Morris, are you ready?

MR. MORRIS: I am, Your Honor.

THE COURT: All right. Mr. Dondero, are you ready to go forward? (No response.) Mr. Dondero, are you there?

MR. WILSON: Mr. Dondero will be on his line

momentarily. He's attending from a different room so we don't have feedback issues.

THE COURT: All right.

(Pause.)

THE COURT: All right. Are we almost ready, Mr. Wilson? You're on mute.

MR. WILSON: I believe so, Your Honor. He -- he walked out of our room right before you came on and said he was going to run to the restroom and go back to his room. So I think it should just be a second.

(Pause.)

THE WITNESS: I'm back.

THE COURT: All right. Mr. Dondero, you're still under oath.

Mr. Morris, you may proceed. (Pause.) Mr. Morris, now you're on mute.

MR. MORRIS: Thanks for letting me know.

DIRECT EXAMINATION, RESUMED

BY MR. MORRIS:

Q Mr. Dondero, you understand that the TRO prevented you from communicating with any of the Debtor's employees except as it specifically related to shared services to affiliates owned or controlled by you. Correct?

A Well, shared services broadly, as I would -- I would describe it. And -- yes. But -- but the -- the proposal for

quite a while, for months, was shared services partly to affiliates but partly to a new entity also.

MR. MORRIS: Okay. Can we pull up Exhibit 11, please, from the Docket No. 128? And if we can go to Page -- the bottom of Page 2, just to make sure that we're on the same point here.

BY MR. MORRIS:

Q Paragraph 2 says, James Dondero is temporarily enjoined and refrained from, little (c) at the bottom, 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.

Do you see that?

A Okay. That's correct as far as it goes, but yes.

Q Okay. And there's nothing ambiguous to you about the language that's in the order, correct?

A That's correct. That -- yes.

Q And you personally don't have a shared services agreement with the Debtor, do you?

A Not at this -- no -- with the Debtor. No, I don't. Not with the Debtor.

Q Okay.

A No.

Q And the Bonds Ellis firm only represents you in your individual capacity in the bankruptcy case, right?

A Yes.
Q The Bonds Ellis firm doesn't represent any entity that is owned or controlled by you. Right?
A Correct.
Q So the Bonds Ellis firm doesn't represent any entity owned or controlled by you that's party to a shared services agreement with the Debtor. Correct?
A I believe that's correct.
Q Okay. And Douglas Draper is a lawyer who represents the Get Good and Dugaboy Investment Trusts. Right?
A Yes.
Q And you're a lifetime beneficiary of each of those trusts, correct?
A For Dugaboy, yes. For Get Good, I'm not sure.
Q Okay. To the best of your knowledge, neither the Get Good nor the Dugaboy Investment Trust ever had a shared services agreement with the Debtor, correct?
A No. They didn't have a formal agreement.
Q Okay. And Scott Ellington is not your personal lawyer. Is that right?
A Not in this bankruptcy.
Q Okay. He was not your personal lawyer in December 2020, correct?
A No.
Q He never represented you personally. Scott Ellington, as

a human being, never represented Jim Dondero as a human being at any time after the petition date. Fair?

A I don't know how to answer that with regard to settlement counsel. I -- in his role as settlement counsel, I'm not a lawyer, who does he work for when he's been tasked with being settlement counsel and he can talk to all parties on behalf of all parties in order to get a deal done? I don't know -- I don't know how to describe that role.

Q To the best of your knowledge, has Mr. Ellington ever been employed by anybody after the petition date other than the Debtor?

A I don't believe so.

Q Did you ever retain Mr. Ellington to represent you?

A Not -- not formally, but in his role as settlement counsel, I believe he was in some ways trying to represent all parties to try and kick a deal to the altar, so to speak.

Q Did he owe you a duty?

A I don't think in a classic -- I don't -- that -- I don't know. That's a legal -- I don't want to make a legal interpretation.

Q You've represented -- you've retained and engaged lots of lawyers and law firms over time. Is that fair?

A Yes.

Q Did you engage or retain Mr. Ellington at any time after the petition date?

A Well, I mean, very recently, he's heading up our shared services group or our shared services entity. But again, I don't know how to answer. The role of settlement counsel was an in-between role that I don't think it was documented formally, so I don't know how to -- I don't know how to answer that.

Q When did -- have you -- has Mr. Ellington been hired by you or any company you own or control since the time that he was terminated in early January?

A No. But he's the owner of the entity that houses a lot of the employees that migrated over.

Q Okay. So I want to -- I want to try to clear this up. I'm not asking you about settlement counsel. It's a very, very specific question. Did James Dondero ever retain or engage Scott Ellington to represent him? Did you ever engage or retain Scott Ellington for the purpose of providing legal advice to you?

A And that's the question I'm struggling with, because I believe, as settlement counsel, he was representing -- trying to represent multiple parties to strike a deal.

Q Did you ever pay him any money for services rendered to you in your individual capacity?

A No.

Q Did you ever give him anything of value in exchange for legal services rendered by him to you in your individual

capacity?
A No.
Q Did you ever sign an engagement letter with Scott Ellington pursuant to which he provided legal services to you in your individual capacity?
A No.
Q How about Isaac Leventon? Did Isaac Leventon ever represent you in your individual capacity?
A You mean since the advent of the bankruptcy, right? Yeah, no.
Q Okay. Let's say after the TRO was in place. Did Mr. -- did you ever retain or engage Mr. Leventon to provide legal services to you in your individual capacity?
A No.
Q Between December 10, 2020, the date the TRO was entered, and January 8, 2021, excuse me, the date the TRO was converted to a preliminary injunction, you communicated with certain of the Debtor's employees about matters that did not concern shared services, correct?
A No.
Q No, it's your testimony that all of your communications concerned shared services?
A Yes. Yeah, and shared services or the pot plan or in his go-between role where he would be used as a messenger by Seery or by me to get to Seery because I hadn't communicated

directly with Seery in six or seven months other than that interaction around Thanksgiving.

Q Sir, between the time the TRO was entered and the preliminary injunction was entered, you communicated with certain of the Debtor's employees about matters that were adverse to the Debtor's interests, correct?

A Absolutely not. I respectfully disagree with that characterization whenever it occurs.

Q Okay. After the TRO was entered, you and your lawyers at Bonds Ellis worked with Scott Ellington to identify a witness who would testify on your behalf in support of a motion against the Debtor, correct?

A I don't know what the witness was for. I know there was -- I know there was some back and forth on the witness, but I don't remember what the witness was for.

Q All right. Let's just see if we can get through this quickly.

MR. MORRIS: Can we put up Exhibit 48, please?

BY MR. MORRIS:

Q So this is December 11th. Do you see that?

A Yes.

Q The day after the TRO was entered into, correct?

A Yes.

Q It's sent from Mr. Lynn to Mr. Ellington and is entitled "Testimony," correct?

A Yes.
Q Mr. Ellington was the Debtor's general counsel at the time, correct?
A Among other things, yes.
Q In fact, Mr. Ellington was the Debtor's general counsel throughout the month of December 2020, to the best of your knowledge, correct?
A Yes, but not solely, yeah.
Q Was he -- was he a general counsel for somebody else?
A No, but he was also settlement counsel and he was also the go-between with Seery.
Q Sir, really, I respectfully ask that you listen to my question. To the best of your knowledge, Mr. Ellington was the Debtor's general counsel throughout the month of December 2020, correct?
A Yes.
Q Can you please read Mr. Lynn's email out loud?
A (reading) Scott, you are going to talk with John Wilson of our firm or have JP do so. He needs to speak today so we know who to put on the witness and exhibit list and will be waiting for a call. Thanks.
Q Now, again, the Bonds Ellis firm doesn't represent any party to a shared services agreement, correct?
A Well, they represent me and I'm on the other side of the shared services agreement we were trying to put together.

Q You're not a party to shared services agreements, are you, sir?
A No, but the solution that everybody was negotiating that fell apart that we had a hearing on a couple weeks ago, everybody was trying hard in good faith until negotiations failed to migrate the shared services in a way that would have resulted in $3 or $5 million to the Debtor. But the negotiations fell apart.
Q Sir, in this email from Mr. Lynn in which you're copied to the Debtor's general counsel the day after the TRO is entered, your lawyer is asking the Debtor's general counsel to have a conversation about a witness and exhibit list that your lawyers were putting together. Fair?
A That appears to be what it's about.
Q Okay. And the next day, the topic of identifying a witness who would testify on your behalf continued, correct?
A I don't know.
MR. MORRIS: Can we go to Exhibit 49, please?
BY MR. MORRIS:
Q This is an email string from Saturday evening, December 12th, in which the Bonds Ellis firm's -- firm brings you and Mr. Ellington into the discussion about identifying a witness who would testify on your behalf at the upcoming hearing, correct?
A Yeah, but I -- okay. I have no idea what this refers to,

1 though, or what this is in regard.
2 Q Well, if you look at Mr. Assink's email at the bottom
3 dated December 12, do you see the subject is "Witnesses for
4 Hearing"? Do you see that?
5 A Yes.
6 Q And he asks Mr. Wilson whether Mr. Wilson had heard from
7 Ellington or Sevilla yet. Do you see that?
8 A Yes.
9 Q And he -- he says that he needs to let the other side know
10 if you're going to call one of them as a witness. Isn't that
11 right?
12 A Yes. I can read all that. But again, I don't know -- I
13 don't know -- I have no idea what witness for what, if it
14 represents -- and what the witness would represent and if it
15 is in any way adverse to the Debtor. I have no idea.
16 Q Well, you're adverse to the Debtor, are you not?
17 A Well, I do not believe so. I mean, I -- I've been doing
18 everything possible to try and preserve this estate as it's
19 getting run into the ground. But no, I mean, I've -- I've
20 done everything to try and maximize value.
21 Q Well, Mr. Lynn brings you and Mr. Ellington in the
22 conversation on Saturday, December 20th, on the topic of
23 witnesses for a hearing, right? That's -- that's what's
24 happening at the top of the page? You and Mr. Ellington are
25 now included, correct?

A Okay.
Q It's true; isn't that right?
A Right.
Q Okay. And this is the debate over whether to include Mr. Ellington or Mr. Sevilla on your witness list, correct?
A Again, I don't know with regard to what or for, you know -- I don't know if it's background context. I don't know if it's corporate rep. I don't know -- I don't know -- I have no idea what this is about.
Q Okay. Do you recall that the issue of identifying a witness who would testify on your behalf was resolved later that night?
A No.
MR. MORRIS: Can we go to Exhibit 17, please?
BY MR. MORRIS:
Q And if we start at the bottom, you'll see there's an email from Mr. Lynn to you and other lawyers at Bonds Ellis where he says the possible deal with the Debtor went nowhere, and I think he meant to say it looks like trial. Is that a fair reading of Mr. Lynn's email to you on the evening of December 12th?
A Yes.
Q And then if we scroll up he says, quote, that said, we must have a witness now.
Do you see that?

A Yes.
Q And the "we" there refers to you and the Bond Ellis firm, right? You guys needed a witness now. Is that fair?
A I don't know.
Q Well, if you look -- if you look up at the top, Mr. Ellington responds. So this is an email from Mr. Ellington to you and your personal lawyers at Bonds Ellis. Do I have that right?
A Yes.
Q And in that email, Mr. Ellington responds to Mr. Lynn's request for a witness and he identifies Mr. Sevilla, correct?
A Yes.
Q And Mr. Ellington told your lawyers that he would instruct Mr. Sevilla to contact them the first thing in the morning, correct?
A That seems to be what it says.
Q Okay. Is there any exception in the TRO that we looked at that you're aware of that would allow you and your lawyers to communicate with Mr. Ellington for the purpose of having Mr. Ellington identify a witness who would testify on your behalf against the Debtor?
A Again, I go back to his role as settlement counsel and go-between with Seery. If you look at the subject line here, it says "Possible Deal." I -- I think this is all perfectly within the scope and not adverse to the Debtor, but I'm

willing to be educated if you think otherwise.

Q Sure. I'll try. Let's go back to Mr. Lynn's email at the bottom. The email is titled, Possible Deal, and what he says is, quote, the possible deal with the Debtor went nowhere. It looks like trial.

Does that refresh your recollection that this string of communications had nothing to do with a deal, but it had to do with a trial, and it specifically had to do with your lawyers communicating with Mr. Ellington to identify a witness who would testify on your behalf against the Debtors?

A That's not how I view this and that's not how I view Ellington's role.

Q Okay. I'm going to ask you again. Very simple. And I'll put it back up on the screen if you want.

MR. MORRIS: In fact, let's do that. Let's go back to Exhibit 11. And let's look at Paragraph 2(c).

BY MR. MORRIS:

Q And if you can tell me, right, Paragraph 2(c) prohibited you from communicating with any of the Debtor's employees except as it specifically relates to shared services currently provided to affiliates owned or controlled by you. Do you see that?

A Yes.

Q Okay. Does that provision authorize you and your lawyers to communicate with the Debtor's general counsel for the

purpose of identifying a witness who would testify on your behalf, your personal behalf, against the Debtor?

A Again, we haven't established that it's on my behalf against the Debtor, so I can't say -- I can't say yes to that. And again, you know, Scott Ellington, up until the day he was terminated, was settlement counsel and go-between for Seery, and that role never changed, even after the TRO was put into place. And Seery even acknowledged it after the TRO was put in place and continued to use Ellington as a go-between.

Q So, so the Bonds Ellis --

THE COURT: All right. All right. Let me just interject again,--

MR. MORRIS: -- firm represents --

THE COURT: -- because here we go again with the narrative answer way beyond yes or no. Here is a big, big concern I have. You both estimated three and a half hours, but if I continue to get the long narrative answers, I don't think it's fair to count all of this against Mr. Morris. Okay? So, Mr. Wilson, what can we do about this? We've had this witness on the stand since 10:24 minus 14 minutes, so we're getting close to two hours. But again, you know, I've been, I think, extremely overly-patient with allowing these narrative answers.

So, Mr. Wilson, can you help us out here and -- I mean, I don't know how many more times I can say it, that yes, no, and

then when it's Mr. Wilson's time to cross-examine you, to examine you, Mr. Dondero, that's when you can give all of these more fulsome answers. All right? We're going to be here much beyond today if we don't get this under control. All right?

So, Mr. Wilson, --

MR. MORRIS: I appreciate --

THE COURT: Mr. Wilson, please make sure your client understands this. Can you add to this? Can you let him know you're going to examine him later?

MR. WILSON: Yeah, I agree -- I agree with that, Your Honor, but I also would just state that a lot of Mr. Morris's questions don't call for a simple yes or no answer, and I think Mr. Dondero maybe needs to change his response to "I can't answer that yes or no."

THE COURT: Well, you can't coach your client like that. Okay?

MR. MORRIS: Your Honor? Your Honor, with all due respect, every single question I'm asking is a leading question. When it ends "Is that correct?" or "Is that right?" he either says yes, it is, or no, it's not.

THE COURT: All right.

MR. MORRIS: Then I'll have the decision as to what to do at that point. Every single question I'm asking is leading.

THE COURT: All right. Well, I tend to agree with that, Mr. Wilson. All right?

So, Mr. Dondero, you've heard us say it a few times now. Yes. No. I understand you want to say more in many situations, but Mr. Wilson can get at that later when he examines you. Okay?

Continue, Mr. Morris.

MR. MORRIS: Thank you, Your Honor.

BY MR. MORRIS:

Q On this series of emails that we've looked at, these last three exhibits that are to and from the Bonds Ellis firm, the Bonds Ellis firm only represents you in your individual capacity, correct?

A Correct.

Q And the Bonds Ellis firm was communicating with Mr. Ellington in order to have Mr. Ellington identify a witness for their witness and exhibit list, correct?

A Yes.

Q Okay. At the same time you and your lawyers were communicating with Mr. Ellington about identifying a witness who would testify on your behalf, you and your lawyers were also engaged in discussions about entering into a common interest agreement among you, certain entities in which you have an interest, and certain of the Debtor's then-employees, correct?

A I have no idea -- conversations like that happened. I don't know when they occurred.
Q Okay. Let's see if we can put a time on it.
MR. MORRIS: Can we please put up Exhibit 24?
BY MR. MORRIS:
Q And starting at the bottom, you'll see there's an email string from Deborah Heckin (phonetic) on behalf of Douglas Draper. Do you see that?
A Yes.
Q And this email string is dated December 15th, right after the TRO was entered into?
A Why isn't this privileged?
Q We'll talk about that in a moment, but --
A What was your question?
Q -- be that as it may, this email string is dated December 15th, after the TRO was entered into, correct?
A Yes.
Q Okay. And you'll see that Mr. Draper, or at least on his behalf, attaches a form of a common interest agreement. Do you see the reference to that in his email?
A Yes.
Q Okay. And Mr. Lynn responds, if we scroll up, and he includes Scott Ellington on this email, right?
A Yes.
Q And Mr. Lynn informs Mr. Ellington and his colleagues that

Bryan or John would review the agreement. Is that -- is that right?

A Yes.

Q And if we scroll up, Mr. Assink then later that day sends your lawyer's comments -- sends your lawyer's comments to his colleagues and to Mr. Ellington, right?

A Yes.

Q And Mr. Ellington then forwards the revised common interest agreement to Mr. Leventon, right?

A Yes.

Q As contemplated at that time, you and the Get Good Trust and the Dugaboy Investment Trust and certain of the Debtor's then-employees were engaged in discussions about entering into a common interest agreement, correct?

A Yes.

Q And those discussions continued for a while in December; isn't that right?

A I believe so.

Q You're familiar with the law firm Baker & McKenzie, correct?

A Generally.

Q That firm has never represented you or any entity in which you have an ownership interest, correct?

A Boy, I don't know. It depends on how far back you went, but I don't know.

Q To the best of your knowledge, Baker and McKenzie has never represented you or any entity in which you have an ownership interest, correct?
A Don't know.
Q Okay. In December, there was an employee group. There was a group of Debtor employees that were known as the Employee Group; is that right?
A I believe there was a general employee group and then there was a senior management group.
Q Okay.
A I don't know what they were called.
Q And Mr. Ellington and Mr. Leventon were part of the group who were considering in December changing their counsel from Winston & Strawn to Baker & McKenzie, correct?
A I -- I only have -- I don't know for sure. That sounds correct, but I don't know for sure.
Q All right. But that was your belief at the time, right?
A I don't remember.
Q Well, because of that, you specifically asked Mr. Leventon for the contact information for the lawyers at Baker & McKenzie, right?
A I remember asking Isaac for Clemente's number. I may have asked -- yeah, yeah, I think I -- I needed to speak to somebody at some point over there, so I did ask -- I asked somebody for the number. If I asked Isaac, it could have

been.

Q Okay.

MR. MORRIS: Can we put up Exhibit 20, please?

BY MR. MORRIS:

Q And this is -- that's Mr. Leventon at the top. Is that right?

A Yes.

Q And on December 22nd, you specifically asked him to send you Mr. Clemente's contact information as well as the Baker & McKenzie contact information, correct?

A Yes.

Q And this was a week after the -- after your lawyers provided their comments to the common interest agreement and Mr. Leventon -- Mr. Ellington forwarded the draft agreement to Mr. Leventon, right? That was December 15th, so this is a week later?

A Yes.

Q And Mr. Leventon was an employee of the Debtor at the time, correct?

A Yes, I believe so.

Q And you specifically wanted the contact information from Baker & McKenzie in order to help Mr. Draper coordinate the mutual shared defense agreement that was the subject of the December 15th email, right?

A I don't know if that was the purpose.

MR. MORRIS: Can we go back to the transcript line, Line -- Page 97, please? Down at Line 16. To be clear, I'm reading at the January 8th hearing from the deposition transcript.

BY MR. MORRIS:

Q But can you confirm for me, sir, that when asked the following question, you gave the following answer? Question, "Why did you want the Baker & McKenzie contact information?" Answer, "I was trying to help Draper coordinate the mutual shared defense agreement, period."

Is that your -- was that the answer that you gave in your deposition?

A Yes.

Q And is that the answer that you confirmed at the preliminary injunction hearing on January 8th?

A I don't remember.

Q Are you aware of any exception in the TRO that would permit you and your lawyers to communicate with the Debtor's employees about entering into a common interest agreement?

A To the extent Scott Ellington was continuing as settlement counsel, I -- I viewed these types of things as very appropriate.

Q The only exception in the TRO was for shared services, right?

A Shared services, yes, but shared services broadly

incorporates a lot of things, in my opinion.
Q And in your opinion, it's perfectly appropriate for you to be discussing, after a TRO is entered that prohibits you from discussing anything with any of the Debtor's employees except for shared services, in your opinion, it's perfectly appropriate for you and your lawyers to be engaged in conversation with the Debtor's employees about possibly entering into a common interest agreement? That's your testimony?
A Yes.
Q Okay. Let's go back in time, December 15th. Do you recall writing to Mr. Lynn and Mr. Draper and Mr. Ellington about a conversation you had with Mr. Clubok, UBS's counsel?
A I don't remember, but I'm willing to be refreshed.
Q Okay.
MR. MORRIS: Let's do that, and put up Exhibit 50, please. Five zero.
BY MR. MORRIS:
Q This is an email that you wrote, correct?
A (no immediate response)
Q This is your email, sir?
A Yes.
Q Okay. Why did you decide to -- this is an email about a conversation that you had with Mr. Clubok, right?
A Yes.

Q And you understood at the time that Mr. Clubok represented UBS, right?
A Yes.
Q And at the time, you knew that UBS was going to appeal the settlement that had been entered into between the Debtor and Acis, correct? I'm sorry, between the Debtor and the Redeemer Committee?
A Yes.
Q Okay. And so the Debtor had entered into a -- you knew that the Debtor entered into a settlement with the Redeemer Committee, right?
A Yes.
Q And that settlement was approved by the Court, correct?
A I don't remember if it was ever scrutinized at all. It wasn't -- I don't know if it was approved.
Q Well, this email is about the appeal of the approved order, the order approving the settlement, right?
A Appears to be.
Q Okay. And so UBS was challenging the very agreement that the Debtor wanted to enter into, right?
A Yes.
Q And you -- and you decided, after the TRO was entered into, to bring Scott Ellington into the discussion between you and your lawyers about supporting UBS and otherwise getting evidence against Mr. Seery. Is that right?

A We already had the evidence against Seery not seeking court approval, being inept in asset sales. We already had all that evidence.

Q But you're bringing -- you voluntarily brought Mr. Ellington into this discussion; isn't that right?

A Because Ellington was settlement counsel. We were trying to push -- he was trying to push all parties to some kind of reasonable settlement before the estate got wiped out by tripling everybody's claims.

Q And you thought it would be helpful to bring Mr. Ellington into a conversation where you're discussing with your lawyers supporting UBS in their objection to the Debtor's settlement and to -- and to give him evidence of Seery's ineptitude and improper asset sales? You think that was going to advance the cause of the settlement, right?

A Yes.

Q Okay. And again, there's no -- there's no exception in the TRO for settlement, right? That's just your own thinking, fair?

A Since the summertime, more than a few people have testified Scott Ellington was settlement counsel.

MR. MORRIS: I move to strike.

THE COURT: Sustained.

BY MR. MORRIS:

Q Is there anything in TRO that you are aware of that

authorizes you to speak with Mr. Ellington in his capacity as so-called settlement counsel?

MR. WILSON: Objection to the extent it calls for a legal conclusion.

THE COURT: Overruled.

MR. MORRIS: I'll reframe the question. I'll reframe the question, Your Honor.

THE COURT: Okay.

BY MR. MORRIS:

Q Do you have any -- is there anything that you are aware of in the TRO that would permit you to speak with Mr. Ellington as settlement counsel?

A I think it's trickery to try and say it takes that away. That's my opinion.

Q Okay. But other than your opinion, you can't point to anything in the TRO that you're relying upon that would permit you to speak with Mr. Ellington as settlement counsel. Fair?

A Other than broadly, settlement or not settlement all filters into shared services and whether or not we buy the employees, don't buy the employees, etc.

Q Okay. This email has absolutely nothing to with shared services, right?

A It's one step removed but ultimately leads into it.

Q The settlement between the Debtor and the Redeemer Committee has nothing to do with shared services, correct?

A Ultimately, the settlement with Redeemer and Clubok had everything to do with shared settlement. With shared services.

Q All right. Maybe your lawyer will put that up on the screen later.

After the TRO was entered, you also communicated with one or -- one of the Debtor's employees to make sure that she didn't produce the Dugaboy financial statements to the U.C.C., correct?

A Yeah. They weren't properly requested, and they weren't requested of me.

Q Sir, you communicated with one of the Debtor's employees to make sure she did not produce the Dugaboy financial statements to the U.C.C. without a subpoena, correct?

A That was my -- the advice of counsel to say exactly that in response, and I think ultimately -- I think ultimately counsel was okay with it. They just wanted to review the documents first.

Q Dugaboy's financial statements were maintained on the Debtor's server, correct?

A Yeah, and I think most of them weren't even password-protected.

Q You communicated with at least one employee concerning the production of the Dugaboy financial statements, correct?

A Under advice of counsel, yes.

Q And that's Melissa Schrath, right?
A Yes.
Q Ms. Schrath was employed by the Debtor as an executive accountant in December 2020, correct?
A Yes, solely working on mine and Mark Okada's financials.
Q She's the one -- she's the Debtor employee who maintained the Dugaboy financial statements, right?
A Yes.
Q And on December 16th, after the TRO was entered, you communicated with Ms. Schrath for the very specific purpose of instructing her not to produce the Dugaboy financials without a subpoena, correct?
A I gave her a legal response that came directly from my lawyers from an improper -- what my lawyers viewed as an improper request improperly done.
Q Dugaboy had their own lawyer, right? Mr. Draper?
A I -- uh, I believe -- I believe he was coming on board or up to speed around that time.
Q Yeah. Why didn't Mr. Draper take a hold of this issue? Why did you do that?
A I think, again, I think he was just coming up to speed at that point. I think ultimately he was okay with it; he just said he wanted to review the documents first. But I think he was agreeable in trying to work with you guys.
Q He was, in fact. So why did you, instead of letting him

do his job on behalf of his client, the Dugaboy Investment Trust, why did you, after the TRO was entered, communicate with the Debtor's employees to give instructions not to produce the Dugaboy financial statements without a subpoena? Why did you do that?

A Those words and requiring a subpoena were the specific legal advice I got from counsel at Bonds Ellis before Draper was up to speed on the issue. And then when Draper got up to speed on the issue, which I think was only a couple days later, he tried hard to work with you guys.

Q And he never asked for a subpoena, did he?

A I -- I don't believe he did. I think he asked to just review stuff first.

Q Did you ever tell him that you had made a demand for a subpoena, that -- withdrawn. Did you ever tell Mr. Draper that you had instructed one of the Debtor's employees not to produce the documents without a subpoena?

A I -- I think Draper was fully -- fully informed of everything that happened with regard to the Dugaboy financials before he got involved. Yes.

Q So, so for all of the communications that occur after the time that you instruct Ms. Schrath not to produce the documents without a subpoena, would it surprise you to learn that Mr. Draper never once mentions the subpoena? Never once mentions that the documents shouldn't be produced without a

subpoena?
A Different -- different lawyers have different views at different times. I don't know what else to tell you.
Q All right. Let's just confirm for the record.
MR. MORRIS: Can we please put up Exhibit 19?
BY MR. MORRIS:
Q And that's Ms. Schrath at the top; is that right?
A Yes.
Q And this is, if we scroll down a bit, this is where you give her the instruction after the -- you communicate with her -- withdrawn. This text messages show that you communicated with Ms. Schrath, one of the Debtor's employees, after the TRO was entered into, for the purpose of instructing her not to provide the Dugaboy details without a subpoena, correct?
A Yes.
Q There is no exception in the TRO that you are aware of that permits you to communicate with any of the Debtor's employees about the production of documents, right?
A Regarding a personal entity that's not in bankruptcy and not subject to the estate, it -- this -- I believe this was appropriate. And again, the advice I got from counsel.
Q Sir, are you aware of anything in the TRO that permits you -- is there any exception in the TRO that permits you to give instructions to one of the Debtor's employees about whether and how to produce documents that are on the Debtor's system?

MR. WILSON: Objection. It calls for a legal conclusion.

THE COURT: Overruled.

THE WITNESS: I don't know.

BY MR. MORRIS:

Q Okay. You can't point to anything as we sit here right now, right?

A Don't know.

Q And again, Dugaboy is not party to a shared services agreement, correct?

A Not formally. It is -- I think -- I believe it is now.

Q On the same day that you were instructing Ms. Schrath not to produce Dugaboy financials without a subpoena, you were also communicating with Mr. Ellington about providing leadership with respect to the coordination of counsel for you and the various entities owned and controlled by you. correct?

A I don't -- I think that may be a mischaracterization of the leadership email. Let's go to that, please.

Q Okay.

MR. MORRIS: Exhibit 18, please.

BY MR. MORRIS:

Q On December -- December 16th, Mr. Draper wrote to you, at the bottom of the exhibit, Mr. Draper wrote to you and to Mr. Lynn, correct?

A Yep.
Q And again, Mr. Draper represents Dugaboy and Get Good, right?
A Yep.
Q And the subject matter of his email is a List for a Joint Meeting. Do you see that?
A Yes.
Q And Mr. Draper proceeded to list a number of lawyers and entities, correct?
A Yes.
Q And first is John Kane, counsel to the DAF, right?
A Yes.
Q And then you have George Zarate (phonetic), who was counsel to HCM Advisor, correct?
A Yes, sir.
Q And third is Lauren Drawhorn, counsel to NexPoint, correct?
A Yes.
Q Fourth is Mark Maloney, counsel to CLO Funding, correct?
A Yes.
Q And last is David Neier, who was then counsel to certain of the Debtor's employees, correct?
A Yes.
Q And Mr. Draper specifically asked you and Mr. Lynn whether anyone should be added or removed from the list, correct?

A Yes.
Q And neither you nor Mr. Lynn identified anyone to be added or removed, correct?
A No.
Q And then you, you forwarded the email string to Mr. Leventon -- Ellington, correct?
A Yes.
Q And so you're the one who's sharing your attorney-client communications with Mr. Ellington, right, in this email?
A Yes.
Q Okay. And he's not your lawyer, right?
A He's settlement counsel.
Q Yeah. Okay. Why don't you read what you wrote to Mr. Ellington?
A (reading) I'm going to need you to provide leadership here.
Q But reviewing this email, at least as of the January 8th hearing, you had no recollection of why you forwarded the email string to Mr. Ellington and why you told him you needed him to provide leadership, correct?
A Correct.
Q But Mr. Ellington did respond; isn't that right?
A Yeah. I think he just said "I'm on it" or "I'll handle it" or something.
Q Okay. Are you aware of any exception in the TRO that

would permit you to ask Mr. Leventon -- Ellington to provide leadership in the context of working on a joint meeting that would include lawyers for you and any entities -- and various entities owned or controlled by you?

A I -- I don't know. I don't have any answers other than some of the narrative ones I've given before.

Q Okay. And again, there's no lawyer on this whole email string that represents any entity that's subject to a shared services agreement, right?

A That's not true.

Q I apologize. Let me rephrase the question. There's no lawyer who sent, received, or were copied on any of these emails who represents an entity that was subject to a shared services agreement, correct?

A That's not true.

Q Well, does Mr. Lynn or Mr. Draper represent an entity who's subject to a shared services agreement?

A No, but the other lawyers referenced in the text of the email, almost all of them are.

Q Right. I'm just -- I'm asking you very specifically just about the people to whom this email string was sent or received from. Right? Sent to or received from. And they only include Mr. Draper and Mr. Lynn, right? They're the only ones who were --

A Yes.

Q Right?
A Yes.
Q And neither one of them represents a party to a shared services agreement, right?
A Not a formal one, correct.
Q Right. So there's nobody on this email string where you're asking Mr. Ellington to provide leadership, there's nobody who's sending or receiving this email string that represents a party to a shared services agreement, right?
A No formal -- yes. Those three people, there's no formal shared services agreement.
Q Later on in December is when you learn that Mr. Seery was again seeking to trade in certain securities held in the CLOs, correct?
A Yes.
Q And as soon as you learned that Mr. Seery was again seeking to trade in certain securities, you sent an email to Mr. Ellington letting him know that, right?
A Oh, yes. Yes.
Q And this is the information that caused you to personally instruct employees of the Advisors not to execute the trades that Mr. Seery had authorized, correct?
A No. We've gone through this before. I did nothing in the December 20th trades to do anything to interrupt or speak with any Highland employees. I sent one email to Jason Post to say

you should look into this. It was -- it was a completely different interaction. It was respectful of the TRO. It was completely different than the November trades.

But the trades were the same. He handed a couple million-dollar lawsuits to the Funds, he sold things during the least liquid week of the year, the day before Thanksgiving and the day before Christmas, and he was purposely trying to push losses to investors.

MR. MORRIS: I move to strike, Your Honor.

THE COURT: Sustained. And I'm just letting you know it's 12:50. We're taking a break at 1:00 o'clock.

MR. MORRIS: Yeah, that's fine. I think I should be done right there, Your Honor.

BY MR. MORRIS:

Q The next day, on December 23rd, you had a call among you, Scott Ellington, Grant Scott, and certain lawyers representing various entities you own and control, correct?

A Yeah. I don't remember specifically, but yeah, I remember a couple conference calls.

Q Yeah.

MR. MORRIS: Can we go to Exhibit 26, please?

BY MR. MORRIS:

Q You'll see the subject matter is "It appears Jim will be available for a 9:00 a.m. Central time conference call."

Do you see that?

A Yes.
Q Okay. And this email string is between and among employees of the Advisors, Grant Scott, Scott Ellington, and outside counsel to the Advisors, correct?
A Can you scroll up or down? I mean, I --
Q Sure.
A What was the question again regarding the people?
Q Yeah. The folks on this email string are employees of the Advisors, outside counsel to the Advisors, and Scott Ellington, right?
A I'm sorry. I'm struggling to see Ellington on this one.
Q Oh, it's at the top. There you go.
A Okay.
Q And Mr. -- and Grant Scott, right?
A Yes.
Q And Grant Scott is the director of the DAF, correct?
A Yes.
Q And this is the exact same time that K&L Gates are sending the letters to the Debtor concerning the CLOs, correct?
A I believe it's around that same time.
(Interruption.)
MR. MORRIS: Your Honor, somebody's not on mute.
THE COURT: Yeah, who is that, Mike? Can you tell?
THE CLERK: It was one of the call-ins. I just muted them.

THE COURT: Okay. It was one of the call-ins. We've muted them.

MR. MORRIS: Okay. Yeah.

BY MR. MORRIS:

Q It's your understanding that those letters -- in those letters, the Advisors and Funds represented by K&L Gates asked that the Debtor not trade in securities on behalf of the CLOs, correct?

A Yes.

Q And this was just days after the Court dismissed as frivolous the motion that they brought seeking the exact same relief?

A I believe it was about that same time frame, yes.

Q Okay. So, all in this same time frame, December 22nd, December 23rd, K&L Gates is sending those letters and Mr. -- and Mr. Ellington is participating in conversations with you and lawyers for the Advisors and Mr. Scott, right? This is all happening in the same two or three days?

A I continue to struggle to see the issue, but yes.

Q Okay. You were aware of the letters that K&L Gates sent at the time they sent them, correct?

A Yes.

Q Okay. And despite the outcome at the December 16th hearing, you were supportive of the sending of those letters, right?

A I still believe they are bona fide. I still believe we just -- maybe not as good a presentation to make the Court understand. But yes, I still believe they're bona fide and were done in good faith.

Q Okay. And so you think it was a problem with presentation at that hearing; is that right?

A Yeah. I mean, you have -- yes. I believe you have no business purpose booking losses for investors that asked that their accounts not be traded while they were being migrated, and instead they were handed a bunch of losses and then they've been, they've, in a backdoor way, lost control by the Advisor buying assets without court approval to block the DAF and the retail funds' rights. I mean, it's craziness.

Q And then you brought Mr. Ellington into the discussion about these letters specifically; isn't that right?

A No. I -- I remember my main --

MR. MORRIS: Your Honor, it's a --

THE COURT: Okay.

THE WITNESS: Well, the answer is no.

THE COURT: It's a yes or no, a yes or no question.

THE WITNESS: No. The answer is no.

MR. MORRIS: Okay. Can we go to Exhibit 52, please?

BY MR. MORRIS:

Q And if we look at the bottom and scroll up, the email string begins with some back and forth between your lawyers

and my colleague, Mr. Pomerantz. Do you see that? And they discuss specifically the K&L Gates letters.

A Yep.

Q Okay. And then they're forwarded to you and you respond to Mr. Lynn and to your lawyers, right?

A Yep.

MR. MORRIS: Can we scroll up just a bit more?

BY MR. MORRIS:

Q And you write to your lawyers -- now, this is -- this is at this time a very private conversation between you and your lawyers, right? And -- and --

A Yeah.

Q And you could share whatever view you had at the time with your lawyers, because at least as of December 24th at 5:53, you thought that that would be a protected conversation and communication, correct?

A I don't know what I thought then.

Q Well, you told Mr. Lynn, "Who knows how Jernigan reacts." Do you see that?

A Yes.

Q And that's because you were unsure of how Judge Jernigan was going to react; is that right?

A Yes.

Q You didn't express the view to your lawyer on December 24th that Judge Jernigan was going to rule against you because

she was biased, did you?
A I don't know if that's in this email chain.
Q I'm happy to look at it from top to bottom.
A I -- but I -- I don't know.
Q And it's certainly not in this email, right? You didn't -- you didn't tell -- you didn't tell your lawyers in this private conversation that you had any concerns about Judge Jernigan's bias, right?
A Not -- not here.
Q And you didn't -- you didn't say anything in this email on December 24th that you thought Ms. -- that you thought Judge Jernigan was anything but partial, right?
A The issue is not addressed in this email.
Q In fact, you told -- you told your lawyers just the opposite, didn't you? Isn't that right?
A No.
Q You told your lawyers "Who knows how Judge Jernigan is going to react;" isn't that right?
A Yes.
Q Okay. And then you forward your private communications with your lawyers to Mr. Ellington, correct?
A Yes.
Q And in your communications with Mr. Ellington, you included the K&L Gates letters, correct?
A Yes.

Q Are you aware of anything in the TRO that would allow you to communicate with Mr. Ellington concerning the letters between the Debtor and the K&L Gates clients?
A I don't know. Goes back to settlement counsel.
Q Okay. You had other communications with Mr. Ellington on Christmas Eve, didn't you?
A I did.
Q And in fact, you communicated with Mr. Ellington about your decision to object to the Debtor's settlement with HarbourVest; isn't that right?
A Yes.
Q Okay.
MR. MORRIS: Can we just see that for the record, Exhibit 21?
BY MR. MORRIS:
Q You recall that, in late December, the Debtor filed notice of a settlement it reached with HarbourVest, correct?
A Yeah.
Q And in this email string, Mr. Assink, one of your personal lawyers, purported to summarize the terms of the settlement for Mr. Lynn and other attorneys at Bonds Ellis. Do you see that at the bottom?
MR. MORRIS: Yep, right there.
THE WITNESS: Yes.
BY MR. MORRIS:

Q And then Mr. Lynn forwarded Mr. Assink's email to you, correct?
A Yep.
Q And you responded to your lawyers and told him to make sure that you objected, correct?
A Yes.
Q You didn't like the terms of the deal; isn't that right?
A Well, at the time -- at the time, we didn't realize that -- yeah. And -- yes. It was -- it was a ridiculous way of destroying the estate, in our opinion.
Q Okay. So, so you were adverse to the Debtor at this moment in time with respect to the Debtor's decision to enter into the HarbourVest settlement, correct?
A We disagreed with the HarbourVest settlement is as far as I want to answer that question.
Q And you wanted to challenge the Debtor's decision to reach an agreement on the terms set forth in Mr. Assink's email, correct?
A Yes.
Q And you decided to forward your communications with your lawyers on the topic of your decision to object to the HarbourVest settlement to Mr. Ellington on Christmas Eve, correct?
A Yes.
Q Okay. Can you identify anything in the TRO that would

authorize you to communicate with the Debtor's employees after the TRO was entered into about your decision to object to the HarbourVest settlement that the Debtor was seeking to enter into?

A I don't know. I was relying on Ellington's role as settlement counsel.

Q Okay.

THE COURT: All right. We're going to have to stop. Are you almost through, Mr. Morris?

MR. MORRIS: I have one more document.

THE COURT: Okay.

MR. MORRIS: Literally three -- two or three minutes.

THE COURT: Okay.

BY MR. MORRIS:

Q You had one more communication on Christmas Eve with Mr. Ellington; isn't that right?

A Uh-huh.

Q Okay. And this is -- this is where you told him about the Debtor's letter evicting you from the offices and about their demand for your cell phone, right?

A I -- please refresh me.

Q Okay.

MR. MORRIS: Exhibit 53, please.

BY MR. MORRIS:

Q On December 23rd, the Debtor sent your lawyers that letter

that we looked at earlier giving notice of eviction and demanding the return of your cell phones, correct?

A Yep.

Q And then the next day, on December 24th, Mr. Lynn forwarded the letter to you, correct?

A Yep.

Q And Mr. Lynn forwards that to you and he provides advice about the contents of the cell phone, correct?

A Yes.

Q And you pass this advice, along with the letter, to Mr. Ellington, correct?

A Yes.

Q This email string and the letter have nothing to do with shared services, correct?

A Okay. Broadly, shared services includes everything trying to get to a settlement of what to do with the employees. And so I, again, I view it broadly as yes.

Q Okay. Mr. Lynn's advice that you're passing along to Mr. Ellington is limited to the cell phone, correct?

A I think he has the same view that I do regarding Ellington as settlement counsel should be -- should be restricted and not open up a window into all legal communication with me and my lawyers. But obviously you're taking a different view.

MR. MORRIS: I move to strike. Real simple. Last question, Your Honor.

THE COURT: Sustained.

BY MR. MORRIS:

Q Mr. Dondero, you forwarded -- the email that you forwarded to Mr. Ellington included the advice from your lawyer about your cell phone and the letter that evicted you from the Debtor's offices and made the demand for the cell phones back, correct?

A Yes.

Q Okay.

MR. MORRIS: I have no further questions, Your Honor.

THE COURT: All right. It's --

MS. SMITH: Your Honor, this is Frances Smith. Before we go on break, I just wanted to give Your Honor one piece of good news that might help save you some time this afternoon.

THE COURT: Okay.

MS. SMITH: We now have an agreement with Mr. Dondero's counsel that they will not be calling Mr. Leventon, and the Debtor has already agreed that they would not be calling Mr. Leventon. So if we could please release Mr. Leventon for the rest of the afternoon, we would appreciate that, Your Honor.

THE COURT: All right. Mr. Wilson, you confirm?

MR. WILSON: Yes, Your Honor.

THE COURT: All right. Well, Mr. Leventon is

excused. Thank you for that.

MS. SMITH: Thank you, Your Honor.

THE COURT: All right. It's 1:06. We're going to take a 30-minute break. We'll come back at 1:36.

THE CLERK: All rise.

MR. MORRIS: Thank you, Your Honor.

(A luncheon recess ensued from 1:06 p.m. until 1:42 p.m.)

THE CLERK: All rise.

THE COURT: All right. Please be seated. All right. We are going back on the record, a few minutes late, 1:42, in Highland Capital Management.

Mr. Morris had just passed the witness, Mr. Dondero, to Mr. Wilson. And remember, we were clear earlier on that this can be both cross as well as direct, beyond the scope of Mr. Morris's direct, so that we can hopefully be more efficient with our time.

All right. So, Mr. Dondero, you're still under oath. Mr. Wilson, you may go ahead. (Pause.) All right. Mr. Wilson, can you hear me?

MR. WILSON: I apologize, Judge. I forgot to unmute.

THE COURT: All right. You may proceed.

MR. WILSON: All right.

CROSS-EXAMINATION

BY MR. WILSON:

Q Mr. Dondero, when did you learn that the Debtor was

seeking a TRO against you?
A On or about the time they filed it.
Q And did anyone at that time explain to you the relief the Debtor was seeking?
A Shortly thereafter, counsel went over it with me.
Q And did they -- your counsel explain the relief to you?
A Yes.
Q And did you end up attending the hearing on the TRO?
A No.
Q And why did you not attend the hearing on the TRO?
A Well, all of these hearings tend to start with a diatribe of what I think are untruthful, hurtful, and insulting comments about me that seem to go on for hours. And I -- I don't know, what's the expression, twisted by knaves to make a trap for fools, but I hate -- I hate hearing it, so I -- I've done nothing but try and help the estate and buy the estate in good faith, but people are moving to different agendas, and I think we've been betrayed by Seery morphing from a Chapter 11 to a Chapter 7 trustee for his own benefit.
Q After the hearing, did you learn that there was a TRO entered against you?
A Yes.
Q And how did you learn that a TRO had been entered against you?
A From counsel.

Q And how long after the hearing did you learn about that?
A Shortly thereafter. I'm not sure exactly when.
Q And did your counsel provide you a copy of the TRO?
A Yes.
Q And did anyone explain to you what the TRO meant?
A Yeah, I -- again, I take seriously anything that comes from the Court, and I did adjust my behavior, but the overall theme, that somehow I was doing something to hurt the creditor or hurt the Debtor or hurt investors I viewed as incongruent with any of my behavior. So I didn't think it was going to require much adjustment. I -- I -- yes. So, anyway. But I paid attention. I listened. I understood that we're still moving forward with pot plan activities. I understood we were still moving forward on trying to migrate the employees peacefully under a shared services agreement. And I understood that we were still trying to figure a settlement, either individually with different creditors or globally with different creditors.
Q Okay. Did you -- you said that your counsel provided you a copy of the TRO and you discussed the TRO with your counsel. Did you -- did you form an understanding of what you could and could not do under the TRO?
A Yeah, I -- again, like I -- like I just said, I thought the spirit was to make sure I didn't do anything that could be interpreted as moving against the Debtor, but still

nonetheless trying to preserve value and reach a settlement. And, you know, the -- the employees have been treated more shoddy than in any bankruptcy we've ever been involved in, and so I was also wanting to make sure that shared services went as smoothly as possible.

Q Did you have an opportunity to ask your counsel questions about the TRO?

A Yes.

Q And did you rely on your counsel to explain to you what the TRO meant?

A Yes.

Q And in the weeks that followed the entry of the TRO, did you continue to seek advice from your counsel regarding what you could and could not do under the TRO?

A Yes.

Q And why did you do that?

A Again, to stay compliant, not -- to stay compliant and avoid any specific tripwires or any trickery that might have been in the agreement.

Q Did you -- why do you believe that the TRO was entered against you?

A It goes back to the trades that were done for no business purpose the week of Thanksgiving, two days before Thanksgiving, I think, actually, the Friday after Thanksgiving, when only five percent of the people on Wall

Street are actually in the office, selling securities for no business purpose at a 10 percent loss to where they were trading and a 50 percent loss to where they were trading a month later.

Q Well, did you interfere with Mr. Seery's trading activities?

A I've been as clear as I can be. I take much umbrage in capricious, wanton destruction of investor value. And I interfered with the trades around Thanksgiving directly by telling the traders that they shouldn't put the trades through, there's no business purpose, there's no rationale, that the investors that control a vast majority of the CLOs are going to move the contracts and they don't want the securities traded. So, yes, I objected strenuously in the November Thanksgiving time frame.

As far as December 20th is concerned -- I know I've corrected this testimony three or four times -- there is no evidence of me talking to anybody other than sending one email to Jason Post, who is a NexPoint employee, not a Highland employee, and just saying, you know, Jason, you need to look at these trades. Because I couldn't believe they would pass through compliance when they were against the specific interests of investors.

Q Well, Mr. Dondero, did you rethink your actions around Thanksgiving, after the filing of the TRO motion by the

Debtors?
A Yeah. I mean, yes. I mean, just to repeat, again, I did nothing regarding the December 20th trades except for one email to Jason Post saying you should take a look at it. I never followed up with him. I never knew what he was doing. It wasn't until he testified a month later that he looked at it with outside counsel, agreed that the trades were improper, so he wouldn't put them through the order management system, so Seery and Highland had to come up with their own workaround to do trades that I still believe are improper.
Q Did you respect the Court's authority to enter a TRO against you?
A Yes. I mean, like I said, I didn't interfere directly or -- and I think Seery has testified twice that he had his own workarounds, he did what he wanted to do, regardless of investor thoughts or compliance, and no one stopped him or slowed him down anyway. So there's no -- there was no harm whatsoever regarding the December trades.
Q So you took the TRO seriously?
A Absolutely.
Q And the TRO was important to you?
A Well, I -- yes. I mean, I understood, I respected, you know, I modified my direct behavior, but I still had my views on what's proper for the estate and what's proper for investors, so I have to reflect those, you know, differently

or indirectly.

Q So I guess a fair characterization of what you just said is that you may have had differing opinions on the actions the Debtor was taking but you changed the way that you reacted to those actions?

MR. MORRIS: Objection to the form of the question. Leading.

THE COURT: Sustained.

BY MR. WILSON:

Q Well, Mr. Dondero, did you -- did you agree with everything Mr. Seery did after December 10, 2021? I'm sorry, 2020?

A No.

Q Did you take any action -- did you take any action after December 10, 2020 to -- that you understood might violate the TRO?

A No. And, again, with the goal of trying to transition employees fairly, make up to them the fact that their 401(k) contributions were canceled, their 2019 bonuses were canceled, their 2020 bonuses were canceled. You know, I tried to do what was best and fair for everybody, but not in a way that disrupted the Debtor or even contacted, you know, people directly.

Q And so were you aware on December 10th that you were restrained from 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?

A Yes. And that's how we handled it. We had a meeting with -- or, in fact, I wasn't even at the meeting, but Judge Lynn had a meeting with the independent board members to discuss the pot plan towards the end of the month of December.

Q And in your understanding, did you ever do anything to violate that provision of the TRO?

A No.

Q Were you aware that on December 10th you were restrained from making any express or implied threats of any nature against the Debtor or any of its directors, officers, employees, professionals, or agents?

A Yes.

Q And did you do, in your understanding, did you do anything after December 10th to violate that provision of the TRO?

A No. I mean, that's -- I had very -- very little, if any, contact with any Highland employees or board members, or Seery, other than the day after Thanksgiving, in that period of time whatsoever. So I never -- I never threatened anybody -- I'm going to say period -- but even during the injunction period, for sure.

Q Were you aware that on December 10th you were restrained from 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?

A Yes.

Q And did you knowingly do anything to violate this provision of the TRO?

A No. I said this before, probably not in the right format, on whatever it was, cross or direct earlier, but shared services was a broad, multifaceted discussion that a lot of people were involved in and moving towards for three or four months. It included systems, it included accounting personnel, it included what was going to happen to 40-odd employees, which asset management contracts were potentially going to move or not move. At one point, the CLOs were, and then those CLOs weren't. You know, whatever.

So, there was -- it was not just about moving back office. It was also about front office and valuation and whether or not there was going to be an overall settlement, whether or not the pot plan was going to work out, whether or not there was going to be an ability to buy out individual creditors. All those things were being explored, as you saw in the emails earlier, like with Clubok. There was a -- exploring buying out his interest or changing his dynamics.

There was also conversations where Redeemer Committee had agreed to sell their interest in Cornerstone for ninety million bucks but then changed their mind.

There was agreements with -- there was negotiations going on all over the place. And I needed help, since I'd been isolated, and Scott Ellington, as my settlement counsel, or as the go-between with Seery and with the creditors, was an important piece of trying to get something done.

Q Mr. Dondero, were you aware that on December 10th you were restrained from 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?

A Yes. I mean, it was -- it was clear this was the final step in the divide-and-conquer strategy. It was clear that Pachulski and Seery were going to be rewarded a multiple of ten or fifteen times compensation for becoming liquidating trustees instead of Chapter 11 trustees. And the best way to do that was to isolate me by creating gigantic awards to claimants who six, nine months earlier, Seery would bet his career had zero claims, all of a sudden got a hundred million bucks.

It was a way of distorting those claims between Class 8 and Class 9 so that there would never be a residual interest, and then for Pachulski and Seery to get paid large incentive compensation for administering a liquidation, even though they

were betraying the estate that they had been hired for to do a Chapter 11.

Q Given all that, did you do anything that you believed would violate the -- that provision of the TRO?

A No. I don't believe that objecting to the 9019s that had no basis in economic reality or legal risk, that were never scrutinized, you know, by the Court, I did not believe that objecting to those in any way violated the TRO.

Q All right. Well, in any event, are you -- are you aware that the TRO included a footnote that says, For the avoidance of doubt, this order does not enjoin or restrain Mr. Dondero from seeking judicial relief upon proper notice or from objecting to any motion filed in the above-referenced bankruptcy case?

A Yes.

Q Were you aware that on December 10th you were restrained from otherwise violating Section 362(a) of the Bankruptcy Code?

A Yes.

Q And do you know what Section 362(a) of the Bankruptcy Code is?

A That's -- is that the one with disturbing contracts or taking property? It's one of those two, right?

Q Well, would it -- would it be the automatic stay, in your understanding?

A Yeah, okay, the automatic stay regarding contracts.
Q And did you violate, after December 10th, that provision of the TRO?
A No.
Q Were you aware that on December 10th you were restrained from causing, encouraging, or conspiring with any entity owned or controlled by him -- meaning you -- and/or any person or entity acting on his behalf from, directly or indirectly, engaging in any prohibited conduct?
A Again, yes. Again, it's broad and far-reaching, but it's an intent to isolate anybody who -- myself and any other third party or related party that has bona fide interests in stopping this destruction of an estate that started with $450 million of assets and $110 or $120 million of claims the first three months in. And that was Pachulski's work and everybody else's. And then somehow at the end we end up with $200 million of assets and $300 million of claims.

Where did it go? Where's the examiner? Where's the -- where's the -- where's the scrutiny of giving HarbourVest more of an award than they had in investment in the funds? Where is the scrutiny of giving Josh Terry another $28 million on top of the 18 he's already taken out of Acis on a $1 million employee dispute? Where's the scrutiny of Redeemer getting more in terms of cash, noncash, keeping of Cornerstone, than their original arbitration award? Where is the fairness in

this process?
Q Despite your personal beliefs on those matters, did you do anything that would violate that provision of the TRO?
A No.
Q And, in fact, after December 10th, did you do anything at all that you believed would violate the TRO?
A I've done nothing except, in a complex, shifting betrayal, trying to provide continuity for the business and for the employees. I've tried nothing except try to settle this. But as the -- as the Court's best judgment is to relentlessly pound on everything we do, there's no way to ever to reach a compromise because the other side figures they're going to win everything and has no downside. So I don't see how I could ever negotiate more on a settlement.
(Interruption.)
Q So, to clarify, after December 10th, did you ever do anything that you believed might violate the TRO?
A No.
Q All right. I'm going to show you an exhibit -- and I think Bryan Assink is going to put it on the screen -- that was previously admitted for the Debtor. And that would be Debtor's 55. And I want to go to Page 14 of that document.
MR. WILSON: And scroll down just a hair, Bryan. All right. That'll work.
BY MR. WILSON:

Q All right. Mr. Dondero, you were asked to read some provisions from this. And to refresh you, this is the Highland Capital Management Employee Handbook, Exhibit 55 for the Debtor. But you were asked to review and read some provisions from this exhibit in your earlier testimony, but I want to point you to one sentence that you were not asked to read, and that would be the last sentence of the paragraph in the middle of the page there that starts with "Participation in this policy." Can you read that sentence, starting with "Your obligations"?

A I'm sorry. Where is it? In the first full paragraph or the second full paragraph?

Q Yeah. The first -- the last sentence of the first full paragraph, starting with "Your obligations."

A Okay. (reading) Your obligations under this policy shall terminate upon the termination of your employment, provided that you will remain obligated to furnish historical call records covering the period through the date of your termination, as requested, through the termination of your employment.

So I had been terminated -- I had been terminated long ago, if that's what you're asking.

Q Yes. What day were you terminated?

A Well, I was terminated as a Highland employee early on in the case, and I was -- well, I guess I was paid by NexPoint,

but no, then I was terminated by Highland -- you know what, I don't remember, honestly.

Q Well, do you -- do you recall if you submitted a letter of resignation on October 9th?

A You know what, that -- that sounds familiar. Yeah, I would have -- yes. I would have preferred not to resign, but I contractually had to.

Q Well, so what were the reasons that led to you resigning?

A I was asked to resign.

Q And who asked you?

A Jim Seery.

Q During your time with Highland, did Highland pay for your personal cell phone bill?

A I -- I don't know. I -- pre-bankruptcy, I assume yes. I don't know what was going on after bankruptcy.

Q Do you know whether you or Highland paid for the cell phone itself?

A I don't know.

Q And by cell phone itself, I'm referring to the cell phone you had up until around mid-December. You don't recall who paid for that cell phone?

A No.

Q How often do you get a new --

A But that'd be a --

Q -- cell phone? I'm sorry. You --

A That'd be a good -- I was going to say, that would be a good question to research. It might not have even being been paid by Highland. I don't -- I just don't know the answer.
Q Did you --
A Yeah.
Q Did you routinely replace your cell phone?
A Usually every three or four years, although I really do not like this new 5G phone at all.
Q Well, do you know when you last got a phone prior to December of 2020?
A Three years ago.
Q And did Highland have a procedure for replacing your cell phone?
A Yes. It was -- it was put in place by Thomas Surgent as head of compliance with the goal of protecting investor information or anything that could be business communication being misused by a recycled or destroyed phone. So there was a process by which, when you got a new phone, you gave it to Jason Saffery -- I'm sorry, wrong Jason -- Jason Rothstein, and -- or one of the tech guys, and then they would order your new phone and they would wipe the old phone clean. I think -- I think in this case they had my phone for -- my old phone for the better part of a week.
Q All right. And you said it was Thomas Surgent who put that policy in place?

A Yeah. That's been a policy for at least a decade.
Q And who is Thomas Surgent?
A He heads up -- he's a very experienced, very thoughtful compliance guy. He's headed up compliance at Highland for over a decade.
Q And did Mr. Surgent hold compliance training sessions for Highland employees and executives?
A Yes.
Q And how often would those training sessions be held?
A I remember them as an annual event. And it was really -- it wasn't a page by page, line by line, through, you know, hundreds of pages of manuals. It was really what had changed in the environment, you know, usually more from a compliance standpoint than anything. But it would also include a refresh of any sort of manual stuff.
Q And so you attended these compliance training sessions?
A Yes.
Q And did these compliance training session specifically include training on Highland's cell phone replacement policy?
A That's part of the employee manual. You know, again, to not have to be aware of every single rule at Highland, when I have something that I know requires compliance issues, I don't solve the compliance issues myself, I give the proposed investment or solution to Compliance and they come back and tell me if it's okay or how to do it.

If I have a phone or technology issue, I give my phone to the technology guys and tell them that I want a new phone, and then they handle it in a compliant manner.

Q Do you recall when you first got your very first cell phone?

A In 1980 -- '89.

Q Okay. And when did you start Highland?

A 1994.

Q Okay. So you had a --

A '93.

Q So you had a cell phone prior to Highland ever existing, correct?

A Yes. That was in California. But once we moved to Dallas, I've had the same phone number, probably half a dozen different phones or more in Dallas.

Q So when did you move to Dallas?

A '93, '94.

Q Okay. And you've had the same cell phone number ever since that time?

A Yes.

Q And did you keep your cell phone number when you got a new phone in December of 2020?

A Yes.

Q Do you use that cell phone number for personal use?

A Yes.

Q Do you have --
A I only have one cell phone.
Q Okay. You only have one cell phone? Do you use that cell phone number to communicate with your friends and family?
A Yes.
Q Do you use that cell phone number to communicate with your attorneys?
A Yes.
Q And is there personal information on your cell phone?
A Yes.
Q Is there information on your cell phone related to business interests other than Highland?
A Yes. Some.
Q And are there communications from your attorneys on your cell phone?
A Yes.
Q Have any Highland employees with company-paid phones ever left Highland in the past?
A Yes.
Q And did Highland ever keep an employee's cell phone number when an employee would leave Highland?
A No. We didn't have a unique prefix like some companies do that designates that it's a company phone. So there was no reason for the company to ever keep cell phone numbers versus new random numbers.

Q All right. So let's go back to December of 2020. And you may have hit on this earlier. But why specifically did you decide to make changes to your cell phone plan in December of 2020?

A You know, and again, as I said, I didn't even know if my phones were -- my phone was being paid for or by who, but I assumed they were still being paid by Highland, and it's just the notice to all Highland employees they were going to be terminated without bonuses, without '19 or '20 bonuses, was going to be December 31st, then it was pushed off until January 31st, then February 15th, then February 28th. But part of that was that their benefits were ceasing at that point in time, too. So, as far as I knew, everybody was migrating their phone over, and I did mine in the most compliant way I knew how to, by giving it to the -- to the tech guys.

Q So, if Highland was still paying for your cell phone, and you're not a hundred percent sure of that, your testimony is that Highland was going to discontinue paying for that cell phone?

A That was -- that's what they had told all the employees as part of their termination.

Q Okay. So were you changing the financial responsibility to ensure that it was in your name?

MR. MORRIS: Objection, Your Honor. Just leading

questions.

THE COURT: Sustained.

BY MR. WILSON:

Q Did you put the financial responsibility for your cell phone in your name in December 2020?

A I -- December -- yes.

Q And when you were doing that, why did you decide to get a new cell phone at the time?

MR. MORRIS: Objection. Asked and answered.

THE COURT: Sustained.

BY MR. WILSON:

Q Mr. Dondero, did you -- did you keep the cell phone you had in December 2020 when you changed the financial responsibility on your phone?

A I got a more advanced 5G with better picture-taking capability and more -- more storage.

Q And do you recall when you made the decision to get that new cell phone?

A A couple weeks before the 10th. It take -- it take -- it took -- during COVID, it takes longer to get the phones, so it took a couple weeks to get it and then for the tech guys to swipe or clean out the old one and then for me to get the new one and for the old one that hit Tara's desk on the 10th.

Q Okay. Well, who ordered the new cell phone?

A I don't know. Sometimes -- most of the time, it's the

guys in tech who do it, and then they coordinate people's credit card to pay for it.

Q Okay. But it was not you that actually made the order?

A No. I was not involved.

Q Okay. And you say you think it was ordered about a week to ten days before your new phone was set up?

A At least. The iPhone 12 is -- is and has been backlogged.

Q After the cell phone policy that you testified to earlier was put in place, did you follow this policy every time you got a new cell phone?

A Yes.

Q Did you do anything differently with respect to the process of replacing your cell phone in December of 2020?

A No, I did not.

Q At the time you got a new phone, were you aware that Scott Ellington was also getting a new phone?

A No.

Q So did you discuss your decision to get a new phone with Mr. Ellington?

A No. Again, I assumed everybody was doing it. It wasn't something I needed to discuss with him.

Q So, --

A Yeah.

Q -- do you recall if you had any discussions with Isaac Leventon about getting a new cell phone?

A No.
Q No, you don't recall, or no, you did not?
A No, I did not.
Q At the time you got your new phone, were you aware that any party was seeking information from your old phone?
A No.
Q Did Isaac Leventon ever tell you that anyone wanted to preserve text messages on your old phone?
A No.
Q Were you ever provided a litigation hold letter or other notification to preserve information on your phone?
A No.
Q Did you ever receive -- or, I'm sorry -- did you receive a text message from Jason -- Jason Rothstein on December 10th stating that your old phone was in Tara's desk drawer?
A Yes.
Q And who is Tara?
A Tara is my assistant.
Q Did you ever see your old phone again after receiving that text?
A No.
Q And who -- do you recall who -- the individual you handed your phone to when you initiated the process to getting a new one?
A It was Jason Rothstein in the Systems or the Technology

Group.
Q And to be clear, Mr. Rothstein is a Highland employee, right?
A Yes.
Q Do you have any personal knowledge about what happened to your phone after Jason Rothstein texted you that he left it in Tara's desk?
A No.
Q Did you ever look to see if it was in Tara's desk?
A No.
Q Did you -- you -- you didn't take the phone out of Tara's desk?
A No.
Q So did you ever see the phone again after you turned it over to Jason Rothstein?
A No.
Q Do you know where the phone is today?
A No. But, again, I don't know why this is relevant. They can get the text messages from the phone company if they think it's that big of a deal.
Q When you previously testified that the phone was disposed of, what did you mean?
A I mean, that's -- that's the last step. That's what always happens to the old phones. But to say it was tossed in the garbage, I have no idea. I have no idea what happened to

it after it went back to Tara's desk.
Q So do you have any personal knowledge that your phone was actually disposed of?
A I don't know.
Q When did you first become aware that the Debtor wanted to see your phone?
A Again, when I had given it to Jason, I thought they had seen it. You know, so I was surprised by the communication during the week of Christmas, I think it was, when I was -- I was out of town.
Q Well, yeah, I'll rephrase my question. When did you first become aware that the Debtor's counsel wanted to see your phone?
A I had some communication from my counsel the week of Christmas.
Q Okay. And what did you do for Christmas last year?
A I took my girls to Aspen.
Q And do you recall the dates that you were in Aspen?
A Until the 28th.
Q I'm sorry. I think you cut out.
A Until the -- until the 28th.
Q Okay. And were you working while you were in Aspen?
A A little bit.
Q So, there was some talk earlier about the Committee filing a motion to get ESI from Highland and certain individuals.

Did anyone, after or contemporaneously with the filing of that motion, ever inform you that the Committee was seeking your text messages?

A No. And -- yeah. No. And it's -- that's an indirect request versus a direct request, right?

Q Well, so no one at the Debtor ever asked you to preserve text messages?

A Correct.

Q And so would that include Isaac Leventon? He never asked you to preserve any text messages?

A Correct. No one -- no one -- no one from the Debtor did.

Q And, so, going back, you were in Aspen when the Debtor's December 23rd letter was sent to Mr. Lynn, correct?

A Yes.

Q And Mr. Lynn communicated that letter to you?

A Yes.

Q And did you discuss that letter with Mr. Lynn?

A Yes.

Q And are you aware that Mr. Lynn wrote a response to Jeff Pomerantz regarding that letter?

A Yes.

Q And are you aware that that response was sent on or about December 29th?

THE WITNESS: You want to -- can John Morris maybe put his phone on mute, because he's -- he's shuffling papers

and it's -- it's throwing it off on this end.

THE COURT: I --

MR. WILSON: Yeah. My question was, are you aware that that letter was sent on or about December 29th?

THE WITNESS: Yes.

BY MR. WILSON:

Q And are you aware that that letter from Mr. Lynn to Mr. Pomerantz stated that, we are, at present, not sure of the location of the cell phone issued to Mr. Dondero by the Debtor?

A Yes.

Q On December 29, 2020, did you know the location of your cell phone?

A No.

MR. WILSON: Your Honor, at this time I would like to ask for the admission of the exhibits on my second amended witness and exhibit list.

THE COURT: All right. Are you talking about Exhibits 1 through 20 at Docket Entry 106?

MR. WILSON: That's correct. Exhibits 1 through 20.

THE COURT: Any objection?

MR. MORRIS: No, Your Honor.

THE COURT: All right. They're admitted.

MR. WILSON: All right. All right, thank you.

(Dondero's Exhibits 1 through 20 are received into

evidence.)

MR. WILSON: Can you turn to 1?

BY MR. WILSON:

Q We're going to put an exhibit -- Dondero Exhibit No. 1 on the screen. Mr. Dondero, have you seen this document before?

A Yes.

Q And can you identify what this document is?

A It's a shared services agreement -- (pause). It's a shared services agreement between Highland and NexPoint Advisors.

Q Okay. And in the first paragraph, is NexPoint Advisors defined as the Management Company?

A Yes.

MR. WILSON: Go to Page 3, the bottom. Article 2.

BY MR. WILSON:

Q Now, I want to direct your attention to the bottom of Page 3, Article 2. Can you read the first paragraph, Section 2.01?

A (reading) Highland is hereby appointed as staff and services provider for the purpose of providing such services and assistance as the management company may request from time to time to -- and as applicable to make available the shared employees to the management company, in accordance with and subject to the provisions of this agreement, and the staff and services provided -- and the staff and services provider hereby accepts such appointment. The staff and services

provider hereby agrees to such engagement during the term hereof and to render the services described herein for the compensation provided herein, subject to the limitations contained herein.

Q All right. And can you read for me the first part of Paragraph 2.02, please?

A (reading) Without limiting the generality of 2.01, and subject to Section 2.04, applicable asset criterion concentrations below, the staff and services provider hereby agrees from the date hereof to provide the following back and middle office services, administrative infrastructure, and other services to the management company.

Q All right. In Paragraph A, under Back and Middle Office, if we go down to the next page, does that include Finance and Accounting Services?

A Yes.

Q And then Paragraph B, does that include Legal, Compliance, and Risk Analysis services?

A Yes.

Q And specifically, would that be assistance and advice with respect to legal issues, litigation support, management of outside counsel, compliance support and implementation and general risk analysis?

A Yes.

Q So, did NexPoint Bank have its own accountants?

A No. NexPoint -- NexPoint Advisors, that's who we're talking about here, --
Q I'm sorry. NexPoint Advisors.
A -- yeah, relied on Highland for those services. I mean, it subsequently -- it subsequently had to hire a couple lawyers because it wasn't getting those services to the extent it used to. But it used to have zero, zero of its own accountants and lawyers.
Q Okay. And then you had -- you said it had zero lawyers initially. Was it the intention that, that by shared services, that NexPoint Advisors would use Highland's lawyers and accountants without the need of having to hire their own?
A Yes. I mean, the structure might be unusual compared to other companies that run through bankruptcy, but in financial services, there's -- there's generally a centralized model for high-cost people in the legal, accounting, and tax arena so that each subsidiary doesn't have to have their own expensive, duplicative set of employees.
Q Okay.
MR. WILSON: Can you go to the next exhibit? 2?
BY MR. WILSON:
Q I'm going to put up Dondero Exhibit 2. (Pause.) It should be here momentarily. All right. Can you see that document, Mr. Dondero?
A Yes.

Q And have you seen this document before?
A This is a similar shared services agreement, but this time with HCMFA, the other asset management arm.
Q Okay. And you would agree with me that Highland Capital Management, LP is defined as HCMLP and that Highland Capital Management Fund Advisors, LP is identified as HCMFA? Do you agree with that?
A Yes.
Q Okay.
MR. WILSON: Go to Page 3.
BY MR. WILSON:
Q Now, can you read Paragraph 2.01 to me?
A It's almost the exact same as the other one. Do you really want me to read it? I mean, it just -- is there something different in this paragraph? It's just a different entity.
Q Right. Well, just -- just read the Paragraph 2.01.
A Okay. (reading) During -- during the term, service provider -- service provider will provide recipient with shared services, including, without limitation, all of the finance and accounting services, human resources services, marketing services, legal services, corporate services, information technology services, and operations services, each as requested by HCMFA and as described more fully on Annex A attached hereto, the shared services exhibit, it being

understood that personnel providing shared services may be deemed to be employees of HCMFA to the extent necessary for purposes of the Investment Advisers Act of 1940, as amended.

Q All right. And you stated a minute ago that, although worded differently, this paragraph has the same structure and intent of the prior document we looked at, correct?

A Yes.

Q And there's a -- a sentence and a portion of a sentence that you read that says that the personnel providing shared services may be deemed to be employees of HCMFA. Do you see that?

A Yes.

Q And do you know why that provision is in there?

A Sometimes the Investment Advisers Act requires specifically employees to be named that are key man in different -- whatever. So sometimes people have to be dual employees or -- or in the entity. Even if there are very few people in the entity and it's relying on shared services, sometimes, yeah, sometimes you need to have split people or move them in.

Q All right. I just want to ask you a couple questions about your depositions given in this case. Did you give a deposition on December 14th?

A Yes.

Q And who took that deposition?

A I believe that -- I believe that was John Morris.
Q Okay. And was that deposition given remotely by Zoom?
A Yes.
Q And December 14th is four days after the TRO was entered, correct?
A Yes.
Q And at that deposition, did Mr. Morris ask you where you were located?
A Yes.
Q And what did you tell him?
A In the Madrone conference room. Or the main conference room at Highland.
Q Okay. Now, you acknowledged that you personally intervened to stop trades that Mr. Seery wanted to make around the time of Thanksgiving, correct?
A Yes.
Q Were any trades halted as a result of your actions?
A I -- I don't believe, even when I directly impacted it in November, I don't believe it actually stopped or slowed anything down. And I believe he testified similarly. And I know for sure in December, because I had no contact with any of the traders, I know I did nothing to disrupt anything in December 20th --
Q But in any event, it's your understanding, as you earlier testified, that those events around Thanksgiving led to the

entry of the TRO?
A Yeah. I mean, again, I think he intentionally did it to get my attention. He sold illiquid restructured equities that the CLOs had owned for ten years, had no reason to sell, would have liked to have held longer, and he sold them for almost -- for about half the price that they were two months later. It was -- it was a colossal, intentional harm of investors.
Q But you believe that those events led to the entry of the TRO?
A Yes. I reacted severely and -- by telling him not to do it again. And then that got perceived as a threat and got perceived as somehow usurping his power to harm the beneficial holders of those CLO assets, which are the retail funds, the DAF, HarbourVest at the time, et cetera.
Q Since that TRO was entered, have you taken any actions to try to stop Mr. Seery's trading?
A No.
Q Have you interfered with the Debtor's trading in any way since the TRO was entered on December 10th?
A No.
Q Have you agreed with every trade that the Debtor has made since December 10th?
A No.
Q Now, you -- there's -- there's been testimony in this case that Mr. Seery wanted to make more trades in December of 2020.

Do you recall that testimony?
A More trades between Thanksgiving and New Year's like the other ones? I mean, I -- I don't know how crazy we could get here, but I -- I don't remember that testimony.
Q Okay. Well, did you become aware that Mr. Seery was making trades in December of 2020?
A I believe in the same names, you know, the same AVYA at $17, $18, $20 a share, $21, before it hit $35, $37, you know, after he sold it. You know, that kind of stuff.
Q But you did become aware that Mr. Seery was attempting to make trades in December, correct?
A Yes.
Q And did you attempt to stop any of those trades?
A No.
Q Did you call Mr. Seery about those trades?
A Nope. I didn't call the traders. I just -- again, I thought it was another compliance breach, I thought it was another violation of the Registered Investers Act, and so I just highlighted it to Jason Post, the NexPoint compliance guy, said, take a look at it.
Q Did you send Mr. Seery any texts or emails about the trades?
A Nope.
Q Did you threaten Mr. Seery in any way about the trades?
A No.

Q Do you recall how you became aware that Mr. Seery wanted to make trades in December of 2020?
A He was -- he was either still using Highland Fund traders or he was using NexPoint or the OMS system. Somehow, he was using either traders or an OMS system that wasn't his and was ours. It -- the -- either the OMS system or the general blotter or something, where other employees made me aware of it.
Q And so did you -- did you receive that notification through an email?
A I don't believe -- yeah, no, I think I did, because that's what I forwarded to Jason Post, I believe.
Q Okay. And who is Mr. Post?
A Jason Post is the compliance officer at NexPoint.
Q Okay. And he's not a Highland employee, correct?
A No.
Q Did you have any follow-up communications with Mr. Post after you forwarded him that email?
A No, I did not.
Q Did you ever give Mr. Post any direction or any instruction to take any action with respect to those December trades?
A No. And like I said, the first time I found out he did anything, which he just found them to be noncompliant and I think he would have let them go through our order management

system, I didn't find that out until a month, month and a half later.

Q And how did you find that out?

A When I was in Davor's offices and he testified.

Q Was that hearing in January of this year?

A Yes.

Q And so did -- did Mr. Post, to your understanding, end up interfering with the booking of trades?

A I -- I think what ended up happening was, instead of using the order management system, I think Seery just started going directly through Jefferies without any compliance oversight. That's how I understood.

(Interruption.)

THE COURT: All right. Someone needs to put their phone on mute.

Go ahead.

BY MR. WILSON:

Q Okay. Can you tell me what you mean by booking of trades?

A If you don't have access to the order management system, then you have to book them directly with the dealer.

Q Well, so when the trade is booked, has it already been executed?

A Yeah, generally.

Q Okay. And you talked about the OMS or the order management system. What is that?

A Well, it's like an automated version of the old trade blotter that used to be a gigantic book that everything had to be written in in pen back in the old days. That's essentially the source document for all trades that an organization performs.

Q Okay. So what's the benefit of using the OMS system?

A It's a necessary part of compliance with the SEC. You have to show that you have a discrete and protected primary source for all your trades, all your trade information.

Q And so, if I understand you, you said that these trades that Mr. Seery executed in December weren't run through the OMS?

A I understand that when Jason Post, I think, made the determination with outside counsel that they weren't properly -- that they weren't proper trades for some reason, and then he didn't allow them to go through the order management system, so I think Seery's testimony was he wasn't impaired at all, he just did the trades himself through Jefferies. But it -- yeah, that's all from -- that's all from memory.

Q Well, had the Advisors booked trades for Highland in the past?

A Yes.

Q And were the trades that the Advisors booked for Highland run through the OMS?

A Yes.

Q Were the Advisors contractually obligated to book trades for Highland?
A I don't know. But first and foremost, they have to be compliant, you know.
Q Did you have any role in instructing the employees of the Advisors not to book Mr. Seery's trades in December of 2020?
A I had no involvement whatsoever.
Q Now, are you familiar with letters that were sent in December of 2020 from the K&L Gates law firm to the Pachulski law firm?
A Yes.
Q Do you know how those letters came about?
A I believe the CLO equity investors -- and remind you, those are old CLOs where there's almost no debt on them at all; they're just pools of assets -- that the CLOs -- that the CLO investors had owned for years and wanted to keep the exposure, they were witnessing Seery selling things from their portfolio for no business purpose. And as the beneficial holders of, I think, in aggregate, between the retail funds and the DAF, they owned more than a majority of 13 of the 18 yields and a supermajority of seven of them, and they had every intention of replacing Highland as manager once the bankruptcy ended because Highland had no staff, it was going to have no staff post the bankruptcy and would not qualify under key man provisions and would not have the expertise

necessary to manage their CLO.

We had seen what happened in Acis when a manager has no employees and no skill to manage a CLO. You end up with the Fort Worth performing CLOs in the universe and the destruction of value. And so I think that NexPoint and DAF investors were -- were worried --

(Interruption.)

THE WITNESS: -- about what would happen if they didn't get control of the CLOs.

THE COURT: Someone needs to put their device on mute. I'm not sure who it is. Caller 77. Anyway, it went away. Continue.

MR. WILSON: Okay. Can you pull up Debtor's 14?

BY MR. WILSON:

Q All right. I'm going to pull up the Debtor's Exhibit No. 14.

MR. WILSON: And go to Page 5. Yeah, that's right.

BY MR. WILSON:

Q All right. Do you recognize this document as being one of the letters sent from K&L Gates to the Pachulski firm?

A Yes.

Q Did you instruct anyone at K&L Gates to send this letter?

A No.

MR. WILSON: Let's go to 15, hopefully. And then go to Page 6.

BY MR. WILSON:

Q And I'm now going to show you 15, Exhibit -- Debtor's Exhibit 15. And this is Page 6. This is another letter from K&L Gates, it looks like sent the following day from the last letter we looked at. And so I'm going to ask a few questions referring to both of these letters. But did you instruct K&L Gates to send either one of these letters?

A No. If I -- if I had had involvement in these, I would have written them much stronger than these letters are written. You know, these letters are written with a little bit of needing approval from the independent board, a little bit of fear of the, you know, bankruptcy process, not understanding what's going on or why Seery is doing what he's doing, you know, understanding the detriment of the portfolios from -- from me or the manager, et cetera.

So it's -- both these letters are fairly diluted in what they say they'll do. You know, it's -- they both say subject to bankruptcy court approval or subject to this, we may do that or this, or we're concerned about this. But I think the behavior was egregious and self-serving. I would have had much stronger letters if I had anything to do with them.

Q So you're saying that these letters don't contain your words?

A They do not.

Q Did you participate in the drafting of these letters in

any way?
A I did not. Like I said, I would have done something much stronger and I was disappointed on how watered down they were.
Q Did you instruct anyone as to the general substance that these letters should convey?
A No, I -- it's -- I applauded it and I encourage people to do their jobs, which is to watch out for the investors and watch out for capricious behavior on the part of Jim Seery. But -- yeah, but no, I did not -- I did not draft it or have direct input into it.
Q Did you read or approve the letters before they went out?
A No.
Q Did you have any part in putting together these letters?
A No. I mean, like I said, I was -- I was disappointed in the soft -- I would have had more umbrage. I was disappointed in the softness of the letters.
Q But were -- you were provided a copy of these letters after they were sent?
A Yes.
Q So was the sending of the letters in general your idea?
A In general, I thought it was a good idea. I mean, in general, like I said, I viewed it as a violation of the Advisers Act and the spirit of the Advisers Act, when the beneficial holders have told you they're going to change managers and don't want their account liquidated. And I still

to this day believe -- believe that. And if it was -- if it was money I inherited from my grandmother, I would be extremely annoyed if a financial advisor or something did this to the portfolio.

Q And I appreciate your answer, but that wasn't exactly what I asked you. Was the sending of the letters your idea?

A No. The sending -- I believe Jason used outside counsel to, you know, validate the impropriety, and then he championed the letter dealing with independent boards and third parties and, you know, whatever, and this is -- these are the letters that came out.

Q So did he cause the sending of these letters?

A I wouldn't use the word cause. I mean, like, again, I was supportive. I encouraged them. I think they were the right thing to do. I would -- I would do them again. Would encourage someone to do them again. I still think this issue isn't resolved. I still think it's -- it's craziness that Highland is managing these CLOs.

Q Since December 10th, have you ever communicated with any Highland employee to coordinate your litigation strategy?

A No.

Q And you're familiar with Scott Ellington?

A Yes.

Q And he was a Highland employee?

A Yes.

Q And what was your understanding of his role at Highland after December 10th?

A Again, I was being -- I was being, you know, increasingly without support and isolated. I didn't even -- you know, I was trying to put pot plants together without even knowledge of the assets, you know, and I was -- I was increasingly in a vacuum. But Scott Ellington was helping, as settlement counsel, trying to reach some kind of agreement to exit Highland, transition the employees, et cetera.

It was important for him to know everything that was going on, in my opinion. Because whether it included the letters we just went over that reduced the value of the assets at the Debtor such that, you know, you know, we could pay less, whether it was legal matters or legal risks, you know, I thought it was important for him to be -- important for him to be aware and important for him to be fully informed so that he could be nimble in his role as settlement counsel and in his role on shared services. Because, again, we were trying to -- we were trying to transition 40 or 50 employees that were being treated extremely harshly by the Debtor. And we were trying to provide fair and proper continuity for them also.

Q When you refer to settlement counsel, are you referring to what others may have referred to as a go-between between you and Mr. Seery?

A Go-between was part of it, but he had -- Ellington had

been anointed in the late spring/early summer as a go-between to work different parties and angles during the mediation and after the mediation and around the pot plan, et cetera. And he was integrally involved in all of those.

And then as far as the shared services and transitioning employees, he was deeply involved in that, and I think he actually spoke as almost a union rep for the employees. So there was -- he was intimately involved in that.

And then how the shared services were going to work going forward, once everybody was terminated from Highland, you know, to treat people as fairly and smoothly as possible.

Q Was Mr. Ellington --

A I'm sorry. Let me just say the last thing. I don't think, other than the Thanksgiving time frame, I don't think I talked to Seery in the last seven or eight months. So he was an important go-between and an acknowledged go-between and used as a go-between by Seery as much as by me. So whether his role was official, he was def... the form -- or, the substance over form is that he was being used in that role, literally having meetings on shared services a day or two before he was terminated for cause.

Q And was Mr. Ellington general counsel at Highland?

A Yes, he was.

Q And as part of Highland's legal department, did he provide shared services to the Advisors?

A Yes.
Q And would those Advisors be Highland Capital Management Fund Advisors and NexPoint Fund Advisors?
A Yes.
Q And those are both entities that -- that you -- that are part of your umbrella?
A Yes.
Q After the independent board was established, you testified that Mr. Ellington started serving as a go-between between you and the board, correct?
A Yeah, I'd say the official go-between role, because I was actively talking to board members and I was actively talking to Seery, and every time Seery sold something in a non-arm's-length transaction or below market or without court approval, I went and I complained to the other independent board members.

So I was having active conversation around the life settlement transactions with the independent board, around the SSP transaction, et cetera. But by the summertime, like I said, Ellington was the primary contact person for me and I -- to deal with Seery, and I think the primary contact person for Seery to deal with me.
Q And did Mr. Ellington -- I'm sorry. Did you use, actually use Mr. Ellington to communicate ideas to the boards or Mr. Seery concerning your pot plan proposals?

A Yes. We did a couple pot plans of our own when we couldn't get the independent board to focus. And once Seery shifted to whispering to creditors about a liquidation plan, we couldn't get Seery to buy into a pot plan at all, so Ellington and I went forward with a couple of pot plans on our own, and then -- but the last pot plan was solely with Judge Lynn and the independent board members, without me and without Ellington.

Q Well, did Mr. Seery use Mr. Ellington to communicate ideas back to you?

A Yes.

Q Did Mr. Seery use Mr. Ellington to communicate ideas to you after December 10th?

A Yes. Like I said, up until literally a day or two before he was terminated, there were authorized shared services meetings, because there was a couple-week period there where no one was allowed to have a shared services meeting unless approved by Seery in advance, and nothing was getting done. So he -- Seery anointed a couple people at Highland to be able to deal with a few people at NexPoint and to have a couple meetings, and Ellington was one of those people who actually led the meetings in the last week of December.

Q Did you ever discuss entering a common interest agreement with Mr. Ellington?

A I believe -- I believe the lawyers had a couple different

conference calls on it, and then I think the lawyers for the employees and for the senior employees determined that their strategies and tactics would be best served by not being a part of it. But I think in the beginning there was thought that it would be good for them to be in the group. But that wasn't a conversation I had with Ellington. Those were decisions the lawyers made amongst themselves.

Q Did you ever have any discussions about a common interest agreement with Mr. Leventon?

A No.

Q Did you ever discuss entering a common interest agreement with any current or former Highland employee?

A No. No.

Q Did you have discussions regarding a common interest agreement with Douglas Draper?

A Yes.

Q And who, again, is Douglas Draper?

A He represents Dugaboy and the Get Good Trust. And, you know, more importantly, there needed to be some coordination among the lawyers, and then I think it was clear to him that positioning for the Fifth Circuit was going to be important, so he -- he coordinated -- or, he led the coordination of the law firms.

Q Did you ever participate in any conference calls regarding a common interest agreement?

A I'm going to say maybe one, but it quickly -- I'm not a lawyer by training, so it was quickly not something that I added value in, and I wasn't the one that made the decisions or influenced anybody to be in or out of the agreement. So, again, maybe once, but -- but --

Q Well, was -- was Mr. Leventon or Mr. Ellington on any conference calls you might have been on regarding a common interest agreement?

A Not that I'm aware of. I have not talked a single word to Mr. Ellington or Isaac since they were terminated, which was, I believe, the last week of December. Because I have not spoken a single word to either one of them since then.

But, again, as recently as a day or two before they were terminated, they were actively involved in shared services meetings.

Q So you're not aware that they were on any conference calls that you were on regarding a common interest agreement?

A Correct.

Q And other than you, are you aware that there were any other current or former Highland employees on a conference call about a common interest agreement?

A I believe it was all employees. I mean, it was all lawyers for the different entities.

Q Would -- would -- were you aware if counsel for Mr. Ellington or Mr. Leventon were on any of these conference

calls?
A That, I believe, is true. Yeah, I believe his -- their counsels were.
Q So, you're familiar with the Dugaboy and the Get Good Trusts?
A Yes.
Q And are you the trustee for either one of those trusts?
A No.
Q Do you control either one of those trusts?
A No. Not directly. I'm a lifetime beneficiary of the Dugaboy Trust, but I don't control it.
Q When did you become aware that the U.C.C. was seeking production of documents from Dugaboy and the Get Good Trust?
A Around when -- a day or two before that Melissa email requesting a subpoena, for whoever -- but it -- I think it was a midlevel person at DSI was asking or demanding Dugaboy financials, and that was her response to that person.
Q So would that have been approximately December 2020 when you learned of that?
A Right. And, again, that was -- that response was the exact specific wording I was given by counsel to tell them at that moment.
Q Were you served with any formal requests for the Dugaboy or Get Good Trust documents?
A No.

Q And you stated that the Dugaboy and Get Good Trusts have hired counsel to represent them?
A Yes.
Q And that counsel is Douglas Draper?
A Yes.
Q And to your knowledge, has Mr. Draper been working with the Debtor's counsel to produce the Dugaboy and Get Good documents?
A Yes. I think he investigated the requests. I think he got a more formal official request, and then I think he analyzed it and said, as long as he got to review what was provided, he was okay with it. That's -- that's what I understand.
Q Well, have you or Mr. Draper ever taken the position that the documents would not be turned over?
A No. I mean, I've -- I've delegated it to Douglas to handle.
Q Have those documents, at this point, actually been produced?
A I have no idea.
Q Do you have any objection to the documents being produced?
A No.
Q And you testified that Melissa Schrath is an accountant?
A Yes.
Q And so she was a Highland employee that was contracted to

the Advisors under the shared services agreement?
A Yeah. That's -- that's the way I would describe it, because she was -- you know, I was a NexBank and -- a NexPoint employee. I was being paid by NexPoint. And she was a hundred percent -- well, 80 percent servicing me, 20 percent servicing Mark Okada. And so she was properly, as was my administrative assistant, properly lumped as part of the NexPoint shared services.
Q Okay. And in December of 2020, did Melissa have access to the Dugaboy documents?
A Yes.
Q Did you say "I guess" or "Yes"?
A Oh, yes, she did. And as a matter of fact, she said 70-80 percent of them were on the server and non-password protected.
Q So, why did you send a text message to Melissa in December?
A I didn't know they were non-password protected at that time. But, again, that was a specific advice of counsel, that it was -- it was a personal entity, not involved in the bankruptcy, and for a midlevel DSI person to ask my accountant was not -- I believe that wasn't perceived as adequate proper channels. So that was -- that was the legal advice I got from your firm. So, --
Q All right. When was your access to the Highland computer system shut down?

A I believe at night right around the 30th.
Q All right. So I just want to -- I just want to ask you a couple more questions. Did you, after the entry of the TRO, did you make an effort to modify your behavior in such a way that you would comply with the TRO?
A Yes. And, you know, something I want to make clear that I discovered during the break when I went through my phone, the January 5th deposition that has somehow become important, even though there were no Highland employees in the office other than the receptionist, is memorialized by a calendar invite on my phone -- which will also be in the Highland system -- where it was an invite a week earlier from Sarah Goldsmith, who was one of the Highland employees supporting the legal team that was largely supporting Jim Seery, sent me a calendar invite to the conference room at Highland for the deposition on the 5th. It's right front and center in my calendar. It'll be on the Highland Outlook program. And Sarah Smith -- I mean, Sarah Goldsmith works directly for Jim Seery.
So, just to maybe put that issue to bed, I would highlight that for everybody.
Q So, the answer to my last question was you made a concerted effort to modify your behavior in response to the TRO?
A Yes. The only two times I've been in Crescent was for those two depos. I don't even go to -- when people have happy

hour at Moxie's, because it's in the lobby of the other -- one of the adjacent buildings, I don't even attend happy hours at the bar in the lobby for fear of somehow violating the building order.

Q All right. So, have you thought better of your actions that you took around Thanksgiving of last year?

A I mean, you know, in due respect for the Court and the Court may be thinking that the investor allegations are fanciful or frivolous, it granted nonetheless an injunction, and I respect it. And I -- so I've been -- I handle things differently as far as what I think are material breaches on the 20th and I've -- I've adjusted my behavior. But I do not regret or think differently about the -- liquidating the portfolio the week of Thanksgiving, liquidating illiquid assets for no business purpose. I still think that was highly irregular and highly wrong.

Q So, to sum up, your opinions of the way Highland is currently being managed are not -- sorry, start over. Although your opinions of the way Highland is being managed have not changed, has your outlook on what your behavior ought to be changed?

A Yeah, my outlook really is the same, that material assets are being sold without court approval, material assets are being bought without court approval, material assets are being sold in a non-arm's-length noncompetitive way for less than

full value. I still believe that it's impacted the estate materially. I know somehow my limited involvement in portfolio management responsibility on very limited funds only through March or April, and then the performance of Highland is somehow laid at my feet, but the destruction of value has been entirely based on major asset sales by Jim Seery. Number one.

And then I would say, number two, how analysis of liabilities against Highland go from an estimate of a total of $100 to $120 million in the first quarter and end up ending up at almost $300 million, with nothing ever being litigated or challenged, just business judgment rule, that somehow it would be cheaper than litigating some of these frivolous litigation claims, has destroyed the liability side of the balance sheet.

But, anyway, but I -- you know, life goes on and I'm doing the best I can to move the rest of the business forward, move the employees forward, and we will do the best we can to get justice for the Highland estate at some point.

Q And just to clarify your testimony earlier, the last time that you saw your old cell phone in December of 2020 was when you handed it to a Highland employee, correct?

A Yes.

Q And do you have any personal knowledge whether that cell phone was actually wiped, according to company policy?

MR. MORRIS: Objection to the form of the question.

THE COURT: Overruled.

THE WITNESS: I was told that it was.

BY MR. WILSON:

Q Okay. But you don't have personal knowledge as to whether the phone was indeed wiped by Highland, in accordance with its policies?

MR. MORRIS: Objection to the form of the question.

THE WITNESS: I was told by --

THE COURT: Sustained.

THE WITNESS: -- Jason Rothstein --

THE COURT: Sustained.

THE WITNESS: -- that it was wiped.

THE COURT: Sustained. Rephrase the question.

MR. WILSON: I'm just trying to get him to let us know if he has any personal knowledge that the phone was ever actually wiped in accordance with Highland's policies.

THE COURT: Okay.

MR. MORRIS: Objection to the form of the question.

THE COURT: Overruled.

THE WITNESS: Jason Rothstein told me that it had been wiped according to Highland policies.

MR. MORRIS: Objection to the form of the -- I move to strike. It's hearsay.

THE COURT: Sustained.

MR. WILSON: Your Honor, that -- Your Honor, that

would be a statement by a party opponent.

THE COURT: Who --

MR. WILSON: And it's --

THE COURT: Who's the party opponent here?

MR. WILSON: And it's just going to show Mr. Dondero's state of knowledge.

THE COURT: All right. Well, the party opponent, how do you justify that exception?

MR. MORRIS: I --

MR. WILSON: Well, Mr. Rothstein is an employee of Highland, as we've talked about, and -- and then the second point of my response will be that it's not to go to the truth of the matter asserted, just that that's the extent of Mr. Dondero's state of mind, is what he was told by Mr. Rothstein, not whether it was actually true or not.

THE COURT: All right. I'll overrule the objection.

MR. WILSON: All right. Thank you. We'll pass the witness.

THE COURT: All right. That was an hour thirty-three minutes. Mr. Dondero, do you need a five-minute break?

THE WITNESS: Sure.

THE COURT: Okay. We'll take a five-minute break, please.

THE CLERK: All rise.

(A recess ensued from 3:15 p.m. to 3:25 p.m.)

THE COURT: All right. Please be seated. All right. Just --

MS. SMITH: Your Honor, Frances Smith --

THE COURT: Go ahead.

MS. SMITH: -- for Scott Ellington and Isaac Leventon.

Your Honor, I have more good news. After the break, we reached an agreement with Mr. Wilson that they would not be calling Mr. Ellington.

THE COURT: All right. Mr. Wilson, you confirm?

MR. WILSON: I do, Your Honor.

THE COURT: All right. Well, they're excused, then.

MS. SMITH: With that, Your Honor, may he be excused?

THE COURT: Yes, ma'am.

MS. SMITH: Thank you.

THE COURT: All right. Thank you.

All right. Mr. Morris, do you have further examination of Mr. Dondero?

MR. MORRIS: I do. I hope, I hope it's not too lengthy, particularly if I'm allowed to ask my leading questions on cross-examination.

THE COURT: All right. And let me --

REDIRECT EXAMINATION

BY MR. MORRIS:

Q Mr. Dondero, can you hear me, sir?

THE COURT: Let me just let you all know where you are timing-wise.

MR. MORRIS: Yeah.

THE COURT: You used two hours and sixteen minutes this morning on examination. But as I told you, I think you're entitled to some credit, so to speak, on your three-and-a-half hour total because of the narrative answers. So I'm not -- I'm not sure yet where I'm going to chop time, but please be mindful that's where we are. Okay?

MR. MORRIS: I'll try to limit this to 15 or 20 minutes, Your Honor.

THE COURT: All right.

BY MR. MORRIS:

Q Mr. Dondero, can you hear me, sir?

A Yes.

Q You testified that you're seeking justice for the estate. Is that right?

A Yes.

Q Your claims against the Debtor consist solely of indemnification claims and tax claims; is that right?

A Well, I mean, with proper 9019s, I think there's a residual equity value to Highland, and Highland should be able to resurrect and go forward.

MR. MORRIS: Your Honor, I move to strike.

THE COURT: Sustained.

BY MR. MORRIS:

Q Sir, the only claims that you have filed against the Debtor are for indemnification and for taxes, right?

A Yes.

Q Okay. And you made a lot of -- a lot of allegations about Mr. Seery, my firm, and the Debtor, and your views on what we're doing in this bankruptcy case. Isn't that right?

A I think it's transparent now, yes.

Q And you -- one of the complaints you have were the settlements that the Debtor entered into with certain of the creditors, right?

A Yes.

Q And you said that they weren't -- there was no scrutiny. Isn't that the word you used?

A Yes.

Q But you had every single opportunity in the world to take discovery with respect to every single one of these settlements; isn't that right?

A We did and we tried.

Q Okay. And you failed; isn't that right?

A Yeah, I -- yes. I guess that's --

Q Right? And you could have -- you, with all of your knowledge, with all of your wisdom, you could have tried to persuade the Court that these settlements were wrong. Correct?

A Yes.
Q And you did not personally ever take the stand to try to explain to the judge why these settlements were wrong. Isn't that right?
A Willing to.
Q But those hearings are over long ago. Isn't that right?
A Yes.
Q So you sit here and you complain about them, but when you had the opportunity, you chose not to testify in order to educate the judge and try to -- and try to show the judge that those were bad settlements. Isn't that right? You didn't do that?
A Counsel chose their strategy, which evidently, based on our success in overturning them, maybe it wasn't the right strategy, but their strategy was for me not to be the expert.
Q And the U.C.C. represents the interests of general unsecured creditors; isn't that correct?
A Yes.
Q And to the best of your knowledge, the U.C.C. did not object to any of the settlements that you complain about, correct?
A Everybody got three or four times more than they deserved, except for Redeemer, that got about 20 percent more.
MR. MORRIS: I move to strike, Your Honor.
THE COURT: Sustained.

BY MR. MORRIS:

Q Sir, the U.C.C. did not object to any of the settlements that you complain about, correct?

A I don't -- I don't know the answer to that. I thought more than one person objected to Josh Terry and Acis and I -- we haven't seen the 9019 for UBS or Pat Daugherty yet.

MR. MORRIS: I move to strike and I'll try one more time, Your Honor.

THE COURT: Sustained.

BY MR. MORRIS:

Q Mr. Dondero, it's a very simple question. The settlements that you complained about -- Acis, HarbourVest -- the U.C.C. didn't object to them at all. Correct?

A Yeah, I guess not. I don't know if they did or -- yes. I don't know.

Q Okay. And Mr. Seery, we -- the Debtor made a motion last summer to have Mr. Seery appointed as the CEO. Do you remember that?

A Yes.

Q And you didn't object to that, correct?

A We didn't realize he had betrayed the estate at that point. We thought he was still trying to negotiate a settlement, not give the company away.

MR. MORRIS: I move to strike.

THE WITNESS: So we did not --

THE COURT: Sus...

THE WITNESS: We did not object.

THE COURT: Okay.

BY MR. MORRIS:

Q And the Debtor didn't -- I mean, the U.C.C. --

THE COURT: Wait. It's happening again, --

MR. MORRIS: -- didn't object, correct?

THE COURT: -- Mr. Dondero. Okay? Please. Yes or no where you get a yes-or-no question.

Go ahead, Mr. Morris.

BY MR. MORRIS:

Q And to the best of your recollection, the U.C.C. was supportive of the appointment of Mr. Seery as CEO, correct?

A Yes.

Q And the Debtors just had a plan of reorganization confirmed, correct?

A Yes.

Q And as part of that plan, Mr. Seery is going to continue on as the post-confirmation executive, correct?

A I believe so.

Q And the U.C.C. is supportive of that, to the best of your understanding, correct?

A Yes.

Q Yeah. Let's talk about the phone for bit. You testified at length about this policy pursuant to which phones can just

be discarded and wiped down. Do you remember that?
A Yes.
Q You took some time to prepare for your testimony today. Isn't that right?
A No, not really.
Q You did meet with your counsel and communicate with your counsel over what grounds would be covered, right?
A Half an hour last night.
Q Okay. And despite all of the testimony that you provided about the policy of discarding phones and changing phone numbers and the rest of it, your counsel didn't show you anything in that 50-page employment handbook to corroborate what you were saying, correct?
A I don't know what you're asking. I'm sorry.
Q There's nothing in the employee handbook that reflects any of the policies you described with respect to cell phones, correct?
A That wasn't my testimony. I don't -- I don't know.
Q Okay. And your lawyer didn't show you anything, to the best of your recollection, that would corroborate what you said about this cell phone policy, correct?
A My testimony was I gave my phone to the Debtor's employee, the technology folks, and I knew they knew what to do in a compliant manner. I did not know the specifics of the employee manual. That was my testimony. I'm sorry. I --

you're asking me something else, but I don't -- I can't answer what you're asking. I don't know the employee manual.

Q Okay. And as you sit here right now, you're not prepared to give the judge any information that would show that there's any written policy of any kind that corroborates your -- the policy that you've described, correct?

A Written evidence? I know it to be approved at the highest levels by Thomas Surgent, whatever Jason Rothstein does with the phones. That's all I know. I assume it's memorialized in -- somehow in the employee manual, but I don't know, nor should I.

MR. MORRIS: I move to strike, Your Honor. It's a very simple question.

THE COURT: Sustained.

BY MR. MORRIS:

Q Sir, Jason Rothstein was on your witness list for this hearing; isn't that right?

A I believe he was at one point.

Q And you and your lawyers actually served him with a subpoena; isn't that right?

A I do believe -- yes, I do believe I heard something about that.

Q And so you had him under your control to come here today to give testimony to corroborate what you testified to on the cell phone policy. Isn't that right? You could have had him

come tell the judge what you've testified to, correct?
A I guess.
Q But you didn't, right?
A We didn't believe it was necessary.
Q So, so you're not aware of anything in the employee handbook that corroborates the cell phone policy that you've described, correct?
A We went over it in detail. I don't want to pull up those pages again. But it either says it or it doesn't on those pages. So, --
Q Okay. I'm going to try once again. You are not aware, as you sit here right now, that there is anything in the employee handbook that corroborates the cell phone policy that you've described, correct?
A I don't know.
Q And there's not a single document on your exhibit list that corroborates the cell phone policy that you've described, correct?
A I don't know.
Q And Jason Rothstein, who you've testified a whole lot about, was on your witness list, but you didn't call him today to testify, correct?
A Yes. We didn't believe we needed him.
Q Okay. And let's talk about the policy itself that you've described. Is there any exception to the policy that you've

described for saving text messages if you are personally a target of an investigation?

A I have no idea.

Q So, so the policy that you've described, to the best of your knowledge, doesn't contain an exception that maybe you shouldn't do those things if you're the target of an investigation. Is that right?

A No. I'm just saying that when Jason and Thomas Surgent had my phone, they could have done anything they wanted to.

MR. MORRIS: I move to strike, Your Honor. I'm asking him about the policy that he's described.

THE COURT: Sustained.

BY MR. MORRIS:

Q Sir, when you negotiated the corporate governance settlement, part of that settlement was to state that the Creditors' Committee would share the privilege for estate claims. Do you remember that?

A Not specifically.

Q Do you remember that the Creditors' Committee had the authority to investigate claims against you?

A I believe they were doing that during that six, seven months in the beginning of the estate.

Q Okay. So is there any exception to your policy that you've described with regard to cell phones that would say maybe I shouldn't throw away the cell phone if I'm the subject

of an investigation?
A I don't want to speculate.
Q Okay. You're not aware of an exception to that policy, right?
A I don't want, yeah, I don't want to speculate. I don't know.
Q Is there an exception -- is there an exception to the policy to perhaps not throw away the cell phone if there's a court order that grants a Creditors' Committee the right to the text messages?
A I don't know.
Q You don't know? Okay. We talked about Mr. Rothstein. We talked about the handbook. Just to complete it, are you aware of any document anywhere in the world that's going to be put before the judge today that's going to corroborate the cell phone policy that you've described?
A I -- I don't know. But I would say I challenge you to tell me a different policy.
Q Okay. We looked briefly at the letter that my firm sent to your lawyers on December 23rd when they asked for the cell phone back and they made a very specific statement about the text messages. Do you remember that?
A No.
Q All right. Let's take a quick look at it. And it's Exhibit -- (pause).

MR. MORRIS: It's Exhibit 27, please. And if we can go down to the bottom of Page 2.

BY MR. MORRIS:

Q And this is where they -- they -- the Debtor informed your lawyers that it would be terminating the cell phone plan and they asked for the immediate turnover of the cell phone and they told you to refrain from deleting or wiping any information, right?

A Yes.

Q And you testified earlier that you actually discussed this letter with your lawyers, right?

A Yes.

Q Okay. And let's look back at what your lawyers' response is.

MR. MORRIS: Exhibit 22, please.

BY MR. MORRIS:

Q Now, in this letter, it says, in the second sentence, quote, We are at present not sure of the location of the cell phone issued to Mr. Dondero by the Debtor.

There is no doubt that the -- that the phone that's at issue here was the -- was the Debtor's cell phone, the Debtor paid for it, correct?

A I don't know that.

Q But you've already testified to it; isn't that right?

A Well, if I did, I was guessing. I don't know.

MR. MORRIS: Can we put up Page 55 from the transcript, please? And -- I'm sorry. One sec. Lines 10 through 13.

BY MR. MORRIS:

Q (reading) "Until December 10th, the day the TRO was entered, you had a cell phone that was bought and paid by the Debtor, right?" Answer, "Yes."

Did you give that answer the last time you were examined in this courtroom, sir?

A Yes.

Q Okay. And in fact, not only did you know that it was paid for by the Debtor, but you actually knew the last time you testified that the phone was thrown in the garbage, right?

A That's correct.

Q Is that correct?

A Again, I just assumed. But I -- I don't know the answer for sure to either question. But there's a way to find out whether or not the company paid for it and there's a way to find out whether or not it was in the garbage, too. But I don't know for sure.

MR. MORRIS: Can we go to Page 65, please? Right there, Lines 6 through 8. We'll go to Line 4.

BY MR. MORRIS:

Q Question, "We were a couple of weeks too late, huh?" Answer, "It sounds like it." Question, "Yeah. Because the

phones were already in the garbage, right?" Answer, "Yes."

That was the testimony you gave then, right?

A Yeah. We went over this earlier today.

Q Okay. I just want to make sure.

MR. MORRIS: And now let's go back to Mr. Lynn's letter to the Debtor about the cell phone.

BY MR. MORRIS:

Q There's absolutely nothing in this letter about the policy that you testified to under questioning from Mr. Wilson, correct?

A Not that I could see.

Q There's nothing in this letter, after discussing -- withdrawn. After discussing the Debtor's letter with your lawyer, your lawyer wrote this letter and it doesn't say anything about a practice, a company practice that would align itself with the policies and procedures that you've described, correct?

A Yes. We'll have to -- I was on vacation. We'll have to chastise Judge Lynn for not reading the employee manual or my deposition. I don't know what to say here.

Q Well, forget about the employee manual and the deposition. You actually spoke to him about the Debtor's letter, right?

A Not -- not for an extended period of time, I'll tell you that.

Q Okay. Well, in any event, Mr. Lynn doesn't tell the

Debtor, what are you talking about, Mr. Seery knows all about this and approved it all, right?

A Okay.

Q He -- right? Mr. Seery's not mentioned in this letter, correct?

A Correct.

Q The only statements in this letter about that cell phone are that it was issued to you by the Debtor, that they're not sure of the location, and that you're not prepared to turn it over. Correct?

A Yes. I guess that's what it says here.

Q Okay. Let's talk about that trespass for a bit. You testified that on December 14th you gave a deposition in the Debtor's office and nobody complained. Isn't that right?

A Yes.

Q That's because the Debtor had not yet evicted you from their offices. Isn't that right?

A Yeah, correct. But the TRO was in place.

Q But the reason that the TRO becomes important is because, as you testified earlier, it has that provision about the automatic stay relating to the Debtor's property. Right?

A Yes.

Q And the Debtor evicted you from the property on January -- on December 23rd, right?

A Effective the 30th, yes.

Q Yeah. And the Debtor told you that if you were on their property again, they would consider it trespass, correct?
A They sent me a calendar invite.
Q All right. We looked at those shared services agreements before. Is that right?
A Yes.
Q Okay. Anything in the shared services agreements that requires Debtor employees to take actions that are adverse to the Debtor?
A No.
Q Okay. So when you were the CEO, would you have allowed or required your employees to take action on behalf of the shared services partner that you believed or knew were adverse to the Debtor's interests?
A I'd expect them to honor the contracts. I -- it would depend on what the issue was.
Q Okay. Does the contract require the Debtor's employees to take actions that are adverse to the Debtor's interests?
A Read implicitly, yes, because whenever you manage money for somebody, your fiduciary responsibility trumps what issues that might be adverse to the Debtor. Or adverse to the company.
Q Can -- if I put the documents on the screen, will you be able to tell me where the shared services agreement provides for the resolution of conflicts between the service provider

and the service receiver?

A I don't believe it does, unless there's an arbitration clause. But -- but I don't know.

Q Okay. Let's talk about the trading for a minute. You insist that you did absolutely nothing to interfere with the trading; isn't that right?

A I tried hard to interfere with the November trades. I did nothing to interfere with the December trades.

Q Okay. Let's test that theory for a moment.

MR. MORRIS: If we can go back to Exhibit 27, please. Page 2, the top of Page 2.

BY MR. MORRIS:

Q This is where the -- this is where the Debtors tell your lawyers of their belief that you've interfered with the trading of the AVYA and the SKY securities on December 22nd, correct?

A Okay. But I'm telling you, I did not interfere on the 22nd.

Q I'm just asking you, sir, a very simple question. This is where the Debtors are informing your lawyers of their belief that you interfered with the trades on December 22nd. Correct?

A Yes.

Q Okay. Can you point to me where your lawyers wrote back and disputed that contention?

A I don't know if they did.
Q But they did write back in response to this very specific letter on the issue of the cell phone? We just looked at that response, right?
A Yes.
Q But you don't have any recollection and there's nothing in the record that will show that your lawyers disputed the allegations about your conduct on December 22nd, correct?
A Not that I'm aware of.
Q Okay. I appreciate that. And, in fact, notwithstanding what you testified to today, you testified previously rather unambiguously that, in fact, you did interfere with the Debtor's business, right?
A I clarified that -- I clarified that half a dozen times in the last few weeks. I mixed up the November and the December time frames a couple times. Or once, really.
Q Okay.

MR. MORRIS: Okay. Can we go to Page 73?

BY MR. MORRIS:

Q In case you were confused about the date, let's just look at the transcript, Page 73.

Were you asked these questions and did you give this answer? Question, "And you personally instructed, on or about December 22, 2020, employees of those Advisors to stop doing the trades that Mr. Seery had authorized with respect to SKY

and AVYA, right?" Answer, "Yeah. Maybe we're splitting hairs here, but I instructed them not to trade them. I never gave instructions not to settle trades that occurred, but that's a different ball of wax." Question, "Okay. But you did instruct them not to execute the trades that had not yet been made, right?" Answer, "Yeah," and then you went on.

That was the testimony that you gave at the time, correct?

A We went over this earlier today. I've clarified this several times. There is nobody, there's no emails, there's no one who says I contacted them on the 22nd. I misspoke. I contacted everybody the week of Thanksgiving. The only thing I did on the 22nd of December was one email to Jason Post, full stop, period. You have the system. If I am lying or you had any evidence of me talking to somebody else, you would have it, instead of just making me clarify this for the fifteenth time.

Q Well, I do have evidence, sir. I have -- I have the Debtor's letters to your lawyers that your lawyers didn't respond to. Isn't that correct?

A That's not evidence.

Q Okay. It actually is evidence, but I won't argue with you.

You testified a bit about Dugaboy and the financial statements. Do you remember that?

A Yes.

Q And you had no objection to those documents being produced? Is that right?
A Well, once I delegated it to my -- to Douglas, I let him handle it, and I haven't kept abreast of him. I don't even know where it stands at this point. But I trust him to do the right thing.
Q Does Ms. Schrath work for one of your -- one of the companies that you own or control?
A Yes. We -- yes, she does now.
Q Will you -- will you to authorize her to speak with the Debtor in order to identify where on the Debtor's server the Dugaboy financial statements are located?
A I think the proper channel is I'll authorize -- and he is fully authorized already -- Douglas Draper to appropriately work with you guys on an appropriate request for appropriate materials. But I -- I'll do whatever Douglas tells me is appropriate, but otherwise I'm -- I'm not going to get involved.
Q But Melissa Schrath was the one who knew where the documents were. Isn't that right? That's why you specifically went to her and told her not to produce the documents without a subpoena, correct?
A She keeps the records. So, --
Q Okay.
A But anyway, but she will -- she will march to what -- I

promise you she'll march to whatever Douglas tells her to do, so you work it out with Douglas.

Q I'm not asking you about Douglas. I'm asking about you, James Dondero, would you authorize your employee, Melissa Schrath, to provide information to the Debtor that will allow the Debtor to obtain these documents?

A Only after approved by Douglas, the counsel for Dugaboy.

Q Okay. Let's see what Douglas said previously, because they're your exhibits, actually.

MR. MORRIS: You know what, Your Honor, I'm not going to do this. I'll save it for argument. Because Exhibits 16 through 20 on the -- on Mr. Dondero's exhibit list are all the emails with Mr. Draper. He has no knowledge of the -- of Mr. Dondero's email about the subpoena. He has -- he is actually looking to get the documents, but he's being undermined.

BY MR. MORRIS:

Q Let's talk -- let's talk briefly about Mr. Ellington. You testified that he was settlement counsel, right?

A Correct.

Q After the TRO was entered into, do you know whether your lawyers ever made any attempt to confirm with the Debtor that the Debtor was comfortable, notwithstanding the TRO, having Mr. Ellington talk to you about issues other than shared services?

A No, but he was.

Q Okay. Do you have any documents to corroborate your testimony that, after the TRO was entered into, and notwithstanding the very strict prohibition on communicating with employees other than shared services, any document at all that corroborates your testimony that Jim Seery authorized Mr. Ellington to continue to talk about topics other than shared services?

A No.

Q Okay. I appreciate that.

MR. MORRIS: Your Honor, I have no further questions.

THE COURT: All right. Mr. Wilson, anything further?

MR. WILSON: I'll have a short redirect or recross, whatever this is.

THE COURT: Okay.

RECROSS-EXAMINATION

BY MR. WILSON:

Q Mr. Dondero, you testified under my examination and then again under Mr. Morris's about the cell phone policy that was put in place by Thomas Surgent. Do you remember that testimony?

A Yes.

Q Are you aware if there was ever a written policy regarding the cell phones?

A I -- I don't know. But I would have assumed it was in the employee manual.

Q But whether there was or there was not a written policy in place, you testified that you were instructed in compliance with that policy with annual meetings, correct?

MR. MORRIS: Objection to the form of the question.

THE COURT: Overruled.

MR. MORRIS: Leading.

THE COURT: Overruled.

BY MR. WILSON:

Q Do you recall my question, Mr. Dondero?

A I think I said yes.

Q Okay. Were you the only one at Highland who followed that cell phone replacement procedure that you were trained on by Thomas Surgent?

MR. MORRIS: Objection to the form of the question.

THE COURT: Sustained.

MR. MORRIS: Calls for speculation.

THE COURT: Sustained.

THE WITNESS: Again, the --

THE COURT: Sustained.

THE WITNESS: The policy wasn't --

THE COURT: No, no, no, no.

THE WITNESS: -- set --

THE COURT: That means don't answer. I sustained the objection.

Mr. Wilson, go ahead.

BY MR. WILSON:

Q All right. Mr. Dondero, are you aware of any other employees that followed that cell phone replacement policy at Highland?

MR. MORRIS: Objection to the form of the question. There's no foundation that anybody else -- I'll just leave it at that. No foundation.

MR. WILSON: Well, I'm -- Your Honor, I'm asking if he has personal knowledge of other employees. We're trying to establish a foundation.

THE COURT: Overruled.

THE WITNESS: My belief, the policies weren't set up in anticipation of bankruptcy or anticipation of infighting. In anticipation --

(Interruption.)

THE WITNESS: John, you're -- John Morris, you're making noise in front of the speaker again.

MR. MORRIS: I apologize. Thank you.

THE WITNESS: The policy wasn't set up in anticipation of bankruptcy. The policy was set up to prevent recycled, refurbished cell phones of former executives forming -- falling into a Sony-type scandal where the business emails get promulgated all over the Internet or something. It was meant to protect investor information, and that's -- that's my belief regarding the wiping of the phone.

And I believed and my knowledge is that it was for every senior manager, senior executive when they got a new phone at Highland. It wasn't just me.

BY MR. WILSON:

Q And to confirm your earlier testimony, the last time you saw your cell phone was when you handed it to Jason Rothstein, who's a former Highland employee, correct?

A Yes.

Q And if that phone was indeed wiped of the information on it, who performed that wiping?

A Jason --

MR. MORRIS: Objec...

THE WITNESS: -- or one of the guys on his team.

THE COURT: Okay. Hang on.

MR. MORRIS: Objection to the form of the question. Speculation.

THE COURT: Yeah. Sustained.

BY MR. WILSON:

Q Did you wipe the phone yourself, Mr. Dondero?

A No.

Q Why would you have testified in the past that the phone might have been destroyed or disposed of?

A Because that's what I assumed or thought happened to prior cell phones.

Q But in any event, you did not destroy or dispose of your

cell phone in December of 2020, correct?
A No, I did not.
Q Now, in December of 2020, did Dugaboy and the Get Good Trust hire Douglas Draper to represent their interests, and one of the issues that Mr. Draper had to address was the production of trust documents, correct?
A Yes.
Q Did you communicate with Mr. Draper any unwillingness to produce those documents?
A What I said, which I had testified to, I bought he was aware of the initial response of not without a subpoena, but then he was -- he didn't consider the information a big deal and so he just wanted to see it before it went out. And again, I thought that he was negotiating well with the Pachulski lawyers and I didn't know where that stood, but I wouldn't have been surprised if the information had been provided or was about to be. I don't know. I delegated it to him.
Q In the text that was sent to Melissa, --
MR. WILSON: Can you pull up Debtor's 19?
BY MR. WILSON:
Q I'm going to pull up Debtor's 19, which is the text string with Melissa. And what's --
MR. WILSON: Go down.
BY MR. WILSON:

Q What's the date on the text regarding the Dugaboy Trust?
A The 16th.
MR. WILSON: Okay. Go to our -- go to our 16. And this is going to be Dondero Exhibit 16. Go to the bottom of Page 2.
BY MR. WILSON:
Q Do you see this email at the bottom of the page from Douglas Draper --
A Yes.
Q -- to John Morris and Isaac Leventon? And what's the date of that email?
A The 15th.
Q Okay. So that's the day before you sent the text message to Melissa, correct?
A Yes.
Q So Mr. Draper was already coordinating with the Debtor's counsel to produce these documents prior to your text to Melissa, correct?
A Yes.
Q All right.
MR. WILSON: I have no further questions.
MR. MORRIS: Can we keep that document up on the screen for a moment?
THE COURT: All right. Normally, this would be the end of Mr. Dondero's examination, with recross, but it was

technically redirect as well, so Mr. Morris, you get the last short, and please make it brief.

MR. MORRIS: Yeah. Sure.

FURTHER REDIRECT EXAMINATION

BY MR. MORRIS:

Q The email that -- the email we just looked at was from Douglas Draper dated December 15th, right?

A Yes.

Q And Douglas Draper represents Dugaboy, correct?

A Yes.

Q And yet you're telling the Court that your lawyers told you, notwithstanding a TRO that prohibits you from communicating with Debtor's employees, except for shared services, that they thought you should be the one to instruct Melissa Schrath not to produce the Dugaboy documents without a subpoena? Is that your testimony, --

A That's correct.

Q -- that your lawyers told you to do that?

A That's absolutely correct.

Q Okay.

MR. MORRIS: No further questions, Your Honor.

THE COURT: All right. Mr. Dondero, that concludes your testimony today.

All right. We have one more witness, Mr. Seery, correct?

MR. MORRIS: Yes, Your Honor.

THE COURT: All right. Maybe --

MR. MORRIS: I hope this isn't too long, actually.

THE COURT: Maybe some people want to watch basketball. I don't know.

All right. Mr. Seery, could you say "Testing, one, two" so we pick up your video?

MR. SEERY: Testing, one, two.

THE COURT: All right. I hear you but I don't see you yet. Let's see if we --

MR. SEERY: Testing, one, two, Your Honor.

THE COURT: Okay.

MR. SEERY: Testing, one, two.

THE COURT: There you are. Please raise your right hand.

(The witness is sworn.)

THE COURT: All right. Thank you. Mr. Morris, go ahead.

MR. MORRIS: All right, Your Honor. I'll try to be as quick as I can here.

JAMES P. SEERY, JR., DEBTOR'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. MORRIS:

Q Mr. Seery, did the Debtor -- did the Debtor's independent board --

(Interruption.)

THE COURT: All right. We are getting some sort of feedback. So everyone but Mr. Morris, and Mr. Seery, when he answers, please have your device on mute.

Go ahead.

THE CLERK: Mr. Morris is on mute.

THE COURT: Okay. Now you're on mute, Mr. Morris.

MR. MORRIS: All-righty. Let's see if this works.

BY MR. MORRIS:

Q Mr. Seery, can you hear me now?

A I can, yes.

Q Okay. Did the Debtor's independent board make a decision in early October to demand Mr. Dondero's resignation?

A Yes.

Q And why -- what were the reasons?

A Quite simply, he was taking aggressive actions, interfering with the operations of the Debtor and our pursuit of a plan. Objections, claim objections, even things as far-fetched as piercing the corporate veil, which we're surely going to see later on in this case.

Q And did there come a time a few weeks later that the Debtor sought and obtained a TRO against Mr. Dondero?

A That's correct, yes.

Q And is it fair to characterize Mr. Dondero's relationship to the Debtor in December of 2020 as adverse?

A Extremely.

Q And why would you describe the Debtor's relationship with Mr. Dondero in December 2020 as adverse?
A Well, the discussions regarding any kind of bargain plan had really fallen apart. Mr. Dondero was actively objecting to the pursuit of the monetization plan, either individually or through his multiple entities. He had begun to move forward on litigation strategies versus me. And those, among other reasons, were the reasons that it had become extremely obvious that we were adverse.
Q I'll try to do this as quickly and as easily as I can. You were here this morning for my opening statement; is that right?
A Yes.
Q And did you listen in and watch my examination of Mr. Dondero when I went through the 13 email communications with the Debtor's employees?
A Yes.
Q Were you aware of any of the communications that we looked at today --
A No.
Q -- at the time that the communications were made?
A Well, yeah, I'm obviously aware of them today. They're on your schedule. But I was not aware of them at the time they were made, no.
Q Okay. And is it fair to say, then, that you did not

authorize any of those communications?
A They were definitely not authorized.
Q And having reviewed those communications, do you believe that those communications, each of those communications was adverse to the Debtor's interests?
A They were extremely adverse to the Debtor's interests. They -- they even went so far as to be coordinating shared privilege among adverse parties who were contesting the Debtor's actions with respect to both claims and the plan monetization process. What could be more adverse?
Q Had you known of these communications at the time they were made, do you have any idea as to what you would have thought or what you would have done?
A We would have terminated the employees involved. In fact, when they found out about them, we terminated the employees involved.
Q Okay. And why did you take that step when you learned about these communications?
A The -- some of the issues with respect to Mr. Dondero and certain employees have been brewing for some time, but these were just all examples of employees breaching their duties to the Debtor and taking adverse interests and pursuing them against the Debtor. And we couldn't continue to have those employees in place.
Q Okay. Let's just move quickly to the issue of the cell

phone policy. Did you listen to Mr. Dondero's description of the cell phone policy pursuant to which they could recycle phone numbers or change the account holders and wipe phones clean?

A Yes, I heard it.

Q Okay. Are you aware of any written policy that supports that?

A No. That testimony was largely made up. The policy -- just so we're clear, and this is pretty typical -- and he knows this, of course -- but when someone has a phone at a financial firm, often you get your emails on the phone. When you leave the employ, that's deleted, because it's gone -- the server is the one that connects with your phone. It's not like your Yahoo. This is very standard. The rest of the data on the phone is not deleted and wiped unless you go wipe it.

Mr. Dondero's phone was paid for by the Debtor. Not only Mr. Dondero's phone, his housekeeper's phone, Ellington's phone, his driver's phone, his iPad in Florida. This -- he knows this.

Q And --

A They have the documents. I have them in front of me. Sorry.

Q That's okay. With respect to the trades, you heard some testimony about the trades and how Mr. Dondero insists that

he didn't do anything to interfere with the trades in December. Do you have any -- any knowledge or information that you can share with the Court on the Debtor's allegation as set forth in the letter that we looked at, that, indeed, on December 22nd, Mr. Dondero was involved in interfering with the Debtor's trading activity at that time?

A I think it's pretty clear, and my recollection was that he very directly instructed employees of HCMFA as well as Jason Post to prevent those trades from going through. His description of an OMS system and compliance was complete nonsense. These trades are compliant. You don't have to run a trade through an OMS system to be compliant. They were screened against the restricted list. It's -- it didn't have any basis in fact, what he was saying.

Q Okay. Let's talk just about -- about harm to the Debtor from the breaches that we have been discussing today. Has the Debtor suffered any economic harm, any financial harm, from Mr. Dondero's conduct with respect to the TRO violations?

A Well, I think -- I think the combination of the TRO violations and the continuing attempts to just make the Debtors spend a lot of money. We've spent literally millions, more than a million dollars, just on litigating TRO issues, just dealing with the initial TRO, the hearing, the order, the various appearances, the preliminary injunction,

and taking the preliminary injunction to this stage. We then, with respect to the trades, had to litigate those issues with both Mr. Dondero and his multiple related parties. We had to both pay your firm, DSI, not to mention individual time, but also Kasowitz, as you mentioned, we went out and hired with respect to some of the CLO issues in the litigation.

It's literally millions of dollars. And that doesn't even get to the multiple millions that were spent negotiating the transition that Mr. Dondero talked so glowingly about that he did nothing but throw (garbled). These are not -- these are not my guesses. This is not my supposition. I'm not thinking these are the case. These are just facts. And that's been his design, and he's doing it well. He's making us spend a lot of money.

There's no rebuilding Highland. The employees have been terminated. The contracts have been rejected. Highland, remember, was run to lose money. I've testified to this before. It was designed and he uses it to siphon off lots of value to these other entities. And we're going to keep seeing this. So it will continue to come.

But these actions with respect to blaming it on Jason Rothstein or claiming that Thomas Surgent ever touched his phone: complete nonsense. Not true. Didn't happen. Rothstein followed his orders. Great example of Dondero's

interference and contempt. He's just controlling these employees because they know ultimately they're going to be, many of them, working for him again. So their only avenue to remuneration is -- continued employment, is to do what he asks them to do. And you figure these are, you know, these are some really good folks. Jason Rothstein is a very talented and I think very ethical guy. To throw him under the bus like that is absurd. He doesn't --

Q Um, --

A By the way, he doesn't work for me. Right now.

Q Okay. Let's talk about noneconomic harm. We -- you saw the three categories that we went through from the -- from the 13 communications with the Debtor's employees, the three alleged violations of the automatic stay, the interference with the trading. Do you have a view or a, you know, knowledge that you can share what the Court as to whether the Debtor suffered noneconomic harm from these violations of the TRO?

A Well, absolutely. And I think it's pretty clear, and some of it is from Mr. Dondero's own testimony. A lot of confusion among the employees during the transition. So, in order to make sure that we could try to hold them through the transition and to complete a transition, we -- we entered into a KERP program. We actually spent a lot of money in designing it, coming up with it and bringing it to this

Court.

These employees are confused about where they're going. Are they going to go to this Newco, which is going to have to provide services to Dondero entities? Are they going to go to Dondero entities? That confusion made it more difficult for us to retain employees, and more expensive.

In addition, we went through the whole process of the KERP program. No one who is retaining employee -- employment with either Mr. Dondero or with the Newco actually ended up taking the KERP. They turned down money because he required them, in order to get a job with them, to give that money up and assign their claims to him, which he intends to try to use in some other way to slow up the case or cause more damage, make us spend more money. It's inconceivable. And I'm talking about employees who had a $2,500 KERP payment. He took them. It's crazy.

Q Um, --

A I apologize if -- since I'm not in the courtroom, Your Honor, I'm probably not as formal as I should be. I will -- I will -- I will endeavor to be a little bit more formal. My apologies.

THE COURT: Okay.

BY MR. MORRIS:

Q Did you have any -- did you have any concerns about the conduct that's been presented today in terms of undermining

your own authority as the CEO of the Debtor?

A Well, it's -- it's been very clear. And, again, that relates to both retaining employees and then working on transition services arrangements. We had a whole hearing a couple weeks ago on how the Fund Advisors and the Funds didn't need anything from Highland. They just needed old records. Well, it turns out, we've been working three weeks negotiating the shared resource agreement, that wasn't quite true.

And so we think we have something in place, but it's been much more difficult to get these kinds of arrangements done because authority has been undermined and because employees who are working in that sphere and working on the transition are worried about what the next opportunity is going to be for them. So it's been very, very difficult.

In addition, during January, because of this undermining, we saw some significant cover-ups around certain transfers. Those will be coming to light soon. But it -- I don't think these would have happened without Mr. Dondero's influence, his -- his contumacious conduct with respect to the Court, with respect to the authority, with respect to the transition, frankly, that he initiated when he started this bankruptcy.

MR. MORRIS: I have no further questions, Your Honor.

THE COURT: All right. Mr. Wilson, cross?

MR. WILSON: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. WILSON:

Q Mr. Seery, the Debtor filed the contempt motion on January 7th, correct?

A I don't recall the specific date, but if you represent it, I assume that to be true. Don't know.

Q Do you recall that the Debtor also filed a motion for an expedited hearing on the motion for contempt?

A I -- I believe so. I don't recall the specifics.

Q And the Debtor filed a memorandum of law setting forth the actions that it contends constitute violations of the TRO. Were you aware of that?

A I assume there was an accompanying memorandum of law, yes.

Q Well, did you see a memorandum of law that was filed?

A I certainly would have seen the pleadings. I don't recall whether I read the memorandum of law.

Q Well, did you participate in the process of determining the allegations that the Debtor was alleging should be held in contempt?

A I'm sure they were reviewed with me. I don't recall the specifics of how they were laid out in the pleadings. But I'm sure that counsel reviewed them with me.

Q Well, who decided for the Debtor to make the contempt allegations?

A Ultimately, the decision would have been mine, under the advice of counsel.

Q But did you -- did you not tell counsel what you -- what you contended was a violation of the TRO?

MR. MORRIS: Objection to the form of the question and direct the witness not to answer. He's really asking about Mr. Seery's communications with his lawyers, Your Honor.

THE COURT: Sustained.

MR. WILSON: I'll ask it a different way.

BY MR. WILSON:

Q Who came up with the idea of which allegations were going to be made, were contempt?

MR. MORRIS: Objection. Direct the witness not to answer.

He can ask him about Mr. Seery, but these questions are going to get into attorney-client privilege.

THE COURT: All right. Sus...

MR. WILSON: Your Honor, I'm not asking him to reveal any attorney-client privilege. I'm just asking for his knowledge of who came up with these allegations, outside of counsel.

THE COURT: I sustain the objection.

BY MR. WILSON:

Q Did you yourself form the allegations that were going to be in the contempt motion?

A I certainly gave the recitation of facts to my counsel as to what was happening in the case and Mr. Dondero's actions.

Q Is it the Debtor's contention that Mr. Dondero's willful ignorance of the TRO and the evidence supporting the entry of the TRO is itself contemptible?

A I think I'm answering your question. I -- I don't believe that he was ignorant of it. I think the insinuation, if it's claimed that he's ignorant of it, is highly contemptible, yes.

Q I'm sorry. I didn't understand that. You don't believe that Mr. Dondero was ignorant of the TRO?

A No, I don't believe that at all.

Q Well, so if Mr. Dondero -- if the Debtor contended that Mr. Dondero was willfully ignorant of the TRO, do you disagree with that statement?

MR. MORRIS: Objection to the form of the question. I mean, the -- the evidence is what the evidence is. It's not about our contentions at this point.

THE COURT: I overrule. He can answer.

THE WITNESS: Yeah, I don't -- I don't -- I disagree with that statement. I think, to some degree, I think that the idea that a -- no one's that obtuse, that a relatively

sophisticated man who is fighting for this wouldn't have any idea that there was a TRO in place I think is -- is far afield.

Q Which specific provision of the TRO do you contend that Mr. Dondero violated with respect to his cell phone?

A I'd have to go through each of the -- each of the provisions. I -- I don't have a list of them in front of me.

Q Well, I can put it up on the screen.

A Okay.

MR. WILSON: Can you pull up Debtor's 11?

(Pause.)

BY MR. WILSON:

Q Well, there's provision -- well, Paragraph 2, which has the various provisions in it.

A Just, just starting from there, this is -- this is -- I'm walking through this now. You're going to hear the same. He clearly communicated with Debtor employees, directing them to do something with his phone that had no basis in policy, was clearly destroying property of the Debtors, and I think violates (a) to start with. I -- just to start. I don't have the rest of the -- rest of the paragraph.

MR. MORRIS: Can we -- can we scroll down so he can see the rest of it before he finishes his answer?

MR. WILSON: I thought he was finished.

MR. MORRIS: Well, you haven't shown him the whole

document.

THE WITNESS: I mean, as we talked about earlier, (e) is pretty clear, too. This is destruction of property of the estate and these records. And -- and with respect to wiping it clear, as was previously discussed. I don't think that that's really debatable.

Q Who is Jason Rothstein?

A Jason was the head of IT at Highland. He's a longtime employee of Highland, had worked for Highland I think at least ten years.

Q Have you ever had a conversation with Mr. Rothstein about the Debtor's cell phone policy?

A I think I have.

Q And when was that conversation?

A I believe in and around this time, we talked about it. Because it was pretty clear -- the testimony that Mr. Dondero gave was completely untrue. I've never issued any edict, order, or statement that people lose their job --

MR. WILSON: I'm going to object to nonresponsive.

THE COURT: Sustained.

BY MR. WILSON:

Q What did Mr. Rothstein tell you that the Debtor's cell phone policy was? And by that, I mean the replacement policy.

MR. MORRIS: Objection to the form of the question.

THE WITNESS: I didn't testify to that. I didn't say that.

THE COURT: I overrule.

THE WITNESS: I know -- it -- that's not what I said.

BY MR. WILSON:

Q Well, did Mr. Rothstein ever tell you anything about the Debtor's telephone policy?

A I don't believe so, no.

Q But in any event, we can agree that Mr. Dondero turned over his phone to Mr. Rothstein, correct?

A It appears that way from the information we have.

Q And you testified that Mr. Rothstein is an ethical and honest individual, correct?

A I believe he is, yes.

Q And so are you -- are you insinuating by your testimony earlier that Mr. Dondero caused Mr. Rothstein to do something improper with the cell phone?

A Yes.

Q But yet you said that Mr. Rothstein is an honorable and ethical person, correct?

A Yes.

Q And so does -- how do you square your opinion with him as being honest and ethical, but yet he did something improper under Mr. Dondero's direction?

A I think Mr. Dondero told him to get him a new cell phone or wipe that one clean and he did so. And he's not a lawyer. He's an IT professional. If there was email, it was backed up. He may or may not have known how much Dondero used texts to conduct business.

But he would have done what he was told to do because that's what he was expecting -- where he expects to be working at some time in the future. It's a perfect example of why there was a TRO in place and why this kind of contumacious conduct is harmful to the estate.

Q From the time that you took over as an independent board member and also as CEO later, did you or anyone else at the Debtor ask Mr. Rothstein to back up anyone's text messages when they turned their phone in for replacement?

A No. Not to my knowledge.

Q Did anyone at the Pachulski firm, to your knowledge, ask Mr. Rothstein to back up text messages from anyone's phone?

A Not to my knowledge, no.

Q And you're aware that other Highland executives have left the employment of Highland during the pending of this bankruptcy, correct?

A Not who had a phone that was Highland's phone.

Q So did Mark Okada not have a Highland phone?

A No, he did not.

Q Did Mark Okada have any Highland information on his phone

when he left?
A I don't know. He didn't have a Highland phone. We didn't seize his personal phone.
Q So does it depend on whether the phone was paid for by Highland whether or not that Highland should be able to access the information on the phone?
A That's not the policy, no.
Q Well, my question is, is that did you -- were you at all concerned about any information that might have been on Mr. Okada's phone when he left Highland?
A I wasn't because I had no experience with him texting me to conduct business.
Q Has the Debtor ever requested the phone company to search and see if they can recover any text messages from Mr. Dondero's phone?
A No, we haven't.
Q But the Debtor established a protocol for conducting electronic discovery in this case, correct?
A That's very different. The phone company doesn't maintain text chains for those who use Apple products. Apple maintains them.
MR. WILSON: Your Honor, I object as nonresponsive.
BY MR. WILSON:
Q I'm asking you a different question.
THE COURT: Okay.

BY MR. WILSON:

Q Did the Debtor establish a protocol for conducting electronic discovery in this case?

A I -- I believe there's an order in place.

MR. WILSON: Why don't you pull up 8? Yes. And go -- just scroll on the first page.

BY MR. WILSON:

Q This is Dondero Exhibit 8 that we're pulling up. Do you recognize this document?

A I'd have to see -- I don't. I'd have to see more of it. I'm only seeing a small snippet.

Q Okay. Well, we can -- we can scroll down to satisfy you. (Pause.) The top of the document is Notice of Final Term Sheet, and it looks like the date is January 14, 2020.

A Yes, I recognize this document.

MR. WILSON: Okay. Go to Page 44. Actually, go to 43. Yeah, that's it.

BY MR. WILSON:

Q Do you see -- I'm now looking at Page 43 of the document where it says Exhibit C, Document Production Protocol.

A I see it.

MR. WILSON: All right. Scroll down to the next page.

BY MR. WILSON:

Q And then it, in (a), it talks about ESI or

Electronically-Stored Information. And this appears to be the protocol for preservation of ESI. Would you agree with that?

A In accordance with the term sheet, yes.

Q Right. Are text messages referenced in this document?

A I don't know.

Q Well, if we scroll through letter C, where it says Preservation of ESI, do you see anywhere under Preservation of ESI where it refers to text messages?

A I -- I don't -- I don't see --

MR. WILSON: Then I --

THE WITNESS: I don't see it. This seems to be dealing with the server.

MR. WILSON: And then scroll down to I.

BY MR. WILSON:

Q And here's the final --

MR. WILSON: It's -- no, no, no. It's -- it's Page 45.

BY MR. WILSON:

Q This is -- letter (i) at the top is the final paragraph under that section. That seems to refer to hard drives and laptops and work computers, but does it -- do you see anywhere where it mentions phones or text messages?

A Doesn't use those words, but it certainly covers it.

Q But this would be the protocol that covers ESI that the

-- that Debtor agreed to, correct?
A I believe so, yes.
Q And you approved this protocol prior to its adoption?
A I don't believe so, no.
Q You didn't approve it?
A My recollection is this was right around the time we came in. I think this was part of the agreement that the Debtor had with the Committee. And I don't believe it was subject to independent board approval before its entry. I don't -- I just don't recall specifically. That's my recollection.
Q Did you -- do you recall if you participated in the development of this protocol?
A I did not.
Q But you would agree that this is the protocol that the Debtor agreed to adopt in connection with this bankruptcy case, correct?
A It is a protocol entered in January of 2020.
Q Do you have a Highland email account?
A I do.
Q Do you have a personal email account?
A I do.
Q And do you conduct Highland business on your personal email account?
A I do.
Q Do you preserve your personal emails?

A I do.
Q Do you have a Highland cell phone?
A No.
Q So do you use your personal cell phone for Highland business?
A Yes.
Q Do you preserve all your text messages?
A I don't delete them. I believe that they're accessible, yes.
Q Are your personal emails stored on the Highland server?
A No.
Q Are your text messages stored on the Highland server?
A No.
Q With respect to the motion filed by the U.C.C. in January 2020 relating to discovery, did the Debtor oppose the motion? Or I'm sorry. I said January. I meant July 2020.
A I believe we did.
Q Did the Debtor agree with the U.C.C. at that time to preserve and produce text messages?
A I believe that we did.
Q Do you know if that's in writing anywhere?
A The order was pretty broad. There was obviously significant -- I don't know if it's in writing anywhere.
Q During the pendency of this case -- well, I guess I need to ask a question before that. Who at the Debtor is

responsible for sending litigation preservation notices?

MR. MORRIS: Objection to the form of the question.

THE COURT: Overruled.

THE WITNESS: Currently, the general counsel.

BY MR. WILSON:

Q Currently, the general counsel? Well, who would -- who would have been responsible for sending it during the year 2020?

A Scott Ellington.

Q Were you aware of Thomas Surgent ever sending any litigation preservation notices?

A Since he became general counsel, he has, yes.

Q When did Mr. Surgent become general counsel?

A After Mr. Ellington was terminated.

Q Well, during the pendency of this case, have either Mr. Ellington or Mr. Surgent ever sent around any preservation notices pertaining to text messages?

A I was -- I don't know if it -- I assume they pertain to text messages. I -- I believe there was one, and I asked about it my first day at Highland, that it was -- it was a litigation preservation notice.

Q And that was around the time of your first day at Highland?

A Correct.

Q So, but since that time, are you aware of any

preservation notices pertaining to text messages sent?
A Not specifically, no. Well, certainly, Mr. Surgent's preservation notice since he became general counsel would cover that. I am certain of that.
Q But that would have been in January of this year, correct?
A Correct.
Q Did you ever ask Mr. Ellington or Mr. Surgent to send any preservation notices pertaining to text messages prior to Mr. Ellington's termination?
A I believe I asked on the first day that I was there about document preservation notice, did it go out? Didn't specifically reference text messages.
Q But after that -- after that preservation notice at the beginning of your employment, you're not aware of any other preservation notices that you requested should go out?
A I didn't make any requests after the first one went out.
Q And that -- and that request that went out or that notice that went out in January of 2020 did not specifically refer to text messages, correct?
A I don't know. I actually think, when it would have gone out in -- at the filing, any responsible general counsel would have issued it, and I was told that they did.
Q Are you aware of anyone at the Pachulski firm that asked Mr. Surgent or Mr. Ellington to send any preservation notices

pertaining to text messages?
A Certainly, Mr. Surgent, I don't know if Pachulski asked him, I certainly did, to redo it after we made some significant discoveries in January. But I don't know if Pachulski -- the Pachulski firm or anyone there asking -- it wouldn't have been Mr. Surgent. He was the CCO. It would have been Mr. Ellington, the GC. Other than the, as I said, the request I made in January to confirm that one was sent out at the start of the case.
Q Referring back to Mr. Mark Okada and also Trey Parker, were those individuals covered by the custodians of the U.C.C.'s request?
A I didn't -- I didn't understand your question. I'm sorry.
Q Were Trey Parker and Mark Okada custodians under the U.C.C.'s preservation request or discovery request?
A I don't -- I don't know.
Q Did you ever -- did -- both of those individuals left during the pendency of the Highland bankruptcy, correct?
A Yes.
Q Did the Debtor do anything to preserve text messages from either Mr. Parker or Mr. Okada when they left Highland?
A Not to my knowledge.
Q Now, earlier, you tried to testify about your knowledge of cell phone policies from other financial companies. Do

you recall that testimony?
A Yes.
Q And which financial companies are you referring to?
A River Birch Capital. And Lehman Brothers.
Q So you've -- you have two examples of cell phone policies that you were referring to?
A Well, I -- I know of others as well.
Q But you don't have any firsthand knowledge of Highland's policy, particularly going back ten years, correct?
A That's incorrect.
Q Well, were you -- did you -- were you a Highland employee ten years ago?
A No.
Q Did you attend training by Thomas Surgent on cell phone replacement policies?
A I don't believe there was such a thing. I attended compliance training with Mr. Surgent, yes.
Q But yet you -- you claim that Mr. Dondero made that testimony up, correct?
A Yes.
Q And you heard Mr. Dondero's testimony that ever since he's been attending these compliance training sessions over the last ten years, every time he's replaced his cell phone, he's followed the same procedure: handed it over to a Highland employee and then the Highland employee would wipe

it and provide him with a new cell phone. You heard that testimony, correct?

A I heard it, yes.

Q And you have reason to doubt the veracity of that testimony?

A Yes.

Q And what is that reason?

A Well, for one, his testimony about the numbers and how they got them was untrue, at least from information I've received from the earliest days.

Number two is that's not how you wipe a phone. You can wipe it remotely. That's how you remove access to the system. You don't need the guy's phone in order to wipe it. He had already done that after threatening me with a text and engaging in numerable -- innumerable engagements on texts to conduct business. And then when it became crucial and there were issues regarding his texts, he suddenly decided to get a new phone and destroy it. I found it to be incredible.

Q But you would have to agree with me that, regardless of whether Highland had a written policy, it was actually the Debtor who wiped Mr. Dondero's phone, correct?

A I don't -- I don't believe that to be the case and I don't know. Again, Highland can wipe the phone without having access to it. It can do it remotely. It doesn't delete the texts. It just removes your access to Highland's

system and the records of your emails. You'd still have your phone. You'd still have your texts. It's your phone.

Dondero's problem is it wasn't his phone. It was Highland's phone. So he couldn't just wipe it. He had to get rid of it.

Q But you would agree with me that if anyone wiped the phone, it was Jason Rothstein or someone working under his direction? You testified to that just a few minutes ago.

A The wiping of the phone does not wipe the texts. The wiping of the phone removes the email access and the email records that you can get on your phone when you work for a financial institution. Law firms may have the same thing, if they're sophisticated enough. It prevents that person from getting it. It doesn't clean out the phone. It doesn't get rid of everything you have.

The one problem with it is it does tend to remove your Out... a lot of your Outlook names, because those are connected to your work server.

MR. WILSON: I'll object as nonresponsive.

BY MR. WILSON:

Q You testified --

THE COURT: Overruled.

MR. MORRIS: Your Honor, can I -- can I have a ruling on that, please?

THE COURT: I said overruled.

MR. MORRIS: Because I thought it was terribly responsive.

THE COURT: I said overruled, yes. Thank you.

MR. MORRIS: Thank you.

BY MR. WILSON:

Q So, do you know who wiped the text messages off Mr. Dondero's phone?

MR. MORRIS: Objection --

THE WITNESS: I don't know --

MR. MORRIS: -- to the form of the question.

THE COURT: I didn't hear -- okay.

THE WITNESS: I don't know that the text messages were wiped.

THE COURT: Okay.

THE WITNESS: I'm sorry.

THE COURT: Time out. Would you repeat the question, Mr. Wilson?

BY MR. WILSON:

Q My question was, do you -- do you know who wiped text messages from Mr. Dondero's phone?

MR. MORRIS: Objection to the form of the question. No foundation.

THE COURT: Sustained.

MR. WILSON: Again, I'm trying to ask him if he has personal knowledge of something.

THE COURT: It -- you'll have to rephrase it.

MR. MORRIS: Your Honor, there's no -- he --

THE COURT: You'll have to rephrase what you said.

BY MR. WILSON:

Q Do you have personal knowledge of whether text messages were actually ever wiped off Mr. Dondero's phone?

A No, I don't.

Q So, therefore, if text messages were wiped on Mr. Dondero's phone, you would not have personal knowledge of who actually did it. Correct?

MR. MORRIS: Objection to the form of the question. Calls for speculation.

THE COURT: Sustained.

BY MR. WILSON:

Q Well, if you -- if you don't have personal knowledge that they've been wiped, I don't understand how it would be speculation that you don't know who would have wiped them if they were wiped, but --

MR. MORRIS: Objection. (garbled).

THE COURT: Sustained.

BY MR. WILSON:

Q Prior to becoming the CEO of Highland, did you change or implement a cell phone replacement policy?

A No.

Q Prior to Mr. Pomerantz sending his letter to Mr. Lynn on

December 23, 2020, had the Debtor notified Mr. Dondero that the Debtor wanted his cell phone?

A No.

Q And you're now aware that Mr. Dondero began the process of acquiring a new cell phone well before the TRO was entered on December 10th, correct?

MR. MORRIS: Objection to (garbled) question.

THE COURT: I couldn't hear. Was there an objection, Mr. Morris?

MR. MORRIS: Yes, Your Honor.

THE COURT: Say again what the objection was.

MR. MORRIS: To the form of the question, the use of the phrase "well before." I think the testimony is two weeks.

THE COURT: Okay.

MR. MORRIS: According to Mr. Dondero.

THE COURT: Sustained. If you could rephrase.

BY MR. WILSON:

Q So, you heard Mr. Dondero's testimony that he began the process of acquiring a new cell phone two weeks before the TRO was entered, correct?

A I heard it.

Q And as of December 10th, Mr. Dondero was still performing work at the Highland offices for the Funds and Advisors, correct?

A I don't know what he was performing. He was there.
Q Is it the Debtor's contention that Mr. Dondero violated the TRO by personally intervening to prevent the Debtor from executing certain securities transactions on December 22, 2020?
A Among other things, yes.
Q What actions of Mr. Dondero does the Debtor contend constitute Mr. Dondero's personal intervention to prevent the Debtor from executing certain securities transactions?
A With respect to the December ones?
Q Yes.
A Yeah, he -- he instructed, through either Post or Joseph Sowin, I don't recall specifically, that the trades not be completed. And notwithstanding that we were trying to get it done because we thought it was an advantageous time to make those trades, he got involved and prevented it.
Q What evidence have you presented that Mr. Dondero instructed Mr. Post not to complete trades?
A I believe when you put together his email and the letters from counsel, you'll see, when you piece them together, that that's what happened. I don't think Jason Post did this on his own.
Q So your testimony is speculation, correct?
A No. I think there's -- there's very specific instructions.

Q Well, have you brought that email with those very specific instructions before the Court?
A I think Mr. Morris did earlier.
Q Can you point me in the record to where that is?
A I -- I don't keep track of the exhibits, but this is the -- this is the stuff that Mr. Morris went through earlier today. I don't have -- I don't have it specifically in front of me.
Q In December of 2020, did Mr. Dondero send you any emails regarding the trades that you wanted to make?
A I don't believe he did, although he did email me on December 14th and -- or 4th, and he did email me on December 8th with an apology, and he did email me on December 17th with some material nonpublic information.
Q In December of 2020, did Mr. Dondero send you a text regarding trades that you wanted to make?
A In December? December 3rd, I believe, was his threat, and I don't believe I got a text from him after that.
Q In December of 2020, did Mr. Dondero call you regarding the trades he wanted to make? Regarding that you wanted to make.
A I don't believe so, no.
Q Did Mr. Dondero block any trades in December of 2020 that you wanted to make?
A I don't recall if we completed the -- the end of December

trades or we just determined not -- not to do them because it was too difficult.

Q But, in fact, every trade you initiated in December 2020 closed, correct?

A I don't -- I don't recall if the ones that we're referring to now actually closed or if we just decided not to do them. If I made a trade with --

(Interruption.)

A -- with a dealer, then we completed it. We didn't fail on any trades.

MR. WILSON: Which exhibit is it?

BY MR. WILSON:

Q All right. I'm going to pull up Debtor's 37.

MR. WILSON: Go to Page 173. Of the transcript. Go down where it says, "By Mr. Hogewood."

BY MR. WILSON:

Q Sir, do you recall giving testimony on January 26th in connection with Plaintiff's motion for a preliminary injunction against certain entities owned and/or controlled by Mr. James Dondero?

A I believe I did.

Q Do you recall being asked this question by Mr. Hogewood on Line 16? "Yeah, let me -- let me say it differently. Focusing solely on December of 2020, every trade that you initiated closed; isn't that correct?" A, "Every trade, yes.

We did not fail one trade."

MR. MORRIS: Objection. Objection. He's seeking to impeach Mr. Seery with the exact same testimony that he just gave.

THE COURT: What --

MR. WILSON: Well, I would disagree, Your Honor. Mr. Seery has equivocated on whether all of his trades went through in December of 2020.

THE COURT: He equivocated? I don't remember him being equivocal. Remind me of what the testimony was.

MR. WILSON: Well, I believe that Mr. Seery said that he thinks he gave up on some trades and decided not to complete them.

MR. MORRIS: Objection. The testimony that's being read into the record from the earlier hearing is not inconsistent with anything that Mr. Seery just testified to.

THE COURT: (reading) "Every trade that you initiated closed; isn't that correct?" "Every trade, yes."

I sustain the objection. I don't think it's inconsistent.

BY MR. WILSON:

Q Okay. Mr. Seery, would it be fair to say that the trades that we are referring to in that December 22nd time frame were initiated?

A I -- I don't recall. The -- and that's -- and I think

you're -- you're trying to create some ambiguity where there is none or inconsistency where there is none. I'm sorry. That if we initiated a trade, because I did them through a broker and told them sell or -- at a particular level on a particular day, if he was able to complete that and get a buyer on the other side, we completed the trade. So if we initiated it, we got it done.

I don't recall if those trades that we're talking about earlier were initiated. And this is a little bit of, I guess, inside baseball knowledge Mr. Dondero started going through a little bit before. Typically, the trades are put in through the order management system. It's easier to track the trades then. It's all automated. What we did instead, where we actually initiated a trade, was we did it manually. So we closed those trades manually. And to be clear, the order management system is not -- is not the Advisors'. It's Highland's.

Q Well, Mr. Seery, if the -- if the complaint is that the Advisors' employees did not book the trades, then those trades were initiated. Would you agree with that?

MR. MORRIS: Objection to the form of the question. Conflicts with the testimony.

THE COURT: Sustained.

BY MR. WILSON:

Q Do you understand the -- what's implicated by booking a

trade?
A Do I understand what's implicated by booking a trade?
Q Yes.
A Do I know how to book a trade? Yeah.
Q And would that not be a trade that has been executed? A trade that would be booked would not be booked until after it was executed, correct?
A That's correct.
Q And so the -- the trades that we are talking about in the December 22nd time frame were initiated and executed and then later booked, correct?
A Any trade would have been initiated, executed, and booked. That's the correct order.
Q All right. And you've previously testified, and you testified again today, that every trade that you initiated closed, correct?
A If --
Q In December 2020?
A If we initiated it and we got it done, of course. The issue is whether, when calling up the traders, if they refuse to actually initiate the trade or take it, that -- that wouldn't have closed.
Mr. Dondero didn't get this from some strange, you know, premonition from the sky. He's on a -- he was on a system that showed all of the trades. And that's where the email

back and forth, where he's on that list and says, Don't -- don't do this, both earlier and later, that's where those come from. It's not -- it's not that he had some great insight into what's going on. He's getting email.

Q And, in fact, you did not fail one trade in December 2020, correct?

A No. Didn't fail.

Q Is it the Debtor's contention that the K&L Gates law firm sending letters to the Pachulski law firm on December 22nd and 23rd was a violation of the TRO?

A I think it was, yes.

Q To be clear, these are letters between counsel, correct?

A They are.

Q And, in fact, K&L Gates is not Mr. Dondero's personal counsel, correct?

A That's what I'm hearing.

Q And K&L Gates at the time represented the Funds and Advisors, correct?

A I -- there's so many counsel, I don't recall if they represent just the Fund -- I think they represent just the Funds, not the Advisors. But if they represent the Funds and the Advisors, then I'd precedent your next question, because Mr. Dondero clearly controls the Advisors and he's -- he basically said so earlier today.

Q Can you tell me what threat means in the context of a

TRO?

A What a threat is?

Q Well, what -- what's meant by threat in the context of a TRO.

A I believe -- I believe that a threat is a -- either a statement or action that one takes against another that puts them at risk of some kind of loss or harm in order to get someone to do or not do something. I think that's the common -- relatively common usage of threat as I would use it.

THE COURT: Mr. Wilson, how much longer do you think you're going to take? I probably need to take a break if you're going to be much longer.

MR. WILSON: Yeah. Now would be a great time for a break, Your Honor.

THE COURT: What was the answer to my question?

MR. WILSON: Well, I said now would be a great time for a break, but I don't have an exact time estimate on the remainder of my questions for Mr. Seery.

THE COURT: All right. Well, we're going to stop at 5:30 tonight. I've got a very long day tomorrow so I've got to prepare for it at some point.

Nate will check the time, see how much time you've each used. But we'll take a five-minute break.

MR. WILSON: All right. Thanks, Your Honor.

THE CLERK: All rise.

(A recess ensued from 5:01 p.m. until 5:07 p.m.)

THE CLERK: All rise.

THE COURT: All right. Please be seated. We're going back on the record in Highland.

All right. Nate has told me that, Mr. Wilson, you're at two hours and twenty minutes. So you're actually well within your time frame. And what did you say Mr. Morris is at, without deductions?

THE CLERK: Three hours.

THE COURT: You're at three hours, Mr. Morris, without deductions.

Here's what we'll try to do. We'll try to get through Mr. Seery today, but we're not going to do closing arguments tonight. And what I'm thinking is we're coming back Wednesday on the bond, the supersedeas bond issue with regard to the requested stay pending appeal. So we'll roll into closing arguments on Wednesday after we're finished with that matter. That matters starts at 9:30. So, presumably you'll all be here for that anyway, so we'll defer closing arguments until Wednesday.

MR. MORRIS: Your Honor?

THE COURT: Yes?

MR. MORRIS: Can we put a time limit on that, too, just to make sure it's sufficient? I don't think I'd need more than 15 or 20 minutes.

THE COURT: Okay. I think 20 minutes is plenty per side. In fact, hopefully, with this gap in time, I'll be able to kind of go through the exhibits and have my thoughts collected, so therefore that I don't I'll need a lengthy closing at that point.

Mr. Wilson, sound like a deal to you, 20 minutes?

MR. WILSON: I think 20 minutes will be sufficient, Your Honor.

THE COURT: All right. So you may proceed now with your questioning of Mr. Seery.

MR. WILSON: All right. Thank you.

CROSS-EXAMINATION, RESUMED

BY MR. WILSON:

Q When we left off, Mr. Seery, we were talking about the letters sent by K&L Gates on the 22nd and the 23rd. You would agree with me that these letters did not have any effect on the Debtor, correct?

A The lett... well, they certainly caused us to spend a lot of time and money dealing with the issues that we thought were handled at the prior hearing, where it was basically found to be frivolous. So I disagree with that.

Q You weren't intimidated by the letters, correct?

A No.

Q And the letters didn't cause you or the Debtor to refrain from operating the company in the manner that you perceived

to be in its best interest, correct?
A It did not.
Q The letters didn't cause you to change any of your trading decisions, correct?
A Nope, they did not.
Q The letters didn't cause you to change your investment strategy, correct?
A No.
Q And the letters didn't cause you to trade or not trade in a particular manner, correct?
A That's correct.
Q And you continued to function the Debtor's operations as you deemed appropriate, right?
A Yes.
Q In fact, the Debtor rejected the requests made in the letters and demanded a withdrawal, correct?
A Yes.
Q So the letters did not cause you to conduct yourself in any other manner than you would have conducted yourself had you not received the letters, correct?
A Well, as I said, we spent a lot of time and money responding to them and dealing with them because we didn't just leave them hanging out there. So that's not correct.
Q Did the letters cause the Debtor to breach any contracts?
A No.

Q And, again, every trade you initiated in December 2020 closed, correct?
A Yes.
Q But yet the Debtor considers the sending of these letters between counsel to be an interference with or impeding the Debtor's business?
A Yes.
Q So is it your contention that that provision of the TRO is clear and unambiguous?
A Yes.
Q But could you see where someone might disagree?
A No.
Q Could you see where someone might believe that a letter sent between counsel that did not cause the Debtor to alter its course in any way was not an interference with the Debtor's business?
A A threat doesn't have to be successful in order to be a threat and one that could affect us, and I said it did actually affect what we did because we had to spend money and time dealing with it.
Q Who is Scott Ellington?
A Who is Scott Ellington?
THE COURT: Okay.
THE WITNESS: He's the former general --
THE COURT: Mr. Wilson, --

THE WITNESS: -- general -- former --

THE COURT: Mr. Wilson, we all know who Scott Ellington is, okay? Please. Let's --

MR. WILSON: Oh, I'm sorry. I was just asking the question for the record.

THE WITNESS: He's the former general counsel of Highland.

BY MR. WILSON:

Q And as general counsel, did you believe that Mr. Ellington owed duties to Highland?

A Absolutely.

Q As general counsel, Mr. Ellington would have been part of the legal department at Highland, correct?

A Yes.

Q And that legal department was part of the shared services agreements between the Debtor and the Advisors, correct?

A No, it wasn't.

Q Can you tell me what you mean by that?

A It was not, meaning no. In answer to your question, it was not.

Q Are you saying that the shared services agreements between the Debtor and the Advisors did not cover legal services?

A They included legal services, yes, but you asked me if the legal department was part of it. No.

Q Can you tell me what you mean by when you hear the term legal department?
A Highland's legal department was a pretty unusual thing. It included lawyers and non-lawyers. Not just, you know, administrators, administrative assistants, and paralegals, but even some people who were accountants or MBAs. It did work all over the -- either the Highland complex or even through numbers of entities for which it didn't get paid. Dondero entities. It was a -- it was a pretty standalone odd thing, one of the most unusual I've seen. It's really unusual to have an investment firm with more people in the tax department and in the legal department than in the investing side.
Q Would you agree with me that this is a pretty broad shared services agreement, correct?
A There are a number of services that are performed under it, yes.
Q And it, in fact, says in Provision 2.02 of Exhibit 1 that, without limiting the generality of Section 2.01, and subject to 2.04, the following are the services that are going to be provided. So this -- this document wasn't intended to be limited, correct?
A I can't speak to what was intended. It's a pretty unusual document. Legal services, typically, you don't split legal services, since it's unethical to split fees, so it

wouldn't be providing attorney services. Highland often used it to, in the past, to shield things based on a claim of attorney-client privilege. But I think that that document, whether it's intended to be broad or not, is certainly ambiguous in places.

Q Did you task Mr. Ellington with the role of a go-between between the board and Mr. Dondero?

A No. This -- this settlement counsel is something I'd never heard until Dondero raised it and made it up. It -- it's wholly fictitious.

Now, what Ellington did do is he was on a number of calls with me and Dondero, and he had a communication line with Dondero. This was through the first half of the case and into -- into the summer. But as it started to become more adversarial, particularly around the mediation, he wasn't invited. So, for example, Mr. Ellington was not invited to -- to participate in the mediation. He asked. I said no.

The -- in addition, this idea that he was drafting the pot plan, well, not to my knowledge or understanding, because I drafted it for Dondero and his lawyers because you guys couldn't.

MR. WILSON: Object as nonresponsive.

THE COURT: Overruled.

BY MR. WILSON:

Q Did you send Mr. Dondero messages through Mr. Ellington?

A No.
Q So you're denying Mr. Dondero's testimony to the contrary?
A Yes.
Q Did Mr. Dondero send messages to you through Mr. Ellington?
A No. Mr. Ellington often came back and gave me messages. They were often critical of Mr. Dondero. I didn't always believe them, because I figured Mr. Ellington had an ulterior motive. But he took a number of, you know, shots at Mr. Dondero and he came back and gave his color of what he thought was going on in Mr. Dondero's mind.
MR. WILSON: Object as nonresponsive.
THE COURT: Overruled.
BY MR. WILSON:
Q Did you task Mr. Ellington with negotiating certain items with Mr. Dondero?
A No.
Q Was there not a time, in January, early January, before Mr. Ellington's termination, that you tasked him with negotiating a new shared services agreement with Mr. Dondero?
A No.
Q Did you believe that there were legitimate items that Mr. Ellington needed to discuss with Mr. Dondero?
A I'm sorry. Can you say that again? It --

Q Did you believe that there were legitimate items that Mr. Ellington needed to discuss with Mr. Dondero?
A When?
MR. MORRIS: Objection to the form of the question.
THE COURT: Sustained.
BY MR. WILSON:
Q During the year of 2020, were there legitimate items that Mr. Dondero [sic] needed to discuss with Mr. Dondero?
MR. MORRIS: Objection. Vague and ambiguous.
THE COURT: Sustained.
THE WITNESS: Well, I believe you just asked me if --
THE COURT: Sustained.
THE WITNESS: -- Mr. Dondero could discuss with Mr. Dondero. I think --
THE COURT: I --
THE WITNESS: -- the question is --
THE COURT: I sustained the objection.
THE WITNESS: I'm sorry, Your Honor.
THE COURT: I need it to be rephrased.
BY MR. WILSON:
Q Did you ever instruct Mr. Ellington to keep taking Mr. Dondero's calls after the entry of the TRO?
A No.
Q So are you denying that on January 4, 2021, you

instructed Mr. Ellington to communicate with Mr. Dondero and negotiate a number of expense items?

A Expense items? Not to my knowledge. No, I don't recall that at all.

Q Did you ever tell Mr. Ellington that he could talk to Michael Lynn as much as he wanted because Mr. Lynn was an honorable and ethical person?

A I believe over the summer I did. Meaning summer of 2020. I don't know if I used the honorable and -- but I -- I thought Mr. Lynn, if he needed to talk to Mr. Ellington, that would be appropriate at that time.

MR. WILSON: Pull up Debtor's 17.

BY MR. WILSON:

Q This was the Debtor's Exhibit No. 17.

MR. WILSON: Go down to the bottom.

BY MR. WILSON:

Q Do you remember this email that came into evidence earlier?

A I saw it earlier, yes. I've seen it before.

Q And it starts at the bottom with a discussion between Michael Lynn and Mr. Dondero and other counsel.

MR. WILSON: Scroll up.

BY MR. WILSON:

Q Do you see where -- apparently, Mr. Lynn forwarded that email to Mr. Ellington at 8:44. We can't tell all the

senders and recipients. But do you see where Mr. Ellington responds later that evening on December 12th?

A Yes, I see the email.

Q And is it the Debtor's contention that this email between Mr. Dondero's counsel, Michael Lynn, and Scott Ellington is a violation of the TRO?

A Yeah, I think it is. I think that they're -- they're reaching out, I assume on behalf of Mr. Dondero, to try to create a witness. I assume this is for the confirmation hearing. I don't have the -- the times. But it's a pretty unusual thing to do. I know they ended up ultimately serving a subpoena on Mr. Sevilla but then not calling him.

Q Do you agree that Footnote 2 -- and we can pull it up if you want to.

MR. WILSON: Pull up 11. Debtor's 11. Bottom of Page 2. Bottom of Page 3. No, no. Bottom of the Page 4 on the document. Go to the very bottom of the footnote.

BY MR. WILSON:

Q I'm going to represent to you that this is Debtor's Exhibit 11, and this is the last page of it, and the footnote at the bottom says, "For the avoidance of doubt, this order does not enjoin or restrain Mr. Dondero from seeking judicial relief upon proper notice or from objecting to any motion filed in the above-referenced bankruptcy case."

Were you -- were you aware that that provision was in

this order?
A I'm sure I was at the time. I read it closely.
Q Would you agree with me that attempting to identify a witness for a hearing could be considered seeking judicial relief?
A No, I don't. I don't agree with you, no.
Q Are you aware that Mr. Ellington testified that while at Highland he'd been asked dozens of time by opposing counsel who they should subpoena to testify?
MR. MORRIS: Objection. I move to strike.
THE COURT: I --
MR. MORRIS: If they wanted Mr. Ellington to testify, he should have been here.
THE COURT: Yes. Actually, I couldn't even understand what the question was. Could you say what the question was again?
MR. WILSON: The question was, are you aware that Mr. Ellington testified that while at Highland he had been asked dozens of times by opposing counsel who they should subpoena to testify about a certain topic?
MR. MORRIS: Objection to the form of the question. No foundation.
THE COURT: Okay. Sustained.
THE WITNESS: I'm sorry?
THE COURT: Okay. I sustained the objection. You

don't have to answer it.

THE WITNESS: Oh, okay. I'm sorry, Your Honor.

BY MR. WILSON:

Q The Debtor's memorandum of law says that Mr. Dondero knew that several times in the last year several entities had requested the Dugaboy financial statements. Who are these several entities?

A Well, certainly, the U.C.C. I don't -- we did from Ms. Schrath, who was working for us at the time. And he instructed her, notwithstanding that she was working for Highland, to not give it over. I don't know who else had requested them.

Q Are these documents located on the Highland servers?

A I believe so. We haven't been able to find all of them yet.

Q So, have you looked for them?

A Yes.

Q How -- how many of the documents have you located?

A I don't know.

Q How do you know that there are documents that you haven't located?

A There are numbers of documents that are listed around different servers -- I don't know, I haven't done this work myself -- that indicate that they're Dugaboy. But we haven't been able to get to all of them.

Q How did Mr. Dondero personally interfere with the Debtor's search for the documents?

A I think it's pretty clear. He told a Debtor employee who worked extensively for him, who probably looked to work for him in the future, to not turn them over, notwithstanding that they're on the Debtor's server and they're the Debtor's property.

MR. WILSON: I'll object as nonresponsive.

THE WITNESS: You asked me how.

THE COURT: Overruled.

MR. WILSON: Turn to the list of -- 19.

BY MR. WILSON:

Q We're going to pull up Debtor's 19. Now, my problem with the answer you gave to the last question, Mr. Seery, is that you said that Mr. Dondero ordered that the documents not be turned over. But does the text he sent to Melissa Schrath on December 16th in fact say, No Dugaboy details without subpoena?

A That's what it says, yes.

Q So, in fact, Mr. Dondero wasn't saying that the documents couldn't be turned over, correct?

A It says, No -- No Dugaboy details without subpoena. I read that to mean don't give up anything unless ordered to do so, notwithstanding that they're on Highland's server and that make them Highland's property.

Q Well, I object to your legal conclusion.

THE COURT: Overruled.

THE WITNESS: I think it's factual, but --

MR. WILSON: Can I get a ruling, Your Honor?

THE COURT: I said overruled.

MR. WILSON: Okay. Thank you.

BY MR. WILSON:

Q But you're aware that prior to the communication that Dondero sent to Melissa Schrath on December 16th, that Douglas Draper had been communicating with Mr. Morris about producing these documents, correct?

A I'm aware of that, yes.

MR. WILSON: Let's go to our 16 real quick.

BY MR. WILSON:

Q If you look at the bottom of this, this is Debtor's -- I'm sorry -- Dondero's Exhibit 16. If you look at the bottom, do you see the email from Douglas Draper on Wednesday, December 16th, that said, Do you have a confidentiality agreement with the party requesting the information?

A I see that it says that, yes.

MR. WILSON: Can you go to 17? And can we go to Page 2?

BY MR. WILSON:

Q At the top of this -- this is Dondero Exhibit 17. The

first email on this page is from Douglas Draper on Friday, December 18th, to John Morris, that says, Would like to see them before they go out. I now need to look at the issue in light of the complaint filed (garbled).

Were you aware that Mr. Draper wanted to see the documents before they went out?

A I've -- I've seen this email, yes.

Q Do you know, as of December 16th, whether a formal request for the documents had been made to the trusts or Mr. Dondero?

MR. MORRIS: Objection to the form of the question.

THE COURT: Overruled.

THE WITNESS: Yes, I do. They were requested by the Committee long prior. Remember that these were documents in the Debtor's possession. Mr. Draper doesn't represent the Debtor. Mr. Draper represents Dugaboy. These are the Debtor's -- this is the Debtor's information. He doesn't have a right to see anything.

BY MR. WILSON:

Q But do you know whether a formal request for the documents had been made to the trusts or Mr. Dondero at this point?

A I don't know. Certainly, to the Debtor, I know, but I don't know.

Q And the Debtor -- strike that. Do you believe it's

unreasonable for Mr. Dondero to ask that a formal request, such as a subpoena, be sent regarding the documents?

A Yes. (garbled) control of the Debtor. That -- that's totally unreasonable. He completely interfered with our employee who was required to respond to me, who specifically directed her multiple times to produce them as requested. Initially, to our own counsel. I'm entitled to see them as the CEO. Our counsel is entitled to see them. I requested it multiple times, and she didn't. She rather would be fired because she knew she was being picked up by him.

Q Is it reasonable that counsel for the trusts might want to review the documents before they're produced?

A It might be helpful, but they're not his documents. And from a --

MR. WILSON: I object again.

THE WITNESS: -- perspective, it's not reasonable. The man should be able --

MR. WILSON: Object again as nonresponsive.

THE WITNESS: I don't think it's reasonable.

THE COURT: Overruled.

MR. WILSON: All right. I'll pass the witness.

THE COURT: All right. Redirect?

MR. MORRIS: Your Honor, I'm going to spare any further examination here.

Actually, just two questions.

REDIRECT EXAMINATION

BY MR. MORRIS:

Q Mr. Seery, was -- was Trey Parker -- withdrawn. Was Mark Okada an employee of the Debtor at the time the independent board was appointed?

A You know, he wasn't on the payroll and he didn't have any real authority. He had an office. I don't believe he actually was. I think he had left, according to Mr. Okada, actually before that. He hadn't actually just vacated. But he wasn't doing any work. He wasn't involved in the business.

Q Okay.

A He certainly wasn't on the payroll. He may have been -- he may still have been getting some kind of benefits. I don't know.

Q All right.

MR. MORRIS: Your Honor, I'm mindful of the Court's time. If I may, I'd like to just take three minutes on the exhibits so that -- so that I can rest, and I guess -- I guess Mr. Dondero will rest, too.

THE COURT: All right. All right. All right. I --

MR. MORRIS: But there's only a couple of exhibits that were objected to.

THE COURT: As a technical matter, --

MR. MORRIS: Very quickly.

THE COURT: As a technical matter, I have to ask Mr. Wilson, did you have any recross on that redirect regarding Mr. Okada?

MR. WILSON: No, Your Honor. That's --

THE COURT: All right. So, thank you, Mr. Seery. Your testimony is concluded.

All right. Now, Mr. Morris?

MR. SEERY: Thank you, Your Honor.

THE COURT: You were saying?

MR. MORRIS: Okay. So, yes, just going through the list, I believe -- and Mr. Wilson, please correct me if I miss anything here -- but I believe that they objected to Exhibits 3, 4, 5, and 6. Do I have that right?

THE COURT: That's what I show.

MR. MORRIS: Okay. The Debtor would -- will withdraw those exhibits.

THE COURT: Okay.

(Debtor's Exhibits 3 through 6 are withdrawn.)

MR. MORRIS: The Debtor will also withdraw Exhibit 16.

THE COURT: Okay.

(Debtor's Exhibit 16 is withdrawn.)

MR. MORRIS: But 17 through 22 are in evidence, right?

THE COURT: Correct.

MR. MORRIS: The Debtor will withdraw No. 23.

(Debtor's Exhibit 23 is withdrawn.)

THE COURT: Okay.

MR. MORRIS: But the Debtor does seek to admit into evidence Exhibits 29, 30, 31, and 32, in light of the testimony that we just had, because these, in fact, are the very formal requests by the Creditors' Committee for the Dugaboy financials.

THE COURT: All right.

MR. MORRIS: So we would -- we would move them into evidence for that limited purpose.

THE COURT: All right. Your response, Mr. Wilson?

MR. WILSON: My response was not contesting that the Creditors' Committee had ever sent requests to Highland. My question to Mr. Seery was whether anyone had ever sent a request to the trusts or Mr. Dondero.

MR. MORRIS: Your Honor, I still think that it's relevant to support Mr. Seery's testimony where he testified that he had asked Ms. Schrath to produce the documents on multiple occasions, and this is the reason why he did it. Here is the requests.

THE COURT: All right. I overrule the objection, and so will allow 29, 30, 31, and 32.

(Debtor's Exhibits 29, 30, 31, and 32 are received into evidence.)

MR. MORRIS: Next, Your Honor, Exhibit 35, which is the transcript from the hearing on the protective order. I'd like to offer that into evidence for the limited purpose of any admissions by Mr. Dondero's counsel that he knew and was aware that the -- that the Creditors' Committee was seeking ESI from Mr. Dondero, including text messages.

THE COURT: Okay. Mr. Wilson, your response?

MR. WILSON: I think, yeah, I think we're talking about two different issues. We're -- Mr. Morris is focusing on these events that occurred earlier in the year in 2020, and we're focusing on what Mr. Dondero himself knew in -- in the time frame that's relevant at this -- for this hearing. And not to mention, we called into question, I believe, the definition of ESI under the Debtor's own protocols and whether that would even include text messages. I don't believe that the text messages are -- you know, knowledge that the Committee was seeking those from Mr. Dondero can be imputed onto this transcript of statements by his attorneys.

THE COURT: Okay. I'll overrule the objection. I'll find that these have some relevance. So 35 will get in.

(Debtor's Exhibit 35 is received into evidence.)

MR. MORRIS: Okay. And then the last two, Your Honor, are Exhibits 38 and 39. 38 and 39 are the -- are two exhibits that were on Docket 128 that was filed last night. We had placeholders there previously. These are my firm's

time entries, bankruptcy litigation time entries related to the Dondero litigation in December, is No. 38. And No. 39 is the time entries for January of 2021.

This material was specifically requested by Mr. Dondero in discovery. We produced a form of it at that time, but it had not yet been completed at the time we produced it, and that's why we supplemented it last night. But it's directly responsive both to Mr. Dondero's discovery requests as well as the Debtor's claim for economic harm, at least partially.

THE COURT: All right. Mr. Wilson, any objection to those?

MR. WILSON: My objection to these would be that the requests -- or, I'm sorry, the statements aren't limited to -- or I assume they're not limited to what he's seeking in this hearing, because the fee statements start on November 3, 2020. And, you know, for instance, Exhibit 38 is 46 pages long of fee entries, and they seem to include every entry that Highland's made on this case, that the Pachulski's firm has made on this case, and -- and we can't tell which ones of these items that they are seeking to -- as part of their damage model.

MR. MORRIS: Your Honor, that's just not an accurate characterization of the document. The document is specifically limited to bankruptcy litigation. It's not nearly all of the fees that have been incurred in this case.

You know, to the extent that somebody disputes any particular entry, they have every right to do that. But we believe that it accurately reflects only the litigation matters that are related to Mr. Dondero's conduct. For -- for January and February.

THE COURT: Wait. December and January, you mean?

MR. MORRIS: Yes. I apologize. Thank you very much, Your Honor.

THE COURT: All right. And you're saying it relates to just this TRO matter, or are you saying it also relates maybe to the Advisor dispute as well?

MR. MORRIS: It does relate to both, Your Honor. It does, in all candor, it definitely relates to both, from this same period of time, because, you know, as Your Honor knows, the Court found that whole litigation in December of 2020 to be frivolous, and it was directly related to the letters that were subsequently written.

So, you know, they can argue otherwise, but that's our position.

THE COURT: All right. Well, Mr. Wilson, it sounds like it's perfectly acceptable to allow it to in as their evidence of some of the alleged damages, and then you're certainly able to argue on closing arguments why, you know, *x* amount would not be compensable if I were to allow damages on this front.

So it's at Docket Entry 128 from last night. 38 and 39 are admitted.

(Debtor's Exhibits 38 and 39 are received into evidence.)

THE COURT: But you also talked about earlier today a cleaned-up version of Exhibit 11, a replacement version to just clean the --

MR. MORRIS: Correct.

THE COURT: -- the heading at the top. So I assume no one has a problem with that replacement No. 11 getting in. So all three of those will be allowed.

(Debtor's Replacement Exhibit 11 is received into evidence.)

THE COURT: All right. Anything else?

MR. MORRIS: No. With that, Your Honor, the Plaintiff rests.

THE COURT: Okay. Let me be clear on a couple of these. There was an objection to your Exhibit 34 that we carried this morning. Is that not being offered? I don't show it as either withdrawn --

MR. MORRIS: I'll withdraw that exhibit as well, Your Honor.

THE COURT: Okay. So that's withdrawn. All right.

MR. MORRIS: Yeah.

(Debtor's Exhibit 34 is withdrawn.)

THE COURT: So, with that, the Debtor rests? All

right.

Mr. Wilson, I know you don't have any other witnesses. Do you have any documents that you need to clarify the record on? I admitted all of your exhibits earlier, so I presume no.

MR. MORRIS: Correct.

MR. WILSON: No, I think that that's -- I think that's all we have.

THE COURT: Okay. All right. Well, thank you. If there's nothing further in the way of a housekeeping matter, again, what we'll do is reconvene on Wednesday at 9:30. I'll start with the bond issue pertaining to the requested stay pending appeal, and then we'll allow closing arguments, 20 minutes each side, for this matter. All right?

MR. MORRIS: Thank you for your patience, Your Honor.

MR. WILSON: Thank you, Your Honor.

THE COURT: All right. And I didn't mean the thing about the basketball tournament earlier that someone wanted to get to. My team got utterly humiliated --

MR. MORRIS: We know.

THE COURT: -- Saturday night, so at this point I don't care so much. I do, but all right.

MR. MORRIS: So did Colgate.

THE COURT: Okay. Good evening.

THE CLERK: All rise.

MR. MORRIS: Good night, Your Honor.

MR. WILSON: Thanks, Judge.

(Proceedings concluded at 5:41 p.m.)

--oOo--

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 **03/24/2021**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

INDEX

RULINGS

TAB G

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

In Re:	**Case No. 19-34054-sgj-11**
	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	Dallas, Texas
	Wednesday, March 24, 2021
	9:30 a.m. Docket
Debtor.	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	**Adversary Proceeding 20-3190-sgj**
Plaintiff,	PLAINTIFF'S MOTION FOR ORDER REQUIRING JAMES DONDERO TO SHOW CAUSE WHY HE SHOULD NOT BE HELD IN CIVIL CONTEMPT FOR VIOLATING THE TRO [48]
v.	
JAMES D. DONDERO,	
Defendant.	*Continued from 03/22/2021*

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

WEBEX APPEARANCES:

For the Debtor/Plaintiff:	John A. Morris PACHULSKI STANG ZIEHL & JONES, LLP 780 Third Avenue, 34th Floor New York, NY 10017-2024 (212) 561-7700
For the Debtor/Plaintiff:	Jeffrey Nathan Pomerantz PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 13th Floor Los Angeles, CA 90067-4003 (310) 277-6910
For Defendant James D. Dondero:	John T. Wilson BONDS ELLIS EPPICH SCHAFER JONES, LLP 420 Throckmorton Street, Suite 1000 Fort Worth, TX 76102 (817) 405-6900

APPEARANCES, cont'd.:

For Certain Advisors:	Julian Vasek MUNSCH, HARDT, KOPF & HARR 500 N. Akard Street, Suite 3800 Dallas, TX 75201-6659 (214) 855-7587
For Certain Funds:	A. Lee Hogewood, III K&L GATES, LLP 4350 Lassiter at North Hills Avenue, Suite 300 Raleigh, NC 27609 (919) 743-7306
For Get Good Trust and Dugaboy Investment Trust:	Douglas S. Draper HELLER, DRAPER & HORN, LLC 650 Poydras Street, Suite 2500 New Orleans, LA 70130 (504) 299-3300
For the Official Committee of Unsecured Creditors:	Matthew A. Clemente SIDLEY AUSTIN, LLP One South Dearborn Street Chicago, IL 60603 (312) 853-7539
Recorded by:	Michael F. Edmond, Sr. UNITED STATES BANKRUPTCY COURT 1100 Commerce Street, 12th Floor Dallas, TX 75242 (214) 753-2062
Transcribed by:	Kathy Rehling 311 Paradise Cove Shady Shores, TX 76208 (972) 786-3063

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

DALLAS, TEXAS - MARCH 24, 2021 - 9:40 A.M.

THE COURT: All right. We have Highland settings. We're going to talk about what's set and what's not set and what's requested to be set. But let's start by getting lawyer appearances. First, for the Debtor team, who will be appearing?

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

MR. POMERANTZ: Your Honor, Jeff Pomerantz is also here, to the extent necessary.

THE COURT: Okay. Thank you. All right. For Mr. Dondero, who is appearing? (Pause.) If you're appearing, I can't hear you.

MR. WILSON: Your Honor? Sorry, Your Honor. John Wilson with Bonds, Ellis, Eppich, Schafer, Jones for Mr. Dondero.

THE COURT: All right. Well, I'll see if we have people appearing for the Advisors or Funds, because we did originally have matters set involving them. Do we have counsel, Mr. Rukavina or anyone, for the Advisors?

MR. VASEK: Good morning, Your Honor. Julian Vasek for the Advisors.

THE COURT: All right. Thank you. All right. What about the Funds? Do we have Mr. Hogewood?

MR. HOGEWOOD: Good morning, Your Honor. Lee

Hogewood with K&L Gates for the Funds is on the line.

THE COURT: All right. Mr. Draper, do we have you for the Trusts?

MR. DRAPER: Yes, Your Honor. Douglas Draper on the line.

THE COURT: All right. Thank you. And for the Committee, I think I saw Mr. Clemente, correct?

MR. CLEMENTE: Yes. Good morning, Your Honor. Matt Clemente, Sidley Austin, on behalf of the Committee.

THE COURT: All right. Thank you.

All right. Because there were some late afternoon decisions made yesterday with regard to our calendar, let me just make sure the record is clear. We originally had a follow-up hearing regarding the Motion for Stay Pending Appeal, the Motion for Stay Pending Appeal of the Confirmation Order that was filed by Mr. Dondero, the Advisors, the Funds, and the Trusts. The follow-up hearing was regarding, I guess to phrase it most clearly, whether Bankruptcy Rule 7062 and Federal Rule of Civil Procedure 62 might apply here, so that if the Appellants offered a sufficient monetary bond, supersedeas bond, I would be required to ender a mandatory stay.

There was a little bit of confusion, I guess I should say on my part maybe more than anybody else's, at the end of our hearing last Friday whether someone was suggesting that,

because there was some discussion of a monetary appeal. So I invited parties to -- in fact, the Appellants asked that I allow them an opportunity to brief that and maybe we'd have a follow-up hearing on that today. So I gave the affected parties until 3:00 p.m. Central time yesterday to submit briefs, and shortly before 3:00 p.m. the Court received a letter from the Funds and from the Advisors' counsel saying that they had concluded that there was no legally-viable path there and so they were withdrawing their request for a follow-up hearing on that.

I did get briefing from the Debtor and the Committee that was quite persuasive and convinced me that, in the context of confirmation order, you either meet the 8007 discretionary standards for a stay pending appeal and maybe add on a request for a bond if the four prongs are met or not.

So I was glad not to have a hearing. I understand the Debtor still wanted to have a hearing, thinking there might be some efficiencies in putting on a record at the bankruptcy court if the Appellants plan on next going to the district court seeking a stay pending appeal, or the Fifth Circuit. But I concluded that was not an appropriate way to go forward.

So I instructed Debtor's counsel late yesterday afternoon to submit an order, and I indicated in the email that should have been copied on all counsel what I thought that order should say to make clear for the record that the Court had

concluded, and I think all parties had concluded, that there was no possibility of a mandatory stay here pursuant to Rule 7062.

So, while our posted calendar still shows a follow-up hearing on the stay pending appeal issue, I have cancelled that.

So what we are here on today, what we're definitely here on today is scheduled closing arguments on the motion that the Debtor had filed several weeks ago, a couple months ago, asking this Court to hold Mr. Dondero in contempt of court for allegedly violating a TRO that the Court issued December 10th, 2020. I had allotted twenty minutes per side when we came back this morning for closing arguments on that contempt matter.

Now I see at 9:01 this morning -- news flash for anyone who didn't check their docket this morning within the last half hour or so -- Mr. Dondero's counsel has filed a Motion to Reopen Evidence to Allow for Additional Rebuttal Witness Testimony, and this pertains to what I'll call the cell phone issue that Mr. Dondero and Mr. Seery had inconsistent testimony on.

So, I'll ask, has the Debtor seen this motion? Again, it was filed at 9:01 this morning. Are you aware, I'll ask Mr. Morris, are you aware of the motion?

MR. MORRIS: Your Honor, John Morris; Pachulski,

Stang, Ziehl & Jones. I am aware of the motion. I read it briefly, and I've got argument and commentary to the extent the Court wants to hear anything.

THE COURT: All right. Well, --

MR. MORRIS: I'm prepared to proceed. The fact of the matter is, Your Honor, this is a motion. It's not on an emergency basis. It should be heard on regular notice.

What I would say, having read it, Your Honor, is that I give Mr. Dondero and his law firm 24 hours to withdraw it or we will be filing a motion under Rule 11 for sanctions. It is frivolous. This motion has been pending -- the motion for contempt has been pending since January 7th, more than two months ago. The issue of the cell phone has been front and center. So concerned were they about the cell phone that they actually made a motion to try to exclude it from evidence. Your Honor has made very specific comments about the cell phone. There is nothing here that would allow them in good faith to make this motion. They've got 24 hours to withdraw it or we will be seeking sanctions.

They seek to introduce testimony from Jason Rothstein? Jason Rothstein, as Mr. Dondero testified yesterday under oath, was under subpoena. He was on their witness list. Why they chose not to call him I'll leave for them to explain. Mr. Ellington was in the courtroom on Monday. He was their witness. They released him. And now they want to put in his

evidence?

They ended the proceedings on Monday and they rested. They made no reservation of rights. They did nothing of the kind. This motion is not made in good faith, and we will seek sanctions if it's not withdrawn in 24 hours.

THE COURT: All right. Well, Mr. Wilson, tell me about the filing of this motion. I'll let you know, by the way, you may think I'm being very technical, but one of the first things I do whenever I get a motion, especially when it's kind of emergency, short-notice in nature, is I go see if you have the required certificate of conference that our Local Rules require. And that always makes me grimace when I don't see that, because, you know, I know there are some contexts in a complex Chapter 11 case where you obviously can't have a conference with every affected party, but certainly in this one you could have had that conference.

So, anyway, but let's talk about the motion beyond just that technical point. What would you like to say, Mr. Wilson?

MR. WILSON: Well, Your Honor, Mr. Morris is correct that Mr. Rothstein and Mr. Ellington were on our witness list, although we did amend our witness to omit Mr. Rothstein prior to the time that this matter was heard yesterday.

The real substance of it is, is that Mr. Rothstein and Mr. Ellington's testimony, in our estimation, would have just been cumulative of other testimony in this proceeding. And because

Mr. Morris had, you know, released Mr. Ellington yesterday and said he would not be calling him -- or not yesterday, but Monday, I'm sorry -- we ended up thinking it through over the course of the hearing and determining that, you know, his testimony would just merely be cumulative of testimony that Mr. Dondero would offer and that we suspected that Mr. Seery would confirm.

However, we were greatly surprised by some of Mr. Seery's testimony, including his statements made about Mr. Rothstein and also statements regarding Mr. Ellington, stuff that directly contradicts what was in Mr. Ellington's deposition testimony and what we learned from our client, Mr. Dondero, and that he testified to yesterday.

So we ended up releasing Mr. Ellington prior to the testimony of Mr. Seery, and at such time that Mr. Seery made the statements, he was no longer under the Court's control to call as a witness, and that's why we had to work hurriedly to put this motion together. We had to go through Mr. Rothstein's counsel to get the declaration we got. We were finally able to get that early this morning. You know, I apologize if there's no certificate of conference. That was merely an oversight in a rush to get this filed.

So, you know, my other thought is that I'm not sure that we officially rested our evidence yesterday. But in any event, I understand the Court may --

THE COURT: Okay. Stop right there. You did. The whole discussion was we'll come back for closing arguments Wednesday. I mean, there's no way you could have been mistaken about that.

MR. WILSON: I understand that, Your Honor. And I'm not trying to -- I'm not trying to argue the point. My next statement was going to be that I, you know, I suspect the Court considers that we did. So I would say, if it is to be treated as a motion to reopen the evidence, I mean, there actually is case law on that from the Fifth Circuit. And there's a relevant case, *Garcia v. Woman's Hospital*, 97 F.3d 810, from 1996, and that case says that among the factors the trial court should examine in deciding whether to allow reopening are the importance and probative value of the evidence, the reason for the moving party's failure to introduce the evidence earlier, and the possibility of prejudice to the nonmoving party. And we think that analysis of those factors supports allowing this testimony from Mr. Ellington and Mr. Rothstein, and potentially Mr. Surgent, to rebut specific testimony given by Mr. Seery that we did not anticipate --

THE COURT: Okay. Let me stop --

MR. WILSON: -- that he would give.

THE COURT: Let me stop you right there. Those are broad principles, and every situation is going to be fact-

specific as far as reopening evidence. But you've more than once used the word rebuttal. You used it in the title of the pleading you filed at 9:01 this morning, and you've used it in oral argument. Mr. Seery was in the case in chief of the Movants, the Debtor. Okay? Then you all had your chance to put in your responsive evidence. Why are you calling it rebuttal? Rebuttal is --

MR. WILSON: Well, --

THE COURT: -- is if the Debtor then came along and said, you know, hey, I didn't have this person on my witness list but their witness said something completely different than what he said in discovery and I think, you know, I need rebuttal evidence, not just impeaching him or whatever with a prior depo. I mean, that's a -- there are other examples I could give, but my point is, this isn't rebuttal. This would have been your defensive evidence to the motion, okay? Rebuttal has a more, I don't know, sympathetic, equitable ring to it, like something came out you just had no way of anticipating. Okay? And so now, beyond everyone's case in chief and defensive case, we need something to shed new light.

That's not what we're talking about. You had every reason to know, if you chose to do a deposition of Mr. Seery -- which I'm guessing you did, but I don't know -- to know what he might say. And then he was in their case in chief, so you had your chance to put in a defensive witness at that point.

I have no idea why you decided, eh, we don't need Ellington, eh, we don't need Rothstein. We named them on our witness list. You know, there was a subpoena, I guess, it sounds like, of Rothstein. But correct me if you think I'm viewing this too harshly. It just seems like a litigation strategy that came back to haunt you.

MR. WILSON: Well, I would -- I would disagree with that, Your Honor. I mean, I -- the rebuttal term may be an imprecise moniker for this particular motion, but in essence that's exactly what it is. I mean, we were -- we were greatly surprised by the way Mr. Seery testified and we did not have another witness that was in court at the time to come on and to --

THE COURT: Because of your own --

MR. WILSON: -- counter it.

THE COURT: Because of your own litigation strategy to release them. No one forced you to do that. No one forced you to do that.

MR. WILSON: That may be true, Your Honor. Decisions were made. I've explained, you know, why decisions were made. And -- because I think we do have a couple options here. As I suggested in my motion, I don't believe a continuance is necessary to the extent that we can bring in Mr. Ellington's testimony by deposition. And secondly, if --

THE COURT: They don't agree to that. They don't

agree to that. They don't agree to this --

MR. WILSON: Well, I understand that.

THE COURT: -- entire motion, but I guarantee you, if I said I'm granting the motion, they're not going to agree to a declaration or deposition testimony. I'm sure they would want to cross-examine them. I mean, Mr. Morris, am I making a wrong assumption here?

MR. MORRIS: Your Honor, a couple -- just a couple of things. First of all, they actually never did take Mr. Seery's deposition in connection with the TRO enforcement contempt proceedings. They didn't even do that. Number two, I was specifically asked by Mr. Ellington's counsel at a break yesterday whether I would consent to the entry of Mr. Ellington's deposition transcript, and I categorically said no. I'm not going to call him, but if Mr. Dondero calls him, I'm going to cross-examine him live. And they knew that. And then they had the choice. They had the choice, Your Honor, to call him live or to not call him, and they chose not to call him.

And not only did they rest, if this -- if Mr. Seery's testimony was so stunning, if they were so surprised by the testimony, how come nobody said anything on Monday? How come they let the Court close the evidence? How come they didn't reserve the right? How come they didn't say, We'd like the opportunity to put on a rebuttal case because we just heard

something we didn't anticipate?

They did none of that, Your Honor. This is frivolous, and if it's not withdrawn in 24 hours we will move for sanctions.

THE COURT: All right. Well, Mr. Wilson, anything else you want to urge that you think I'm not hearing, missing here?

MR. WILSON: Well, Your Honor, I think I've explained, you know, our reasons for why we filed this motion. I would say that, in -- that --

THE COURT: And by the way -- I'm sorry to interrupt you again -- but I'm not clear even what you think you heard from Mr. Seery that you think is so surprising it made your team conclude we've got to call -- you say rebuttal evidence -- we've got to call Ellington or Rothstein. What even was it?

MR. WILSON: Well, there were -- there were a few things, Your Honor. I mean, as with respect to Mr. Rothstein, the issue was the written or unwritten -- and I believe the testimony was there was an unwritten policy of how cell phones were disposed of. There was testimony from Mr. Seery, although I believe it was speculation on his part, that the -- that Mr. Dondero actually instructed Mr. Rothstein to do something different in this instance when he submitted his cell phone for replacement. Mr. Rothstein, as shown in his affidavit, would say that --

THE COURT: Okay. Stop.

MR. WILSON: -- you know, he's been --

THE COURT: Stop right now. I feel like you're about to try to get in front of me evidence that you chose not to try to get in front of me Monday. I asked, what did Mr. Seery say in testimony Monday that you think warrants a reopening of evidence? I really, I get it that it's about a cell phone and company policy, but what specifically did he say, --

MR. WILSON: Well, the specific --

THE COURT: -- Seery say?

MR. WILSON: Right. And I gave one instance. But the specific testimony was that Mr. Seery accused Mr. Dondero of making up his testimony regarding the fact that there was ever a cell phone policy, number one. And number two, that Mr. Dondero persuaded Mr. Rothstein to do something improper that was out of the ordinary course with respect to the replacement of his cell phone.

THE COURT: All right. Well, again, if you had deposed Mr. Seery, or even just listening to him, you would have known at the conclusion of that. I mean, you could have cross-examined him and then decided did you need to call Rothstein or Ellington.

I just, it's not like you are articulating unfair surprise. You had every reason to know the theory of the case was he exercised control over property of the estate, *i.e.*,

the phone, in a way that violated the automatic stay. And I guess if you looked at their witness list you knew that the employee handbook and its policy stated therein might be a focus of their evidence. I mean, I'm just not getting what the unfair surprise is here, if that's one of the ways I should look at this.

MR. WILSON: Well, Your Honor, it's true that we did not depose Mr. Seery, but to be honest, we did not believe it was necessary at the time. We had no indication, no idea that he would have a completely different testimony on this from the employees who'd worked at Highland for, you know, many, many years. And we had -- we'd heard from three people, including Mr. Ellington, who confirms that testimony, and that's why we let Mr. Rothstein go.

With respect to Mr. Ellington, the issue runs deeper. It's not only --

THE COURT: I am not --

MR. WILSON: -- his testimony --

THE COURT: -- asking -- I'm not going to allow you to get in evidence before me. I'm really just trying to give you every opportunity to articulate why Seery said something that was an unfair surprise or you think somehow rises to the level where I should reopen the evidence. And I'm just, I'm not hearing --

MR. WILSON: Well, that's --

THE COURT: -- either an unfair surprise or some other reason. And I'm just trying to give you every opportunity to convince me if you think I'm missing something.

MR. WILSON: Well, I appreciate it, Your Honor. I was trying to get to a second point without trying to improperly admit evidence at this stage. But with respect to Mr. Ellington, he -- I did depose Mr. Ellington and got the pages of deposition testimony that I submitted with that motion. Among those pages, there were -- there were statements that contradicted Mr. Seery's testimony yesterday that he did not use Mr. Ellington as a go-between between Mr. Seery and Mr. Dondero. And Mr. Ellington's testimony directly conflicts with what Mr. Seery offered yesterday.

MR. MORRIS: Your Honor, if I might just --

THE COURT: All I can say is you should not have released him. I'm just baffled. I am baffled. I was baffled when it happened Monday, and now I'm baffled that you would argue, I guess, we rethought it after we left and we really wished we would have called him. I mean, that's not grounds to reopen the evidence. All right? So your motion is denied.

MR. WILSON: All right. Thank you, Your Honor. I'd like to make an offer of proof of the Rothstein declaration as well as the Ellington deposition testimony that I've submitted.

MR. MORRIS: We object, Your Honor. The motion was

just denied. There is no basis to offer proof in a record that's been closed.

THE COURT: All right. I'm not getting your procedural request. It's one thing if I deny the admissibility of evidence during a trial. Obviously, then a smart lawyer asks to make an offer of proof so a higher court can decide if that was error in not considering the evidence. But this different. Right, Mr. Wilson?

MR. WILSON: Well, I don't know that it's that different. But I think for purposes of review, I want to make a complete record, and I would offer the evidence as an offer of proof.

THE COURT: Well, didn't you say you attached to the motion -- I didn't look at the attachments -- the substance of the evidence you want to --

MR. WILSON: Yes. Both of the --

THE COURT: -- the substance of the evidence you want to get in?

MR. WILSON: That's true, Your Honor. It's in the attachments to our motion.

THE COURT: All right. Well, then it's there in the record if you want to appeal my denial of your motion to reopen evidence, okay?

All right. Well, let's hear closing arguments, then.

Mr. Morris, as you all will recall, I've limited you to

twenty minutes each, so I'm ready to hear your argument.

MR. MORRIS: Before we go on the clock, Your Honor, just one housekeeping matter.

THE COURT: Okay.

MR. MORRIS: Filed at Docket No. 130 is a list of the exhibits that were admitted into evidence. And because I have some feeling that there might be an appeal, I'd like to make sure that that's accurate, and there are several items that need to be corrected.

THE COURT: Okay. Let me pull this up. Where is the adversary? Here it is. Okay. So you're looking at what the --

MR. MORRIS: I think it's Exhibit -- I think it's Docket No. 130, is the list of exhibits.

THE COURT: Okay. I have it in front of me. You're saying it's inconsistent with what you thought was --

MR. MORRIS: Yeah. There are -- there are three errors, Your Honor.

THE COURT: Okay. I'm trying to -- I don't think I have in here with me my notes on the exhibits because I didn't anticipate this. They must be back in chambers, or maybe -- all right. Well, let's just let you present what you think is missing, and --

MR. MORRIS: Thank you, Your Honor.

THE COURT: Okay. Go ahead.

MR. MORRIS: First is actually -- first is actually an item that we had on our exhibit list that I agreed to withdraw, so it's actually, it's an exhibit against the Debtor.

THE COURT: Okay.

MR. MORRIS: And that's Exhibit No. 3. We had agreed to withdraw that exhibit from evidence, so it should not be on the list.

THE COURT: Okay. So we'll revise that to show No. 3 was withdrawn. Okay.

MR. MORRIS: Correct.

(Debtor's Exhibit 3 is withdrawn.)

MR. MORRIS: But Exhibits 35 and 36, which are the transcripts from the oral argument on the Committee's Motion for a Protective Order, and Exhibit 36, which is the transcript from the preliminary injunction hearing on January 8th, both of those transcript were admitted into evidence. And we would respectfully request that the Court amend the list to exclude Exhibit 3 and to add Exhibits 35 and 36.

THE COURT: Okay. Tell me again what the 35 transcript was. What hearing?

MR. MORRIS: That's the July 21, 2020 hearing on the discovery motions where the issue was the Committee's request for, among other things, ESI, including text messages from nine custodians, including Mr. Dondero.

THE COURT: All right. Mr. Wilson, do you have any contradictory view of that? I can go back in my chambers and get my own list if I need to. I definitely remember the preliminary injunction transcript coming in. I just couldn't remember for certain the July one. Do you have any contrary view?

MR. WILSON: I think that that's true. Was Exhibit 37 admitted?

MR. MORRIS: Yes, and it's on the list.

THE COURT: It's on the list.

MR. WILSON: That was my question. So 35, 36, and 37 are all admitted and in evidence?

THE COURT: Well, he is pointing out, Mr. Wilson, that the official record of the Court does not show 35 and 36, and he's saying that is a mistake. And I'm just asking, do you agree that they were admitted? Otherwise, we can go back and listen to the audio and I can pull my notes from chambers. But --

MR. WILSON: Well, I'm being told by my co-counsel that Your Honor admitted 35 and 36 yesterday.

THE COURT: Okay. Very good. So we will correct the official record here to show 35 and 36 are part of the evidence and No. 3 is not.

All right. Any other housekeeping matters?

MR. MORRIS: No, Your Honor. I'm ready to proceed if

Your Honor is.

THE COURT: Okay. I am ready. And it's 10:12. I have no problem if you save some of your twenty minutes for rebuttal. And if I stop either one of you and ask questions, Nate, you'll stop counting the time.

All right. You may proceed.

MR. MORRIS: That's my intention.

CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

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

Your Honor, as you'll recall, in the face of explicit threats to Mr. Seery and Mr. Surgent, as well as the brash interference with the Debtor's operations a few weeks after the board asked for Mr. Dondero's resignation, the Debtor sought and obtained a TRO against Mr. Dondero. Mr. Dondero has questioned the Debtor's motivation in seeking the TRO, but the motivation could not be clearer. Leave the Debtor alone. Unless he's in the courtroom, unless he's on the phone with lawyers or communicating with lawyers or is communicating with shared services, leave the Debtor alone. That's what the TRO was about, and that's exactly what it says.

But Mr. Dondero cannot help himself. Whether because he wants to burn the house down or he just cannot listen to authority, Mr. Dondero refuses to leave the Debtor alone.

The Debtor has proven by clear and convincing evidence

that in the few short weeks between the time the TRO was issued and the time it was converted to a preliminary injunction, he violated the TRO at least 18 separate times. Section 2(c) of the TRO says clearly and unambiguously, do not communicate with the Debtor's employees unless it's about shared services. It could not be any clearer. It was -- that was the only exception, shared services.

Can we put Slide 2 from the opening dep up on the screen?

Mr. Dondero -- while we wait for that, I'll continue. Mr. Dondero did offer into evidence two shared services agreements. We didn't dispute that shared services agreements existed. That's why there's an exception in the TRO for that. But while Mr. Wilson went through some of the communications that are at issue with Mr. Seery, it's interesting that he did not put one of these 13 communications in front of his client to try to show how any of the communications connected to shared services. And the reason he didn't do that, Your Honor, is because he can't. Every one of these communications is adverse to the Debtor's interests. Mr. Seery testified that he did not know of or authorize any of these communications, and that if he had known, he would have fired the employees on the spot.

And I ask Your Honor to put yourself in Mr. Seery's chair. If you were the CEO of the Debtor and you learned that your employees were engaged in these kinds of communications, what

would you have thought, what would you have done? These are not technical violations. They are not foot faults. Every one of these communications is adverse to the Debtor.

Look at the topics. Getting a witness to testify against the -- to testify on Mr. Dondero's behalf at a hearing against the Debtor. Discussions concerning the entry into a common interest agreement between certain of the Debtor's employees, Mr. Dondero, and other entities owned or controlled by him. Challenging the Debtor's decision to enter into the settlement agreements with Acis and HarbourVest.

And by the way, there's no problem with Mr. Dondero challenging those. The problem is when he brings the Debtor's employees, and in this case, Mr. Ellington, into those discussions.

He directed an employee not to produce documents that were in the Debtor's possession, custody, and control. He engaged in numerous communications between December 22nd and December 24th with Mr. Ellington concerning K&L Gates, the Advisors, the interference with the trading, the letters that were sent. Mr. Ellington's name was all over that.

This is wrong. And Mr. Dondero knows it. How do we know that he knows it was wrong? Because of one singular statement that he made that wasn't even in response to a question that I asked. If you recall, Your Honor, as I was putting these documents up on the screen, there were privileged

communications between Mr. Dondero and his lawyers, and at one point Mr. Dondero said -- and I can't quote because I don't have the transcript -- what are my privileged communications doing up on the screen? They were up on the screen because Mr. Dondero chose to forward them to the Debtor's general counsel.

We are going to deal with the consequences of that for a long time. It is a plain and blatant breach of the attorney-client privilege. It is on a number of topics. It is expensive. The ramifications will be felt for a long time in this case.

But the important point here, Your Honor, is consciousness of guilt. Mr. Dondero's statement of surprise that his communications could be shared with Mr. Ellington but would otherwise have been shielded from the rest of the world both completely destroys any argument, and there was no credible argument to begin with, that he was engaged in shared services, because if it were shared services, he would have no problem with the Debtor seeing the documents, he would have no problem with the Debtor seeing the communications that he voluntarily and knowingly shared with Debtor's general counsel.

But what it really shows is that he never thought these communications would see the light of day. The Court should hear Mr. Dondero's surprise for exactly what it is, an

admission of guilt.

Mr. Dondero wasn't shown any of these 13 communications. He offers no testimony as to how to connect any of them to shared services. And the explanations that he provided have no credibility and are completely undermined by the documents.

I'm just going to take a couple of examples. Exhibit 19 is the text message that he sent to Ms. Schroth: No Dugaboy details without the subpoena. Clearly, it's a violation of the TRO. Ms. Schroth was an employee of the Debtor. It can't have anything to do with shared services because the unrebutted testimony was that Dugaboy was not party to a shared services agreement. But it was -- his explanation is that the lawyers told him to do it.

Think about the credibility. Your Honor really should make some credibility findings here. Think about the credibility of blaming the lawyers. A lawyer who six days earlier heard a court enter a TRO against his client preventing him from speaking to the Debtor's employees except for shared services instructed his client to speak to the Debtor's employees about something other than shared services? Does that make any sense at all? Bonds Ellis is not that bad. They -- they -- I mean, they're good lawyers. They're good lawyers. I don't meant to demean them at all. I'm sure that they had no idea that this was happening. There is no way that somebody at Bonds Ellis -- and I specifically didn't ask

Mr. Dondero to identify the lawyer who told him that, because that wouldn't have been fair -- but somebody from Bonds Ellis, six days after the TRO is entered, instructs Jim Dondero to communicate with the Debtor's employee about something other than shared services? It makes no sense.

You know how I also know it makes no sense? Because Mr. Dondero put into evidence at Exhibits 16 through 20 a string of emails between and among me and Mr. Draper and Mr. Leventon concerning the Dugaboy financials. Mr. Draper was the lawyer for Dugaboy, and he and I are going back and forth about the documents, and he wants to know if I have them. And as Mr. Dondero did testify, Mr. Draper wanted to see them and I told him, I'll give you a copy when I get them, but they're in the Debtor's subject -- custody and control. You can see it. It's at Exhibit 20. I told that to Mr. Draper. I'll give you a copy, but I've got to get them and I've got to produce them.

None of us knew, right, and it's reflected in those exhibits, nobody ever says you need a subpoena. Mr. Draper never says they're not the Debtor's documents. He never seeks to exercise control of the documents. This is the lawyer for Dugaboy, with no knowledge that Mr. Dondero has instructed the one person at the Debtor who knows where the documents are not to produce them. And nobody knows that.

It's not right, Your Honor. This stuff is not right. So there you have 13 different instances where Mr. Dondero is

communicating with the Debtor's employees in ways that are adverse to the Debtor that have nothing to do with shared services.

Next, 362(a). Again, the TRO at Section 2(e) could not be clearer. There's nothing ambiguous. It's not overbroad. It simply says, don't violate the automatic stay.

362(a)(3), as we talked about the other day, prevents anyone from trying to exercise control over property of the Debtor. Mr. Dondero violated this at least three separate ways. The phone twice, because the phone, as he admitted, was the Debtor's property, and as the employee handbook of his baby showed, the text messages were the Debtor's property. I know on cross-examination or direct Mr. Wilson had him point to a line that says the Debtor's obligations or the employee's obligations, you know, maybe they terminate upon the end of the employment. The statement about the text messages being the Debtor's property, that's not an obligation of the employee. That's not an obligation at all. It's completely irrelevant.

The important point is that Mr. Dondero knew that the text messages were the property of the Debtor. And how do we know that? Because not once, but twice, in 2020 he executed certifications where he acknowledged that, and those can be found at Exhibits 56 and 57. Your Honor will recall, as part of the corporate governance settlement, Mr. Dondero agreed

that the Committee would do an investigation on related-party claims. Related-party claims included an investigation of Mr. Dondero. Mr. Dondero knew since no later than January 9, 2020 that he was under investigation.

If that were not enough, we had the motion practice last summer and the Committee said, I want the documents and I want the ESI and I want the text messages of nine custodians. We know that Mr. Dondero knew that. How do we know? Because he filed a pleading in this Court that said so. He said specifically at Paragraph 3 of his response to the Committee's motion, I know the Committee wants my ESI. I know the Committee wants my text messages. And yet there we were, in December, after he's fired, he changes out the phone, the text messages are gone, and we know the phone existed, we know the phone existed after the TRO was entered into.

And let's think about -- so, you know, again, not clear and convincing evidence, Your Honor. Beyond reasonable doubt. It's beyond reasonable doubt that he knew the text messages were the company's property. It's beyond reasonable doubt that he knew the company -- that he was under investigation. It's beyond reasonable doubt that he knew the U.C.C. wanted the text messages. And it's beyond reasonable doubt that the phone existed after the TRO was entered into. Beyond reasonable doubt. No dispute.

Let's look at some of his excuses as to why none of this

really matters. Again, you know, I'll just repeat, he refers to Rothstein and Surgent and Ellington. Again, Rothstein was under subpoena. He didn't call him here. Ellington was in the courtroom yesterday, or on Monday. He didn't sign -- he didn't sign -- where are the people corroborating his story? He had them here and he chose not to put them on.

There's no corroboration in any documents. A 50-page employee handbook that does say text messages are the Debtor's property, does not say anything that corroborates anything that Mr. Dondero said.

There's no communication. There no email. There's no document. There's nothing to corroborate what he said at all.

He says, oh, but there's no litigation hold letter. I have to tell you, Your Honor, I'm a little -- it's -- I don't know what to say when he just keeps trying to blame others. Litigation hold letters -- and this is argument, so I'm going to say what my view is -- litigation hold letters are used to put somebody who might not otherwise be on notice that claims might be asserted against them. You don't send a litigation hold letter to somebody who has agreed to submit to an investigation. You don't send a litigation hold letter to somebody who has acknowledged to a court that they know their text messages are being sought in the context of litigation. It's just, it's just ridiculous, Your Honor. It really is just ridiculous. As my kids would say, give me a break.

In the end, the evidence clearly and convincingly showed that Mr. Dondero controlled the Debtor's property, and in violation of TRO Section 2(e) he controlled it, he discarded it when he knew investigation was underway and when he knew the text messages were at issue.

The third part is trespass. I won't spend a lot of time on it, Your Honor. But, you know, it doesn't matter that he didn't trespass before the TRO was entered. What matters is that on January -- on December 23rd, in the letter, the Debtor told Mr. Dondero that it was going to exercise control over its property. And they told him, don't enter our premises after December 30th or we will consider it a trespass. The Debtor has every right to do that. So Mr. Dondero walking in on January 5th is a violation of the TRO.

Interference with trading. Mr. Dondero, his admission of interference with the trading is clear. It's unambiguous. The Debtor told his lawyers in that December 23rd letter that one of the very reasons they were evicting him was because of his interference with the trading and his interference with the Debtor's operations, and they never, ever rebut that. His lawyers never contest that. They never respond to it. They just let it go.

And so all you have now is Mr. Dondero backpedaling, you have the failure of his lawyers to respond, and you have his plain unambiguous admission, really, with the words December

22nd in my question from the earlier trial.

Your Honor can make whatever credibility findings the Court thinks is appropriate, but that's the evidence that exists, his backpedaling from clear and unambiguous admissions.

We can take down the slide.

I did want to point out just one more thing on the phone, right. The -- he thinks all of these people are going to corroborate what he has to say. You know who actually spoke on the topic and who didn't corroborate a single thing that he said was he lawyers. Because if you remember that one-paragraph letter, Your Honor, where his lawyers actually responded to the Debtor's demand for the cell phone -- let me see if I can find the exhibit number for you. I don't have it handy. But it's the one-page letter from Bonds Ellis where they respond on the issue of the cell phone, and they don't say anything that Mr. Dondero testified to. They don't say that Mr. Seery told them all to swap out their phones. They don't tell the Debtor that there's a longstanding company practice or policy that allows people to switch phones. They don't say anything. All they say is, we can't find it. They do admit that it's the company's phone, though. They do make that admission in their letter. So I just wanted to make that clear.

You know, they want to bring those guys in, Rothstein or

Surgent or Ellington. What about their lawyers? Just think about what their lawyers said contemporaneously in response to the Debtors' demand for the cell phone. They say nothing other than it is the Debtor's cell phone and we can't find it.

Let's just talk quickly about damages, Your Honor, and an appropriate sanction. It's very difficult to quantify. We've put in time records. I know people can have different views of what should and should not be included. I know there's a lot of stuff in there that's not included that probably should be. We don't have any evidence of the costs that the Debtor has borne as a result of these violations from FTI or Sidley or DSI. Kasowitz Benson was hired to analyze some of the issues my firm admittedly is not an expert on. So there's a lot of other expenses.

There's -- Mr. Seery testified extensively, and it's not contradicted, it's not rebutted at all, that there's noneconomic harm here, that his authority was undermined. You know, one could say the communications about a common interest agreement, how can you quantify the harm of knowing that your employees are engaged in discussions about entering into a common interest agreement with your adversary? How can you quantify that harm?

So I don't think that we have a burden, frankly, of proving to the dollar of the harm that the Debtor suffered, but it has suffered immensely. And it's suffered both

economically and non-economically. And we respectfully request that the Court enter a sanction for the violation of the TRO.

I think, Your Honor, I'm at eighteen minutes, and I'm going to save my last two minutes for rebuttal.

THE COURT: Okay. Thank you. Mr. Wilson?

MR. WILSON: Yes, Your Honor. May it please the Court.

THE COURT: Yes.

CLOSING ARGUMENT ON BEHALF OF JAMES D. DONDERO

MR. WILSON: A party commits contempt when he violates a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order. To hold a party in civil contempt, the court must find such a violation by clear and convincing evidence. And I cited you a similar passage from a case yesterday from the Fifth Circuit. That passage is from *Waste Management of Washington v. Kattler*, 776 F.3d 336. That's a case that I believe is in our briefing, but I'd like to highlight that in that case the Fifth Circuit was considering a contempt order issued by a district court, and the district court had issued a TRO enjoining a guy named Mr. Moore from disclosing confidential information and requiring Moore to produce images of electronic devices containing the confidential information.

The district court held Mr. Moore in contempt for failing to produce an iPad, and the Fifth Circuit reversed that contempt finding, holding, however, no contempt liability may attach if a party does not violate a definite and specific order of the court.

After the district judge determined that the iPad was a personal device that should have been produced to WM on December 22nd, Moore stated, If you want that device turned over directly to Waste Management, we'll do it tomorrow. The court responded, I think that's what the order said. The court was mistaken. The order required Kattler to produce an image of the device only, not the device itself. Several days later, after WM determined the image did not contain the relevant information, WM moved to hold Kattler in contempt because he had failed to produce the device itself in accordance with the court's alleged order from the bench. But Moore was under the understandable impression that the only order in place was to produce an image of the device. Therefore, given the degree of confusion surrounding whether the district court ordered production of the physical device, we conclude that Moore did not violate a definite and specific order of the court.

So with respect of each of charges of contempt that the Debtor makes here, Your Honor, you must determine whether the Debtor has met its burden by clear and convincing evidence

that Mr. Dondero violated a definite and specific order of the Court. I submit to you that the Debtor has failed to meet that burden.

With respect to the first charge of willful ignorance of the TRO, it's important to note that willful ignorance of a TRO is not a violation of a definite and specific order of the Court.

But equally important, I would point to you that the allegation simply isn't true. You heard testimony from Mr. Dondero that he was aware of why the TRO was entered. He discussed the order with his counsel. He became aware of what he could and couldn't do through those discussions. Mr. Dondero testified that he respected the Court's order. He took it seriously. He followed up with his counsel over the next few weeks, seeking advice regarding whether certain actions may or may not violate that order. And it was important to him. He made a conscious effort to modify his behavior after the TRO. He told you that yesterday. Or, I'm sorry, on Monday.

Moreover, Mr. Dondero testified that he did not believe that any action that he took would violate the TRO. And in fact, you heard Mr. Seery testify on Monday that he did not believe that Mr. Dondero was, in fact, ignorant of the TRO, in contradiction to what his papers would say.

Number two, the second charge that Mr. Dondero is alleged

to have violated is by throwing away his cell phone. Again, this is not a clear violation of any definite and specific order of the Court. Mr. Dondero did not have any reason to believe that getting a new phone would violate the TRO. Mr. Dondero testified that he changed over the financial responsibility for his phone and got a new device because he was made aware that the Debtor would be terminating all employees and discontinue paying for their cell phone plans. In fact, Mr. Dondero decided to get a new cell phone and initiated the process two weeks before the TRO had been entered.

Moreover, the evidence shows that when Mr. Dondero got a new phone, he simply followed the procedure that Highland had always required its employees to follow. In fact, the wiping of the cell phone was performed by the Debtor's own employee, Jason Rothstein, the head of IT.

And finally, Mr. Dondero did not personally throw away or destroy his phone. He turned it over to the Debtor and he never saw it again.

And I remind you, he turned it over to the Debtor well before the entry of the TRO, up to two weeks. The Debtor was, of course, free at that point, when they had possession of the phone, to preserve any information on the phone that they deemed appropriate. They apparently chose not to do so. Mr. Dondero testified that he assumed that the phone had been

destroyed in compliance with Highland's policies and procedures, but the evidence shows that the last he heard about his phone, it was actually in the Highland offices.

And finally, the Debtor's request for the phone did not come until nearly two weeks after the entry of the TRO and two weeks after Mr. Dondero had received his replacement cell phone, up to four weeks since Mr. Dondero had actually seen his cell phone.

But, however, we were surprised by Mr. Seery's testimony on Monday that accused Mr. Dondero of making up his testimony about the cell phone policy. And in fact, despite testifying that Mr. Rothstein was honest and ethical, Mr. Seery attempted to slander Mr. Rothstein by claiming that he did something nefarious at Mr. Dondero's instruction. Of course, there was no direct evidence of any nefarious conduct on Mr. Rothstein's part.

But in any event, Mr. Dondero's actions in replacing the cell phone, which actually occurred two weeks before the TRO, cannot violate the TRO itself. And there's two very specific reasons for that. Number one, it's not in the time frame. The evidence was that Mr. Dondero has not seen his cell phone since the TRO has been entered.

Second, that provision of -- to enforce that order -- oh, I'm sorry -- to enforce that action against Mr. Dondero does not violate any clear and specific provision in the TRO. The

TRO does not order Mr. Dondero not to replace his cell phone or destroy the old one, even if he did. And it -- in any event, the Debtor has tried to tie it into 362 and its letter that it sent on December 23rd. Both of those documents are documents outside of the TRO itself and cannot be considered to be a part of the TRO for enforcement purposes because that would violate Rule 65(d).

Now, finally, the Debtor, on this point, the Debtor wants a spoliation instruction against Mr. Dondero, apparently. But the spoliation instruction is confusing to us, Your Honor, because in the context of the Debtor's request, the Debtor would actually be seeking a spoliation instruction against itself as it relates to the litigation with the U.C.C.. This Court discussed spoliation in the *Carrera* case, writing, Generally, a party claiming spoliation of evidence must show the following events -- I'm sorry -- elements. That, one, the party had an obligation to preserve the electronic evidence at the time it was destroyed; number two, the electronic evidence was destroyed with a culpable state of mind; and three, the destroyed evidence was relevant and favorable to the party's claim, such that a reasonable trier of fact could support that claim. A duty to preserve arises when a party knows or should know that certain evidence is relevant to pending or future litigation.

The Debtor did not plead or prove any of these elements,

particularly the elements that electronic evidence was destroyed and that Mr. Dondero had an obligation to preserve that evidence at the time.

In any event, it did not occur during the pendency of this TRO and so it cannot be a violation of the TRO.

The third charge that the Debtor brings is that Mr. Dondero trespassed on the Debtor's property. Again, it is not a clear violation of any specific and definite order of the Court. Mr. Dondero did not have any reason to believe that going to the Highland office would violate the TRO. The charge relates to Mr. Dondero giving his deposition in a conference room at the Highland office on January 5, 2021. However, Mr. Dondero testified that he gave his deposition in the Highland offices on December 14th, four days after the entry of the TRO. And at that TRO [sic], Mr. Dondero made clear to Mr. Morris that he was giving his deposition in the Highland conference room. No one at the Debtor claimed that it violated the TRO for Mr. Dondero to give his deposition on December 14th from the Highland conference room, and the TRO did not change between the time that Mr. Dondero gave his deposition on the 14th and the time that he gave it on January 5th.

Therefore, if it wasn't a violation of the TRO on December 14th, it wasn't a violation on January 5th. The only thing that changed was that Mr. Pomerantz, in his letter on December

23rd to Mr. Lynn, but as we discussed in our objection to this line of questioning, that -- that violates Rule 65(d) because that is a document outside of the TRO itself.

Fourth, the Debtor claims that Mr. Dondero violated the TRO by interfering with the Debtor's trading as the portfolio manager of certain CLOs. This charge is admittedly closer to the language of the TRO. However, this allegation is insufficient to hold Mr. Dondero in contempt. There is no clear and convincing evidence that Mr. Dondero violated the TRO.

In fact, Mr. Morris just told you in his argument that his evidence of this charge is that the Debtor alleged in the December 23rd letter that Mr. Dondero had interfered with the Debtor's business and that Mr. Dondero's lawyers did not respond.

There were various reasons of why the response that was given by Mr. Dondero's lawyers was quick and to the point and addressed what seemed to be the main thrust of the letter, being the cell phone. Mr. Dondero was on vacation in Aspen at the time, he was communicating with his lawyers over the phone around the Christmas holidays, and the letter is what it is. But in any event, the letter that went unresponded to with respect to that allegation is not clear and convincing evidence of anything that Mr. Dondero did.

But there's a real question as to what interference means.

Mr. Seery testified that Mr. Dondero did not stop trades. Mr. Seery was able to execute every trade he wanted to make in December. He didn't change his investment strategy. He didn't change his trading decisions. He continued to operate the Debtor as he deemed appropriate.

So it begs the question of what does interference mean? We cite an Eighth Circuit case in our brief, *Robinson vs. Rothwell*, that holds that an order that prevented any actions to interfere in any way with the administration of those jointly administered bankruptcies was neither sufficiently specific to be enforceable, nor clear and unambiguous.

The evidence shows that the only action Mr. Dondero took was to ask Jason Post, his chief compliance officer, to take a look into some of the trades that Mr. Dondero was made aware of. Mr. Dondero did not know what Mr. Post did with respect to the trades until he heard Mr. Post's testimony at the January 23rd hearing. He testified to that on Monday.

But to be clear, all of the trades were executed and they all closed. Mr. Post's actions were merely to instruct the Advisors' employees not to book the trades after the fact because they did not conform to compliance procedures, but the Advisors' employees were under no obligation to book those trades in the first place.

In any event, those are actions of Mr. Post, not of Mr. Dondero, and there was no evidence that Mr. Dondero even took

those actions or even encouraged those actions.

Number five, the Debtor claims that Mr. Dondero violated the TRO by pushing and encouraging the K&L Gates clients to make further demands and threats against the Debtor. This charge attempts to invoke Paragraph 3 of the TRO that Mr. Dondero is enjoined from causing, encouraging, or conspiring with a person or entity to engage in any of the prohibited conduct, the allegation being threats against the Debtor. This charge is problematic for two reasons. First, what is a threat? The evidence consisted of two letters from the K&L Gates law firm to the Pachulski law firm. The first letter was a December 22nd letter that was simply a request between counsel that Debtor refrain from certain actions. The Debtor rejected that request. The Debtor was not intimidated or threatened by the request and did not change its course in any way. Mr. Seery testified to that.

In fact, the Debtor sent a rejection of the request the following day, and also demanded a withdrawal of the request and threatened sanctions for filing it, but -- or for sending it, but it was -- it did not change the Debtor's course in any way.

The next letter referred to was the Funds and Advisors letter, that they may take subject to the automatic stay to exercise a contractual right that they along with their counsel felt that they had. That was a letter that -- that,

again, Mr. Dondero testified he had nothing to do with the sending of, and although he later approved the position taken in the letter, agreed with the position taken in the letter, he did not do anything to cause the sending of the letter.

But, and that goes to my next point, that there was no evidence, other than the Debtor's suspicions, and Mr. Seery testified that his only evidence of this was that Mr. Dondero admitted that he sent an email to Mr. Post and that subsequently these letters were sent. And he concluded that, based on those two facts, that Mr. Dondero was pushing, encouraging, or directing the sending of these letters. However, you heard evidence directly to the contrary from Mr. Dondero himself.

Number six, the Debtor alleges that Mr. Dondero violated the TRO by communicating with the Debtor's employees to coordinate their litigation strategies against the Debtor. The first problem with this charge is the ambiguity of what Mr. Dondero is and is not allowed to do under the TRO, because you've got Footnote 2 of the TRO that says, For the avoidance of doubt, this order does not enjoin or restrain Mr. Dondero from seeking judicial relief upon proper notice or from objecting to any motion filed in the above-referenced bankruptcy case.

That footnote is at the very end of Paragraph 2, so that footnote apparently applies to every single prohibited conduct

element in Paragraph 2. So, therefore, you've got that exception to the TRO.

Second, you've got an exception to the TRO that's built into letter (c) that says that the -- Mr. Dondero was specifically allowed to communicate with employees related to shared services. The employees, Mr. Ellington and Mr. Leventon, were both part of Highland's legal department, which was part of a shared services agreement.

Third, Mr. Ellington was tasked with the role of go-between between Mr. Seery and Mr. Dondero. Mr. Dondero testified to that. Mr. Dondero testified that that role did not change after December 10th and that he continued to receive communications from Mr. Ellington that were -- or, I guess sent through Mr. Ellington that were from Mr. Seery. And moreover, Mr. Seery continued to talk to Mr. Ellington and send such messages up until January 4, 2021.

Given these exceptions to the TRO and the necessity of analyzing each communication to determine if it's permissible creates uncertainty and ambiguity. Therefore, this provision is not sufficiently specific to be enforceable.

In any event, the Debtor has not proved its allegation that Mr. Dondero coordinated his legal strategy against the Debtor with Mr. Ellington and Mr. Leventon. All you have is a few text messages and emails that may have been forwarded to Mr. Ellington or text message -- one text message sent to Mr.

Leventon. There's no evidence of a coordination of legal strategies against the Debtor.

Even if they had a common interest to pursue in this bankruptcy, the evidence showed that neither Mr. Ellington nor Mr. Leventon discussed a common interest agreement with Mr. Dondero's lawyers or participated in a drafting of a common interest agreement with Mr. Dondero and his lawyers, and that they never entered a common interest agreement with Mr. Dondero and his lawyers.

Number seven, finally, the Debtor alleges that Mr. Dondero violated the TRO by preventing the Debtor from completing its document production. This relates to the production of financial documents for the Get Good and Dugaboy Trusts. Once again, this is not a clear, direct violation of a specific order of the TRO because there's no provision in the TRO regarding the Debtor's document production or Mr. Dondero's document production or the document production of trusts that he may be related to.

But the evidence does not even support a finding that Mr. Dondero prevented the Debtor from completing its document production with the U.C.C.. In fact, Douglas Draper has been attempting to work, as you see from our exhibits, with Mr. Morris to get these documents produced since mid-December. Mr. Draper simply requested that he be allowed to look at the documents before they went out.

The only action that Mr. Dondero has taken in this regard was to ask that Melissa Schrath not produce the documents without a subpoena, which is to say that he wanted the proper legal protocols followed.

I will address their damages, Your Honor. With respect to damages, I submit that Mr. Dondero does not have fair notice of the damages that the Debtor seeks in this proceeding. The Debtor has put on no evidence of any monetary damage. Instead, the Debtor appeared to seek its fees in connection with bringing the contempt charges.

However, the evidence the Debtor submits is over 85 pages of fee statements reflecting time entries starting on November 3, 2020. Those entries date back well before the relevant time period.

And moreover, the Debtor did not introduce the fee statements with a sponsoring witness, so we have no testimony as to the reasonableness or necessity of these fees or any of the other loadstar factors.

But more problematic, we have no way to sort through the 85 pages of the statements and identify which entries the Debtor contends were incurred in connection with the Debtor's motion.

Although the burden is not on Mr. Dondero to do so, an examination of the fee statements would suggest that hundreds of thousands of dollars in fees were wholly unrelated to the

proper time period or the subject matter.

In sum, Your Honor, there is simply no clear and convincing evidence that Mr. Dondero violated a definite and specific order of this Court. The TRO had its intended effect. Mr. Dondero changed his behavior. Even though he may not have agreed, and he testified that he did not agree with many decisions that Mr. Seery made after the entry of a TRO, he made a conscious effort not to interfere.

However, the TRO had unintended effects as well, creating a situation where Mr. Dondero tried to comply with the order and he thought he was complying with the order but he wound up defending himself in a contempt proceeding.

The mere fact that the Debtor contends that Mr. Dondero getting a new phone, appearing at the Highland offices to give his deposition, or attempting to ensure that proper procedures for discovery are followed violates the TRO means that the TRO does not give fair notice to Mr. Dondero of what he was and was not allowed to do.

I'll close with a reference back to the case I cited in my opening. It's *United States Steel Corp. v. United Mine Workers* from the U.S. Supreme Court. This is 598 [F.2d] 363 (5th Cir. 1979). It says that a party may avoid a contempt finding where it can show that it substantially complied with the order or has made every reasonable effort to comply.

The evidence shows, at a bare minimum, Mr. Dondero

substantially complied with the Court's order.

And I misspoke. That wasn't the case I thought I was closing with. This is the case from the Supreme Court. The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one.

Congress responded to that danger by requiring a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid. That's the *Longshoremen Association v. Philadelphia Marine Trade Association* case, 389 U.S. 64.

THE COURT: All right. Your time is up. Thank you.

MR. WILSON: Thank you, Your Honor.

THE COURT: I'm going to have some questions for you and Mr. Morris, but I'm going to wait and hear the rebuttal and then have some questions for -- a couple of questions for each of you.

Mr. Morris, go ahead.

MR. MORRIS: Sure. Two minutes, Your Honor.

There's nothing ambiguous about the order. It says don't talk to employees except for shared services. Mr. Wilson just talked about all kinds of things that have -- he made no attempt to argue that any of these communications have to do with shared services.

The order says don't violate the automatic stay. You

didn't need the order to do that. Your Honor actually made the observation at the time. So, you didn't need it, but it was in there, and he knew it. There's nothing vague and ambiguous about that.

Don't interfere with the Debtor's business. I don't know how it could be any clearer, Your Honor. They seem to suggest that you should have put in the order, don't communicate about discovery. Don't communicate about common interests. Don't communicate -- no. That's not what's required. There's a blanket prohibition on communication, and that applies to everything except for shared services.

With respect to Mr. Rothstein, Mr. Seery testified accurately, it will never be factually disputed, that what Mr. Rothstein did with the wiping down of the phones was to wipe down the information that was on the Debtor's server, *i.e.*, emails and things that are on the Debtor's server. He testified very clearly that text messages are not part of that. So the wiping that Mr. Rothstein did was really at Mr. Seery's instruction and it was just to get him off the Debtor's system.

Interference. Mr. Wilson seems to think that the only thing we have here is the Debtor's letter. No. The Debtor's letter said you interfered. There's no response. But more importantly, we rely on Mr. Dondero's sworn testimony. Question, "You personally instructed on or about December 22,

2020 employees of those Advisors to stop doing the trades that Mr. Seery had authorized?" Answer, "Yeah." That's at Page 73. He's trying to walk it back, but the testimony is what it is.

We have proven beyond clear and convincing evidence. We've actually proven beyond reasonable doubt that Mr. Dondero has violated the TRO multiple ways.

With respect to damages, if Your Honor wants to have a hearing, if we really need to go down that path, that's fine, but it's always going to be subject to dispute because there's so many professionals involved. Think about all the people on the phone today.

I have nothing further, Your Honor.

THE COURT: All right. A couple of follow-up questions.

With regard to the cell phone, tell me what evidence I really have before me. I mean, there's a lot of, you know, argument and commentary of Mr. Dondero whether this is much ado about nothing or not, but what really is my evidence besides the testimony I heard? You've mentioned the I forget what date letter from the Bonds Ellis law firm regarding the phone, but what other evidence do I have that you would say is relevant on this issue?

MR. MORRIS: I'm sorry, who's the question directed to, Your Honor?

THE COURT: You, and then I'm going to ask Mr. Wilson the same thing.

MR. MORRIS: Okay. Very, very, very simply. Just one second, Your Honor. The evidence that I have on the issue of the cell phone. Exhibit 55 says that text messages are the Debtor's property. Right? And this is an allegation -- this is an allegation that Mr. Dondero violated Section 2(e) of the TRO, which (audio gap) him from violating the automatic stay. Section 263(a)(3) prevents anyone from exercising control over the Debtor's property. So the handbook itself describes text messages related to company business are the property of Highland. Right? So you've got the word property in the handbook, you've got the word property in Section 263(a)(3), and you've got the TRO provision that prevents the violation of the automatic stay.

THE COURT: All right. So the evidence --

MR. MORRIS: Next, --

THE COURT: -- Exhibit 55, the employee handbook. And what other evidence?

MR. MORRIS: Right. And then, next, we know that Mr. Dondero understood that. How do we know that he understood that? Because twice in the year 2020, including just moments before he left, he agreed to the certifications that can be found at Exhibits 56 and 57. And those certifications state, among other things, this is Mr. Dondero's certification: I

have received, have access to, and have read a copy of the employee handbook, and I am in compliance with the obligations applicable therein.

So he -- that's what the handbook, that was the company policy, and he said that he knew it.

We know that in January of 2020 he specifically entered into a corporate governance agreement in which the U.C.C. obtained the right to conduct an investigation of related-party claims. We know that Mr. Dondero was the subject of related-party claims. We know that the U.C.C. shares the privilege with the Debtor with respect to related party-claims. This was part of the agreement that he entered into. He knew no later than January 9, 2020 that the Debtor -- that the U.C.C. was conducting an investigation of him.

And if there was any doubt about that, in July 2020 the U.C.C. filed its motion for -- to compel the production of documents. And Mr. Dondero's own lawyers, at Exhibit 40, submitted a response to the U.C.C.'s motion to compel in which it said the proposed protocol the Committee seeks, among other things, documents, emails, and other electronically-stored information, exchanged from or between nine different custodians, who include Dondero. The Committee has requested all ESI for the non-custodians, including, without limitation, text messages.

So he knew he was under investigation. He knew the

Committee wanted them. His lawyers told you that he knew the Committee wanted them. And Your Honor subsequently issued an order relating to those text messages.

With no notice to the Debtor, and this is his testimony, with no notice to the Debtor, with no approval of the Debtor, he went out and swapped the phone. And nobody knows where the phone is today, but he had it. He knew where it was after the TRO was entered. He knew because Jason Rothstein told him on December 10th at 6:25 p.m. at Exhibit 8 that the cell phone exists. Okay? He swapped out the number without the knowledge and consent of the Debtor. He, you know, did whatever he did with the cell phone and the information. Nobody knows where it is.

He actually testified, and I don't have the line, he actually testified that it was thrown in the garbage last time. Now he says I don't know what happened to it. I could dig it out, Your Honor, if I had the time. I don't even think it's necessary. But at the last hearing on January 8th, it's in the evidence and I'll pull it out on appeal when that happens, Mr. Dondero testified that it was disposed of and thrown in the garbage.

That's the evidence that I have, Your Honor, as to what happened to the cell phone, why it was the company's property, and why it's a violation of the TRO Section 2(e) to have thrown it in the garbage without notice, when he knew he was

subject to investigation, when his lawyers told you that they knew the U.C.C. wanted the text messages, when you ordered that those text messages be produced.

THE COURT: All right. And I can go back and look at the transcript I'm sure we're going to have shortly from Monday's hearing to verify my memory of this, but maybe you can tell me. Am I remembering correctly that Mr. Seery testified that Highland should have -- the Debtor should have the emails that might have been on the phone because they would be on either Highland's server or the cloud, Highland's cloud or something, correct?

MR. MORRIS: Yes. This is not about emails. We do have emails, and that's how we were able to offer some of them into evidence, frankly, because we do have emails, if it was on the Debtor's server. Now, we understand that Mr. Dondero may have used other URLs, other email addresses that we would never have. But any information that was on the Debtor's server, we admittedly have. Text messages are not among them. And you heard Mr. Seery testify that we cannot go to AT&T or Verizon or whatever the carrier is. You have to go to Apple, and they won't give them to you. Okay? We can't -- they will never, ever be found. They just won't.

And so it's only the text messages that we're talking about. We're not talking about email. In fact, Your Honor, in compliance with the Court's order, because we were able to

do it as Debtor's counsel, in compliance with your Court's order, the Debtor produced, I think, seven or eight or nine million emails of the nine custodians over the five years prior to the petition date to the Committee over the summer. It was a gargantuan task. So, just to be clear, this is about text messages, not about emails.

THE COURT: Okay. All right. Well, let me --

MR. MORRIS: Oh, I'm sorry. If I may, just one more thing.

THE COURT: Uh-huh.

MR. MORRIS: Because the evidence is also in the record that he used text messages to communicate with business. There's no dispute about that.

THE COURT: Okay.

MR. MORRIS: Now I'm through.

THE COURT: All right. Well, I'm going to go to Mr. Wilson now. What do you think is the evidence in the record that is relevant to this whole cell phone issue?

MR. WILSON: Well, I would -- I would say two, two things, two big-picture items, Your Honor. Number one, like I referred to on Monday and like I referred to in my closing, Rule 65(d) says that every restraining order or injunction must describe in a reasonable detail and not by referring to the complaint or other document the act or acts restrained or required.

They're having to refer to Section 362 of the Bankruptcy Code. They're having to refer to --

THE COURT: Okay, Mr. Wilson, I'm going to stop you. This is turning into legal argument. And I understand your legal argument, that you don't think the TRO was specific enough with regard to the cell phone. I understand that, and you may be right. You may be wrong; you may be right. But I'm asking now, assuming you're wrong and this cell phone issue is a big deal, tell me what evidence you think I should focus on.

MR. WILSON: Well, Your Honor, there's really only one document that I think is relevant to this issue, and that would be the Debtor's Exhibit 8, which is the text message from Jason Rothstein to Mr. Dondero on Thursday, December 10th, at 6:25 p.m. And that text message says, I left your old phone --

THE COURT: Right.

MR. WILSON: -- in the top drawer of Tara's desk.

THE COURT: Uh-huh.

MR. WILSON: Your Honor, that testimony confirms what Mr. Dondero said about how he already had a new cell phone by December 10th. And I would say that the other -- the other issue is that if anybody improperly wiped the cell phone, it was Highland itself. Highland had possession of the cell phone up to two weeks before December 10th. And so the

actions --

THE COURT: Okay, again, not argument, evidence. My evidence.

MR. WILSON: Well, I think that this -- I think this exhibit is this evidence, because Jason Rothstein was a Highland employee, and the Highland employee is telling Mr. Dondero on December 10th that he's returning his cell phone to the desk drawer. So that's why I think this is the most relevant piece of written evidence on this. I think that the testimony also addresses it, and you can review that if you would like, Your Honor.

THE COURT: Okay. Let me figure out my notes here. My next question is for you, Mr. Morris. The prohibition in the TRO on Mr. Dondero communicating with Highland employees except as it pertained to shared services agreement, I think I hear you making the argument that Mr. Ellington was in Highland's legal department and shared services agreements encompassed the legal department of Highland; therefore, it was okay for him to talk to Mr. Ellington about anything. Am I putting words in your mouth, or is that your argument?

MR. MORRIS: That's for Mr. Wilson or for me?

THE COURT: That's for Mr. Wilson. Okay? And I have a second -- a follow-up to that, but go ahead and help me to understand. Is that your argument?

MR. WILSON: I think that my argument is, on this

matter, that the -- that the provision is not clear and specific enough to be enforceable because it's vague and unambiguous -- I'm sorry, vague and ambiguous, given that there's two exceptions in the TRO itself that are subject to interpretation, as well as an exception --

THE COURT: Okay. Again, again -- okay. I understand there's the exception with regard to the shared services agreement and with regard to you can file court pleadings or take legal positions in court. But I'm trying to get at, is your -- is the thrust of your argument that hey, any communications with Scott Ellington were fine because he was in the legal department and legal services are part of shared services agreements, which were excepted out of the TRO. Is that a proper characterization of your legal argument?

MR. WILSON: Well, I've got to tell you, Your Honor, I think that that is part of it. I think that the real -- the real issue goes to Mr. Dondero's state of mind and what he believed he was and was not restrained from doing and what the order on its face clearly and specifically restrains him from doing.

And my argument is that, with the exceptions and with the other testimony that was offered about Mr. Ellington's role between Mr. Seery and Mr. Dondero, that he was simply unclear as to what he was restrained --

THE COURT: Okay. Tell me -- tell me -- okay. I'm trying to get a direct answer, and what I think I'm hearing is you don't necessarily think conversations with Ellington would fit into the shared services agreement but you think that's what James Dondero thought. Is that what you're now saying?

MR. WILSON: Well, I believe that Mr. Dondero's testimony was that he was under the impression that because, for various reasons, because that he had been doing this for twelve months and also because it continued after the December 10th hearing, that he was allowed to communicate items to the Debtor in what he termed the role as settlement counsel. And despite Mr. Seery's denial of giving Mr. Ellington any instruction, I think that the issue is what was Mr. Dondero's state of mind, and so I do believe that Mr. Dondero thought he was communicating pursuant to shared services. I do believe he thought he was communicating in a permissible way pursuant to the settlement counsel issue, because he thought that a lot of these issues that he was forwarding text messages to Mr. Ellington would only -- would keep him apprised of where they were, because the whole time Mr. Dondero was still attempting to settle this case through a pot plan.

THE COURT: Okay. And I guess, since you've mentioned it, what is my evidence that Mr. Ellington was the designated, recognized settlement counsel? You know, he -- Mr. Dondero says it. Mr. Seery says absolutely no. Do I have

any other evidence on that point in the record?

MR. WILSON: Well, there -- there was proposed evidence that I submitted earlier this morning on that issue from Mr. Ellington's deposition.

THE COURT: I am not -- I'm asking what's in the record. What's in the record?

MR. WILSON: Right. Well, the evidence in the record on that is Mr. Dondero's testimony.

THE COURT: Okay. And here was a follow-up I meant to ask on shared services, and I'm going to ask Mr. Morris this, too. I thought I heard Mr. Seery testify that -- he testified about what he considered kind of the bizarreness of the legal department at Highland as it had historically been set up, and I thought he said legal was not part of the shared services agreement. Do you want to respond to that?

MR. WILSON: Well, I would respond to that, Your Honor. The shared services agreements were in place many years before Mr. Seery came into being.

THE COURT: Right. Okay.

MR. WILSON: And Mr. Dondero had been operating under those agreements for many years before Mr. Seery came into being.

THE COURT: Was legal covered by the shared services agreement or not?

MR. WILSON: It was, Your Honor. I put -- I put both

of the shared services agreements in the record, and I had Mr. Dondero read the provisions that talked about how broadly the legal services were covered by shared services.

THE COURT: Did it change during the bankruptcy?

MR. WILSON: Your Honor, there was no amendments or modifications to those agreements until they were eventually terminated by the --

THE COURT: Okay.

MR. WILSON: -- Debtor. We had the --

THE COURT: Okay. So there were no written --

MR. WILSON: We had the evidence in our record.

THE COURT: There were no written amendments that -- all right.

MR. MORRIS: If I may, Your Honor? Because I --

THE COURT: You may. Mr. Morris, go ahead.

MR. MORRIS: I've got -- I've got a number of thoughts on this.

THE COURT: Okay.

MR. MORRIS: If Mr. Dondero -- let's look at the language. It's always helpful to look at the language of the order. The language of the order could not be clearer. Section 2(c) prohibited him from communicating with any of the Debtor's employees. Full stop. That is a blanket, unambiguous prohibition. Total and complete. There is one exception. Not two, but one: except as it specifically

relates to shared services currently provided to affiliates owned or controlled by Mr. Dondero.

Mr. Dondero was not party to a shared services agreement. You have two entities that are. They're the Advisors. Those shared services are in Exhibits 1 and 2 of the -- of the Defendant.

There is no dispute that among the services provided were legal services. The point that Mr. Seery was making and the objection that he took to the way the question was phrased was the notion that the legal department was somehow kind of assigned or available. The Debtor wasn't obligated to provide legal services. He just -- he was making a very technical but very accurate and careful distinction between the legal department and the obligation to provide legal services.

THE COURT: Okay.

MR. MORRIS: We don't dispute it. It's, in fact, precisely why we agreed to put it in there, because the Debtor had a contractual obligation to provide all kinds of services, whatever they may be, under those agreements. So I want to be really clear about that.

What Mr. Wilson cannot do and what he will never be able to do is show you that any of the communications that are at issue in this case have anything to do with shared services. And if they're not related to shared services, they are a violation of the TRO.

There's only arguably, arguably, two that could be -- and why do I know that? I know that because none of these communications have any -- have any employee of the Advisors on it. They don't have the lawyers for the Advisors on it. They have people who represent entities other than anybody -- Mr. Draper doesn't represent -- this is the evidence. Mr. Draper doesn't represent anybody who's party to a shared services agreement. Bonds Ellis doesn't do that. Right? There is only two.

Exhibits 26 and 52 are with K&L Gates and Mr. Ellington. And so you can say, well, at least K&L Gates represents Advisors, and at least Advisors are party to shared services agreements. But those communications themselves are adverse to the Debtor. And I asked Mr. Dondero specifically, is there any provision in the shared services agreements that requires the Debtor to provide services to the counterparty that are adverse to itself? Right? And he said no, I can't think of any. It was a candid admission on his part.

So, there's -- there's nothing in this long list, Your Honor, there's nothing in here that has anything to do with shared services. Getting a witness for a hearing to testify on behalf of Mr. Dondero doesn't concern shared services. Discussions, discussions with employees about entering a common interest agreement has nothing to do with shared services. Discussing Mr. Dondero's interest in the UBS appeal

of Acis or the potential appeal of HarbourVest's settlement agreement has absolutely nothing to do with shared services. Asking Mr. Dondero to provide leadership in the coordination of his counsel has nothing to do with shared services. Talk -- telling Mr. Seery about no Dugaboy without a subpoena, what does that have to do with shared services? Dugaboy doesn't have a shared services agreement. There is nothing that fits into the exception.

Mr. Wilson talks about the footnote. We want -- I wrote that footnote, okay, and I wanted to make it clear that this injunction would not permit him -- would not prohibit him from seeking relief before Your Honor. And that's all it says. It doesn't say that he can communicate with the Debtor's employees about these things. It says for the avoidance of doubt because I didn't -- I didn't think it would be appropriate, I didn't think it would be proper to clip his wings and prevent him from coming to the Court to seek relief. He could come to the Court to seek relief. What he can't do is call up the Debtor's general counsel and say hey, I need a witness to testify on my behalf. That's not what the footnote -- that's not what the footnote says, Your Honor. It says he can come to this Court or to seek judicial relief upon proper notice.

I mean, certainly have no notice that Mr. Ellington was identifying witnesses who would testify against the Debtor.

Had -- Mr. Seery testified to, to that. That's in the record. That if he knew that was happening, he would have fired them on the spot.

So, there's no exception. None of this stuff falls into any -- the one exception is shared services. Yes, there's a shared services agreement. Yes, it includes provision of legal services. But none of these communications have anything to do with that.

Mr. Wilson has made no attempts -- he never put one of the communications in front of Your Honor. He never had Mr. Dondero try to explain how any particular communication related to shared services, because they can't. They just can't. So they say, oh, well, there is a shared services agreement, and so -- or, he was talking about settlement counsel. They knew -- here's -- we have the consciousness of guilt that I mentioned earlier. We know that Mr. Dondero didn't think these communications would ever see the light of day because he expressed surprise that his privileged communications were up on the screen. That's the tell. If you play poker, Your Honor, that's the tell. He tipped his hand and he gave me the signal, I didn't think anybody was going to see this stuff because I'm really mad that my privileged communications are out there. But he shared them with Mr. Ellington. That's number one.

And number two, Mr. Dondero and his lawyers knew how to

get -- knew how to seek clarification if they thought there was any ambiguity. And how do we know that? Because at Docket No. 24 they filed a motion, and the motion was to clarify the TRO in order to permit Mr. Dondero to speak directly with board members about the pot plan. He wanted the permission, he wanted it to be clear that he had the right to talk to the independent directors about the pot plan. That can be found at Exhibit 24. But a week later or six days later, at Docket No. 29, he withdrew that motion.

So he knew that if he was confused about what this allowed and what it didn't allow, he knew he could make a motion. There was absolutely nothing preventing him or his lawyers from coming to the Debtor and saying look, there's a blanket prohibition against shared services, can we still talk to Mr. Ellington about settlement? Nothing prevented him from doing that.

But here's the kicker. Number three. What do any of these communications have to do with settlement? There's not a settlement proposal. There's not a request for information about the settlement. They have nothing to do with settlement. This is Mr. Dondero trying to say Scott Ellington had to know everything I thought about every issue in this case.

I mean, if Your Honor buys that, then we've wasted many, many, many, many hours of time and hundreds of thousands

of dollars on this process, if he can just say, I'm basically allowed to talk to Scott Ellington about anything because it's in my head and I want to try to settle the case and therefore I can share it with Scott Ellington.

Number one, there's nothing in the order that allows him to talk to Scott Ellington about settlement. Number two, there's nothing on the face of any of these communications that are about settlement. And number three, again, consciousness of guilt. He was shocked that his privileged communications were disclosed. He thought he could share them with Mr. Ellington but not with you and not with me and not with Mr. Seery.

I have nothing further.

THE COURT: All right.

MR. WILSON: May I respond to that, Your Honor?

THE COURT: Um, --

MR. WILSON: Just briefly.

THE COURT: Briefly.

MR. WILSON: Yeah. So, I pointed you to Exhibits 1 and 2 in the -- in the Dondero exhibits.

THE COURT: The shared services agreements.

MR. WILSON: Those exhibits are --

THE COURT: The shared services agreements.

MR. WILSON: That's correct. Those --

THE COURT: Uh-huh.

MR. WILSON: That's correct. Those two shared services agreements relate to Exhibits 4 and 5, which show that those agreements were in place up until they were terminated by the Debtor effective January 31, 2021.

The next point I'd make is that the order itself says specifically relates to shared services. And those shared services agreements are drafted very broadly. They talk about legal compliance and risk analysis, and one of them says assistance with advice with respect to legal issues, litigation support, management of outside counsel, compliance support, and implementation and general risk analysis. The other agreement just says legal services.

But the agreements themselves were drafted very broadly and intended to cover a large array of services to be provided, because the parties receiving the services in these agreements did not provide any of their own accountants or any of their own lawyers or any of their own back office people or any of their own various other providers that are covered by these agreements. And so, therefore, over the years that these agreements were in place, Mr. Dondero was used to going to his lawyers, which were both employees of Highland and employees of the Advisors under these agreements, for compliance purposes, and he was able to talk to them about all of these various issues. And so if on December 10th Mr. -- and accountants as well.

Mr. Dondero then on December 10th was prohibited from doing certain things, with the exception of items that specifically relate to shared services. So my argument would be that Mr. Dondero did not know whether he could talk to these people or not under the Court's order because the order was not clear and specific enough.

If these agreements broadly covered legal services and accounting services, and Mr. Dondero was free to talk to these people whenever he wants before the order, but then the order creates a carve-out for talking about anything specifically relating to the shared services, that broadly does cover legal and accounting, and the people he's accused of talking to in violation of the TRO are lawyers and accountants.

THE COURT: All right. Here's my last question. With regard to the trespassing argument, as I understand it, we're talking about December 14th and January 5th, two times, both of which --

MR. MORRIS: Your Honor, if I may, I really apologize for interrupting, but that's not -- that's not accurate.

THE COURT: Okay.

MR. MORRIS: As I brought out in the questioning yesterday, the Debtor had no problem with Mr. Dondero being in their offices on December 14th.

THE COURT: Okay.

MR. MORRIS: Okay? What happened was it was a change

because the Debtor exercised control over its property in its letter of December 23rd when it evicted Mr. Dondero from its premises and informed him in writing that any entry by him in the future would be deemed a trespass. So we take no issue --

THE COURT: Okay.

MR. MORRIS: -- and have no quarrel with December 14th.

THE COURT: Okay. I'm glad I asked. I was forgetting that train of event, chain of events.

All right. So we're just talking about the January 5th occasion where he came onsite for a deposition, correct, Mr. Morris?

MR. MORRIS: Yes, Your Honor.

THE COURT: All right. Do we have any evidence of that, other than, I guess, the testimony that is relevant for me to consider -- and this is to you, but it's especially going to be to Mr. Wilson, because I heard some testimony of Mr. Dondero: oh, look, I've got a calendar invite, or I don't know if he looked at his phone or was just recalling he had a calendar invite from someone on behalf of the Debtor saying, Go to the Highland conference room. Do I have any evidence of that calendar invite or any other evidence that is in the record you think I need to focus on?

MR. WILSON: Your Honor, we did not admit the calendar invite into the record, although we could do so. Mr.

Dondero, you know, testified about it, but the testimony he gave was that someone from the Highland legal department named Sarah Goldsmith sent him a calendar invite for his deposition to appear the same way he did at the December 14th deposition.

THE COURT: Okay. So we have just the testimony? Okay.

Mr. Morris, anything further?

MR. WILSON: Your Honor, we'd be -- we'd be willing to supplement the record with the actual calendar invite.

THE COURT: I'm not --

MR. WILSON: We have it --

THE COURT: We've already gone through that.

MR. WILSON: -- on PDF.

THE COURT: We've already gone through that. I'm just asking was it in there and I just missed it on Monday? And the answer is no.

Any other evidence that I need to consider, you think, on the trespassing issue that's in the record?

MR. WILSON: Well, Your Honor, just that -- that, I mean, as you pointed out earlier, the -- it's the evidence that Mr. Dondero appeared in the Highland conference room on December 14th, which was after the entry of the TRO, and if that's not a violation of the TRO, then it can't be a violation of the TRO on January 5th.

MR. MORRIS: Your Honor, I do have evidence.

THE COURT: Okay. Tell me.

MR. MORRIS: Okay. So this would be at Exhibit -- Exhibit 36, which is the transcript of the preliminary injunction hearing, at Page 70, beginning at Line 20. I asked the following questions and got the following answers: Question, "You did not have the Debtor's approval to enter their offices on Tuesday to give your deposition, correct?" Answer, "No." "You did not even bother to ask the Debtor for permission, correct?" Answer, "I'm prohibiting -- I'm prohibited from contacting them, so, no, I did not."

THE COURT: Okay.

MR. MORRIS: So, he was in the offices. He didn't have approval. He didn't obtain consent. He didn't seek consent. That's his unambiguous testimony at Page 70, Line 22, continuing on through Page 71, Line 2.

THE COURT: All right. Thank you.

All right. Well, I'm going to wrap it up here. This obviously warrants very careful consideration of the evidence, and so I'm going to take under advisement this matter and get you out a detailed written ruling as soon as I can get it out. So you'll be expecting something from me, again, detailed, in writing, in the hopefully very near future.

All right. If there's nothing else, we're adjourned.

MR. MORRIS: Thank you, Your Honor.

MR. WILSON: Thank you, Your Honor.

THE CLERK: All rise.

MR. POMERANTZ: Thank you, Your Honor.

(Proceedings concluded at 11:27 a.m.)

--oOo--

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 **03/25/2021**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber